



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Curtis Robinson

CSC Docket No. 2014-2245

Request for Counsel Fees

ISSUED DEC + 5 2014

(CSM)

Curtis Robinson, represented by Christopher A. Gray, Esq., petitions the Civil Service Commission (Commission) for enforcement of counsel fees awarded in the attached decision *In the Matter of Curtis Robinson* (CSC, decided February 12, 2014).

As background, the petitioner, a Senior Medical Security Officer with the Ann Klein Forensic Center, Department of Human Services, appealed his removal effective January 12, 2011, on charges to the Commission. He was charged with conduct unbecoming a public employee, physical or verbal abuse of a patient, client, resident, or employee, and other sufficient cause. In her initial decision, the ALJ found that the appointing authority had not sustained the charges and recommended that the removal be reversed and awarded the petitioner back pay, benefits, and seniority from the date of his removal to the date of his reinstatement. Upon its *de novo* review of the record, the Commission agreed with the ALJ's determination of the charges and with the recommendation to reverse the removal. Therefore, the Commission ordered that the petitioner be granted, back pay, benefits and seniority, and reasonable counsel fees.

In the instant matter, the petitioner seeks the counsel fees awarded by the Commission. In this regard, Gray submits a certification indicating that he had a fee agreement with the petitioner at an hourly rate of \$190 per hour. Gray also states that the matter started when he worked as an Associate at a prior law firm, Alterman and Associates, but, when he changed firms to Sciarra & Catrambone,

where he serves "Of Counsel," the matter transferred with him. Thus, all work completed prior to May 1, 2013 was with his former law firm and all work completed after May 1, 2013 was performed with his new firm. However, for ease of resolution, Gray provides a single invoice for hours of work at \$190 per hour and requests a single check, in the amount of \$17,467.00 (\$17,033.50 for counsel fees and \$453.50 costs) be issued to Sciarra and Catrombone to be placed in trust for the appropriate disbursements to be made to Alterman and Associates. Additionally, Gray submits copies of an order for a matter involving a Police Chief in a non-Civil Service jurisdiction where he was awarded counsel fees in the amount of \$225 per hour by the Honorable Anthony Graziano, J.S.C., copies of his fee agreements, and an invoice for services rendered from September 1, 2010 to September 5, 2014.

The appointing authority, despite being provided the opportunity, did not provide any argument or information for the Commission to review in this matter.

CONCLUSION

N.J.S.A. 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appeal of major disciplinary action before the Commission. In addition, *N.J.A.C.* 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between \$100 and \$150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between \$150 and \$175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with a practice concentrated in employment or labor law, is to be awarded an hourly rate between \$175 and \$200. Further, *N.J.A.C.* 4A:2-2.12(d) provides that if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the attorney shall disclose the agreement to the appointing authority and that the attorney shall not be entitled to a greater rate than that set forth in the fee agreement. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the customary fee in the locality for similar services, the nature and length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

Initially, Gray requests an hourly rate of \$190. In accordance with *N.J.A.C.* 4A:2-2.12(c), as an associate with a law firm, he would only be entitled to an hourly rate between \$100 and \$150. However, he contends that several factors support his request for this higher rate, including the fact that he was awarded \$225 in a Superior Court case involving a Police Chief disciplinary matter in a non-Civil Service jurisdiction, his possession of over six years of legal experience

concentrating in public employee disciplinary matters and his fee agreement with the petitioner specifying an hourly rate of \$190.

In the instant matter, it is clear that the petitioner is entitled to counsel fees pursuant to the Commission's February 12, 2014 order. The record indicates that the petitioner had a fee agreement with his counsel for an hourly rate of \$190. However, the Commission finds that Gray has provided insufficient information to justify awarding him counsel fees at the requested hourly rate of \$190. Notably, Gray's certification does not elaborate as to the specific nature or subject matter of the cases he handled wherein he received the requested rate. While he attempts to justify the requested rate by noting that he was awarded an hourly rate of \$225 in a Superior Court matter involving the discipline of a non-Civil Service Police Chief, he provides no details regarding the subject matter of that case. As to the complexity of the instant case, the matter only involved three days of hearings with several witnesses, none of whom were deemed expert witnesses. This type of appeal inherently lacks the legal complexity necessary to justify the hourly rates requested by Gray. The case was adjudicated based upon the factual testimony rendered at the hearing and the remand decision was based on the written submissions from the parties. Therefore, based on the information provided by Gray regarding his experience in public service employment disciplinary matters and years of experience in the practice of law, as well as the fee agreement presented, he should be reimbursed at the rate of \$150 per hour. *See N.J.A.C. 4A:2-2.12(c), (d), and (e)*. Moreover, the record reveals that Gray was an Associate with Alterman and Associates and is Of Counsel with Sciarra & Catrambone. It cannot be ignored that although provided the opportunity, the appointing authority has not challenged any particular item on the bill submitted by the petitioner or provided any information for the Commission to review in this case. Therefore, the Commission finds that Gray is entitled to \$150 for 89.65 hours of work performed from September 1, 2010 through September 5, 2014 for a total of \$13,447.50. In this regard, this amount includes counsel fees regarding his enforcement request for his counsel fee award since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application. *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 N.J. Super. 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education*, 269 N.J. Super. 394, 411 (Ch. Div. 1993)].

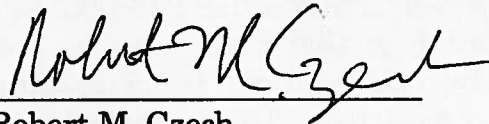
With respect to costs, Gray requests \$453.50 for such things as copying and Federal Express services. However, the costs that represent normal office overhead will not be awarded. *See N.J.A.C. 4A:2-2.12(g)*. These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. *See, e.g., In the Matter of Monica Malone*, 381 N.J. Super. 344 (App. Div. 2005). Therefore, the petitioner's request for costs is denied.

ORDER

Therefore, it is ordered that the appointing authority pay \$13,447.50 in counsel fees within 30 days of issuance of this decision.

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 3RD DAY OF DECEMBER, 2014**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312**

Attachment

- c: Christopher R. Gray, Esq.**
- Stuart Alterman, Esq.**
- Curtis Robinson**
- Anne S. Kenyon**
- Joseph Gambino**

A-9



STATE OF NEW JERSEY

**In the Matter of Curtis Robinson
Ann Klein Forensic Psychiatric
Hospital
Department of Human Services**

**CSC DKT. NO. 2011-2913
OAL DKT. NO. CSV 14260-12
On Remand CSV 1716-11**

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**DECISION OF THE
CIVIL SERVICE COMMISSION**

ISSUED: February 12, 2014 PM

The appeal of Curtis Robinson, Senior Medical Security Officer with Ann Klein Forensic Psychiatric Hospital, Department of Human Services, of his removal effective January 12, 2011, on charges, was heard by Administrative Law Judge Patricia M. Kerins, who rendered her initial decision on December 2, 2012, reversing the removal. Exceptions and cross exceptions were filed by the parties.

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 February 12, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

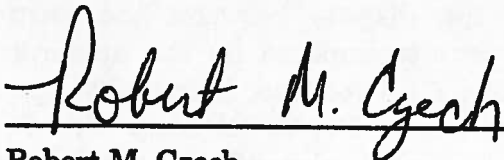
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Curtis Robinson. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

**DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 12, 2014**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312**

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 14260-12

(ON REMAND CSV 1716-11)

AGENCY DKT. NO. 2011-2913

**IN THE MATTER OF CURTIS
ROBINSON, DEPARTMENT OF
HUMAN SERVICES, ANN KLEIN
FORENSIC PSYCHIATRIC HOSPITAL.**

Christopher Gray, Esq., for Curtis Robinson, appellant (Sciarra & Catrambone, LLC, attorneys)

Nicole M. DeMuro, Deputy Attorney General, for Department of Human Services (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: December 3, 2012

Decided: December 2, 2013

BEFORE PATRICIA M. KERINS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent Ann Klein Forensic Center (Ann Klein) removed appellant, Curtis Robinson (Robinson), from his position of Senior Medical Security Officer for allegedly assaulting a patient. Robinson denied that he engaged in such conduct and appealed his removal. On November 8, 2010, Ann Klein, a psychiatric treatment facility within the

Department of Human Services (DHS), filed a Preliminary Notice of Disciplinary Action against Robinson charging him with offenses relating to the physical abuse of a patient. Robinson was removed from his position by a Final Notice of Disciplinary Action, dated January 12, 2011. On January 24, 2011, he appealed that decision, and on February 17, 2011, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.S.A. 11A:1-1 through 12.6 and N.J.S.A. 52:14B-2(b). The matter was heard on July 5, 2011, November 28, 2011, and January 17, 2012, at the OAL in Mercerville, New Jersey. Respondent did not file a post-hearing brief or submit transcripts of the hearing prior to the issuance of an initial decision. An Initial Decision (for purposes of this remand Initial Decision shall refer to the April 16, 2012 decision) reinstating Robinson was issued on April 16, 2012. Subsequent to that ruling respondent filed exceptions and obtained transcripts of the hearing. On October 17, 2012, the Civil Service Commission (CSC) issued a Decision remanding the matter to OAL for a determination on whether Robinson's actions could be considered abuse under respondent's Administrative Order 4:08 and the appropriate penalty, if any.

The remanded matter was transmitted to the OAL on October 22, 2012 and a telephone conference was held on November 28, 2012. At that time, the parties agreed to proceed without additional testimony but with written submissions. Respondent submitted its exception letter of June 4, 2012 and appellant filed its own written submission. The record then closed on December 3, 2012 and extensions were granted for the filing of the Initial Decision on Remand.

FINDINGS OF FACT

For purposes of this remand, the facts as discussed in the Initial Decision of April 16, 2012 are incorporated herein and are as follows:

General Background Facts

Appellant Robinson has been employed by the DHS at its Ann Klein facility since 1999 as a Senior Medical Security Officer. Prior to his position at Ann Klein, he had been employed at the Trenton Psychiatric Hospital. Ann Klein is a psychiatric treatment facility operated by DHS, with a population made up of individuals needing psychiatric treatment who also are within the legal system. Robinson's duties included the safety of patients and the maintenance of order. During his employment he incurred no disciplinary infractions.

M.Q. was a patient residing at Ann Klein in August 2010. Tall and large in girth, M.Q. exhibited behavioral issues on a regular basis and was often in an agitated state. He had been the subject of numerous incident reports and was enrolled in a special therapy program to deal with his problematic and violent behaviors. As part of his duties, Robinson was familiar with M.Q. He had even sought the counsel of M.Q.'s psychiatrist when M.Q. began calling him names, on how to defuse the situation and handle M.Q. in the most appropriate manner.

Incident of August 19, 2010

This disciplinary action arises out of an incident on August 19, 2010, in which Robinson is alleged to have assaulted M.Q. by choking him around the neck. In support of its case, respondent presented the testimony of Ann Klein staff members Senior Vocational Counselor Ronald Stevens, Investigator Ramona Kirwan, and Director of Training Sandi Ferguson.

On the evening of August 19, 2010, Robinson, along with Medical Security Officer (MSO) Jeanette Lewis, was assigned to the on site store for residents from 6:30 to 8:30 p.m. The store is a "commissary" area open at set hours three days a week. It is housed in one room, approximately 16' by 8', with a counter down its length. Shelving lines the walls and refrigerator/freezer units stand at the back of the room and to the left of the counter. The area where patients line up to make purchases is no

more than 2 ½ to 3' wide. The store is staffed by Ann Klein personnel and patients line up to enter the store and make their purchases. On the evening of August 19, 2010, the store was staffed by Stevens and patient workers. According to Stevens he was sitting along the wall of the store when he witnessed an altercation between M.Q. and Robinson. M.Q. was in the store, taking a long time with his purchases and trying to engage the store workers in conversations. He was asked by Stevens and then Lewis, the officer in the store, to complete his purchases as the line of waiting patients was growing. Robinson then entered the store and asked M.Q. to complete his purchases. Standing near M.Q. at the counter, Robinson had a dollar bill in his hand to purchase a soda.

Stevens stated that out of the corner of his eye, in his peripheral vision, he saw M.Q. grab the bill from Robinson's hand. Stevens testified that in response, Robinson grabbed M.Q. by the throat and pushed him up against the counter, with the encounter lasting around 30 seconds. He then saw Robinson leave the store to return to the hall and his oversight of the waiting patients. M.Q. then left the store as well. When Stevens spoke to Lewis immediately after the incident she told him that she saw M.Q. grab Robinson's groin area. Stevens also stated that a patient worker, R.B., told him at the time that he saw M.Q. grab Robinson's groin as he snatched the money from Robinson's hand. While Stevens testified he did not see the groin grab, he admitted that his view was obstructed from where he was seated. He did not "call a code" or seek help during the incident since it happened so quickly. Stevens finished working the store hours that evening and then went to the security office to report the incident, speaking first with a female officer and then with another security officer with whom he was more familiar. The next morning he also reported the incident to the Patient Security Compliance Unit.

Based upon Stevens' report, respondent initiated an investigation of the incident. Ann Klein presented the testimony of Ramona Kirwan, an institutional abuse investigator who oversaw the investigation. She identified various reports on the incident and the diagrams of the store prepared by the patients and staff present. She also opined that she did not consider a patient grabbing an officer's groin area to be

assaultive. Respondent then presented the testimony of Sandi Ferguson, Ann Klein's Director of Training and Staff Development. In charge of training at the facility, she reviewed the training programs for staff in the handling of patients. She described the MANDT training program¹ in place at the time of the incident and the appropriate holds for the restraint of patients when necessary. With only a few "holds" allowable, she stated that grabbing a patient around the neck or bending them over a counter would be inappropriate. On cross examination she did admit that a patient grabbing a staff member's groin was not specifically dealt with in the training manual, and that there were no hard and fast rules on when restraints were to be used. Although initial training was done for the staff in MANDT, updates to that training were not done due to budgetary concerns.

In response to Ann Klein's case, appellant presented the testimony of Robinson, Medical Security Officer Supervisor Angela Baylor-Baker, Nurse Gyan Sekhon and Medical Security Officer Jeanette Lewis. Robinson began his testimony with a description of the training he had received in the handling of patients at Trenton Psychiatric and at Ann Klein. The MANDT program introduced at Ann Klein in 2006 emphasized more use of verbal skills and predicated fewer takedown restraints. He described MANDT hold as "more like hugging" by placing arms around the patient. He did not recall training that covered an incident such as a "groin grab" by a patient in a confined area.

~~Robinson was familiar with M.Q., describing him as a "pretty good size"~~ individual, taller, heavier and younger than he was. He recalled that when M.Q. had begun calling him names in June 2010, he sought out his treating psychiatrist for assistance in how to best handle the situation. On the evening of August 19, 2010, he was assigned to the "store" and his duties included keeping the patients in line and orderly. He recalled M.Q. being in the store and taking too much time with his order, causing the other patients to become agitated with waiting. When he entered the store to purchase a soda he was standing at the counter with M.Q. who then grabbed his cash and his groin. The movements were quick and unexpected, and he felt pain in his

¹ According to Ferguson, the training program prior to MANDT was "Handle With Care" and the current program is "Therapeutic Options."

groin area. Robinson then described trying to put space between himself and M.Q. who was still grabbing his groin. Trying to separate their bodies and dislodge his groin area from the patient's grip he pushed M.Q. back into the counter. As he did the motion caused his arm to go further up M.Q.'s chest toward his collarbone. He then held him there against the counter for a moment before releasing him.

After he and M.Q. exited the store he returned to his duties and ended his shift at 9 p.m. He did not see his supervisor around and did not report the incident. He did not seek M.Q. out further as he did not wish to agitate him. Robinson denied choking M.Q. Operating in the small confined space of the store, he described his responses to M.Q. as a reaction to the unexpected assault on his genitals. He also described M.Q.'s girth and extremely large stomach area which made a "hugging" hold difficult particularly in the confined area as he was trying to separate M.Q. from his groin area.

Appellant then presented the testimony of Nurse Sekhon and Officer Lewis. When Sekhon saw M.Q. on the ward after the incident he told her something occurred with an officer but did not describe it to her. Although she did not examine him, she did observe his neck immediately after the incident and there were no marks. Officer Lewis then presented the only other eyewitness testimony beside that of Stevens and Robinson. She said she was behind the counter across from Robinson and M.Q. She stated she saw the entire incident with no view obstruction. According to Lewis the incident was brief and she saw M.Q. grab Robinson's money and his crotch. In response, Robinson put his hands up to separate himself from M.Q. in the mid-chest area moving him back against the counter. She testified that Robinson did not choke M.Q. or push him over the counter. M.Q. did not yell out and she did not intervene to aid Robinson because the incident happened so quickly. As with the testimony of his supervisor Baker, Lewis found Robinson to be truthful and without violent tendencies toward patients.

In determining the facts of this case, the testimony of Stevens is at odds with that of Robinson and Stevens. When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in

order to make factual findings. In determining whether respondent has proven by a preponderance of the evidence that Robinson abused a patient, and, therefore, warrants removal from his position, it is necessary to assess the credibility of the witnesses in light of their testimony, as well as in the context of the other evidence in the record. Credibility is the value that a fact finder gives to the testimony of a witness. It envisions an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir., 1963). It has been defined as testimony, which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see also, Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself as well. Spagnulo v. Bonnet, 16 N.J. 546, 554-55 (1954). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950).

In this matter, Robinson and Lewis have presented a different version from Stevens of what occurred between Robinson and M.Q. that evening. Reviewing the record and testimony presented I FIND Robinson's and Lewis' version to be more credible. While Stevens was articulate and coherent in his testimony, his view was obstructed during the incident and he admitted that, although he did not see M.Q. grab Robinson's groin area, it could have occurred. In his discussion with security shortly after the incident, he was uncertain whether choking had occurred. While he was correct that an incident had taken place between Robinson and M.Q., his obstructed view mitigates against his version of events. Additionally no marks were observed by Nurse Sekhon when she viewed M.Q.'s neck shortly after the incident, and it is likely that a choking of the type described by Stevens would have left some mark or redness on M.Q.

Robinson was credible and detailed in his testimony. His version of his actions fits with the reaction of a man in a confined space attempting to dislodge a larger, heavier, younger man from a hold on his groin. He first attempted to put space between them by moving the larger man back away from him and his genitals. As the area was confined he himself was limited in his movements away and back. Given M.Q.'s size, girth, and the layout of store, the actions he described were consistent with a response to the assaultive action by M.Q. Significantly, Lewis corroborates Robinson's version of his actions. She had an unobstructed view of the incident and corroborates M.Q.'s "groin grab" and Robinson's actions in response. Her unobstructed view places her in a better position than Stevens to view the entirety of the interaction between Robinson and M.Q. Their testimony that M.Q. initiated the altercation by grabbing Robinson's genitals is corroborated by patient R.B., who like Lewis viewed the incident from behind the counter, closest to M.Q. and Robinson.

Robinson's credibility is buttressed further by his prior interactions with M.Q., by all accounts a difficult and sometimes violent patient. When verbally assaulted by M.Q., Robinson chose to seek out M.Q.'s treating psychiatrist to help him defuse the situation and handle M.Q. in the least confrontational manner.

Based on the record before me, I **FIND** that Robinson did not assault M.Q., a patient at Ann Klein on August 19, 2010.

Issue on Remand

In its remand the CSC found no evidence to disturb the credibility determinations set forth in the Initial Decision and agreed with the finding that Robinson did not choke M.Q. It did however request a further finding on whether appellant's "pushing" or "moving back" M.Q. during the incident "could be considered abuse under Administrative Order 4:08" and if so what the penalty should be.

Administrative Order 4:08 defines physical abuse as:

...a physical act directed at a client, 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 client, patient, or resident being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object.

In order to make such a finding it is necessary to place Robinson's action in context. The facts in this matter show that Robinson's actions were in response to M.Q.'s grabbing his genitals in the confined space of the facility's store, and were defensive in nature. In response to M.Q.'s physical assault on his person Robinson immediately moved to place distance between himself and M.Q. by pushing the larger, younger man back toward the counter. Given M.Q.'s action in grabbing his genitals such an action by Robinson was reasonable. It accomplished the immediate need to separate himself and his genitals from M.Q. in the circumscribed space and to prevent any further assault on his person by M.Q.

Such a response is sanctioned by the MANT training program in place at the time of the incident (R-11) which acknowledges that Medical Security Officers such as appellant are permitted to restrain assaultive clients when there is an imminent threat of harm to self or others:

...physical interaction includes encouraging, guiding, helping, avoiding, redirecting, releasing, supporting, separating and restraining...At times this kind of interaction may even involve physical restraint, which means physically holding a person in a way which restricts the person's movement. (at page 322).

Both Lewis and Robinson credibly testified that the interaction between appellant and M.Q. was brief. Even Stevens agreed that the incident lasted about thirty (30) seconds. Lewis testified that Robinson placed his hands up to separate himself from M.Q. in the midchest area and moved him back against the counter, but did not push him over the counter. Under the circumstances of this case, a defensive movement or push away while being assaulted was reasonable on Robinson's part. An initial "hugging" restraint action would not have served the purpose of separating M.Q. from Robinson and his genitals, and may have been ineffectual in any case given their physical disparity and the enclosed space. Faced with an assaultive client, and in order

to control the situation, appellant first had to free his genitals from M.Q.'s grip and then to move to control the assaultive individual to prevent another further harm to himself or others. By moving him back to counter and preventing him from further assaultive moves, he managed to control the situation.

Robinson's actions in moving M.Q. back toward the counter took place as he was being assaulted physically by a larger, younger client in an enclosed space with other staff and clients at risk if the situation had escalated. The credible testimony of both Robinson and Lewis showed that he did not force M.Q. over the counter, or hyperextend his body. I FIND that his actions do not constitute abuse under Administrative Directive 4.08.

Disciplinary History

Robinson has no history of disciplinary actions in his employment record.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act and the regulations promulgated thereunder, govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who engages in misconduct related to his or her duties, or who gives other just cause, may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). When an employee appeals from a disciplinary action or ruling by an appointing authority, the burden of proof is on the appointing authority to show that the removal of appellant was justified. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). That burden is to establish by a preponderance of the competent, relevant, and credible evidence, that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

In this matter, respondent Ann Klein has not met its burden of proving the allegations against Robinson. I therefore **CONCLUDE** that Ann Klein has not met its burden of proof that Robinson committed abuse of a patient.

ORDER

It is **ORDERED** that appellant's removal from his position is **REVERSED** and his appeal is **GRANTED**.

It is further **ORDERED** that appellant shall be restored to his position as Senior Medical Officer at Ann Klein Forensic Psychiatric Hospital with back pay, service credit, benefits and all other emoluments. The amount of back pay awarded is to be reduced by any calculated mitigation amounts for pay and salaries received or that could have been earned by appellant until the date she is restored. Pursuant to N.J.A.C. 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. Under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay.

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.

December 2, 2013
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

12/2/13

Date Mailed to Parties:

12/2/13

/lam



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Curtis Robinson,
Department of Human Services

CSC Docket No. 2011-2913
OAL Docket No. CSV 1716-11

OCT 17 2012

ISSUED:

(CSM)

The appeal of Curtis Robinson, a Senior Medical Security Officer with the Ann Klein Forensic Psychiatric Hospital, Department of Human Services, of his removal effective January 12, 2011, on charges, was heard by Administrative Law Judge Patricia M. Kerins (ALJ), who rendered her initial decision on April 16, 2012. Exceptions and cross-exceptions were filed on behalf of the appointing authority and the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 3, 2012, ordered that the matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appellant was removed effective January 12, 2011 on charges of conduct unbecoming a public employee, physical or verbal abuse of a patient, client, resident or employee, and other sufficient cause. Specifically, the appointing authority asserted that on August 19, 2010, patient M.Q. snatched money from the appellant that he was holding in his hand and the appellant responded by grabbing M.Q. by the throat and bending him backwards over a counter for approximately one minute. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

In her initial decision, the ALJ found that on the evening of the incident, the appellant, along with Jeanette Lewis, a Senior Medical Security Officer, and Ronald Stevens, a Senior Vocational Counselor, were assigned to the on-site store for residents. M.Q. was in the store, taking a long time with his purchases and was asked by Stevens and then Lewis to complete his purchases as the line of waiting patients was growing. The appellant entered the store and also asked M.Q. to complete his purchases. Standing near M.Q. at the counter, the appellant had a dollar bill in his hand to purchase a soda. Out of the corner of his eye, in his peripheral vision, Stevens testified that he saw M.Q. grab the bill from the appellant's hand, and, in response, the appellant grabbed M.Q. by the throat and pushed him up against the counter. After the appellant and M.Q. left the store, Stevens stated that he spoke to Lewis, who stated that she saw M.Q. grab the appellant's groin area. Stevens also indicated that a patient worker, R.B., told him that he saw M.Q. grab the appellant's groin as he snatched money from the appellant's hand. The ALJ noted that Stevens testified that he did not see the groin grab and admitted that his view was obstructed from where he was seated.

The appellant testified that he was standing at the counter with M.Q. who grabbed his cash and his groin. He stated that the movements were quick and unexpected, and that he felt pain in his groin area. The appellant indicated that while trying to separate their bodies and dislodge his groin area from the patient's grip, he pushed M.Q. back into the counter. As he did, the motion caused his arm to go further up M.Q.'s chest toward his collarbone. The appellant then held M.Q. against the counter before releasing him. The appellant denied choking M.Q., but since the store is confined to a small space, he indicated that his response was a reaction to the unexpected assault on his genitals. Gyan Sekhon, Charge Nurse, 12 Months, testified that she observed M.Q.'s neck immediately after the incident and there were no marks. Lewis testified that she was behind the counter across from the appellant and M.Q. and saw the entire incident with no view obstruction. Lewis stated that she saw M.Q. grab the appellant's money and his crotch, and, in response, the appellant put up his hands to separate himself from M.Q. in the mid-chest area, moving him back against the counter.

In evaluating the testimony of the witnesses, the ALJ found the appellant's and Lewis' versions to be credible. While Stevens' testimony was articulate and coherent, the ALJ noted that his view was obstructed during the incident and he admitted that, although he did not see M.Q. grab the appellant's groin area, it could have occurred. Thus, while Stevens was correct in reporting that an incident occurred between the appellant and M.Q., his obstructed view mitigated against his version of the events. The ALJ also noted that no marks were observed by Sekhon when she viewed M.Q.'s neck shortly after the incident. Additionally, the ALJ found that the appellant's version of his actions was in line with the reaction of a man in a confined space, attempting to dislodge a larger, heavier, younger man from a hold on his groin. Moreover, Lewis, who had an unobstructed view of the

incident, corroborated M.Q.'s "groin grab" and the appellant's actions in response. Thus, the ALJ found that Lewis' unobstructed view placed her in a better position than Stevens to view the entirety of the interaction between the appellant and M.Q. Therefore, the ALJ concluded that the appointing authority did not sustain the charges against the appellant and recommended that he be reinstated.

In its exceptions to the ALJ's decision, the appointing authority states that the ALJ erred when she found that Stevens' testimony was less credible because his view of the alleged groin grab was obstructed. In this regard, it states that Stevens' view of the appellant pushing, choking, and bending M.Q. backwards over the counter was not obstructed and he testified that he was looking directly at the appellant when he attacked M.Q. The appointing authority also states that the ALJ erred when she found the appellant's and Lewis' version of the events to be more consistent, especially since the only consistent portion of their version of the attack was the fact that M.Q. grabbed appellant's groin. Otherwise, it states that their versions of what transpired subsequent to the groin grab are completely inconsistent.

Additionally, the appointing authority contends that the ALJ ignored standards and principles that govern patient abuse cases in New Jersey. Specifically, it states that the ALJ's initial decision is devoid of any analysis as to why the incident did not constitute abuse. In this regard, the appointing authority emphasizes that DHS Administrative Order 4:08 is the guiding standard in abuse cases, and the ALJ offered no analysis as to how this standard applies to the physical altercation between the appellant and M.Q. Administrative Order 4:08 sets forth a "zero tolerance" standard toward abuse, which is defined as "a physical act directed at a client, patient, or resident of a type that could tend to cause pain, injury, anguish, and/or suffering." Thus, even if the ALJ's finding is upheld that the appellant did not choke M.Q., but rather simply pushed and grabbed M.Q. by the shirt at chest level and forced him back over the counter, the proper abuse standard as set forth in Administrative Order 4:08 was not applied. Therefore, since the ALJ failed to apply the proper standard of what constitutes abuse, in conjunction with the flawed factual findings, the appointing authority maintains the appellant should be removed.

In response, the appellant states that the ALJ's findings were based upon the substantial credible evidence in the record and that she found his and Lewis' testimony to be more credible than Stevens' testimony. Further, the appellant maintains that it was clear from the testimony that he was assaulted by M.Q. when M.Q. grabbed his testicles and his reaction was self defense, not intentional abuse of a patient. Moreover, there was no indication of any trauma to M.Q. to substantiate that he choked him.

Upon its review of the record and the exceptions and cross exceptions filed by the parties in the instant matter, the Commission finds that the initial decision contains insufficient information for it to make a reasoned and informed decision.

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 the 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). Upon its *de novo* review of the record, the Commission finds no evidence that the ALJ’s credibility determinations were arbitrary, capricious or unreasonable. Accordingly, the Commission agrees with the ALJ’s finding that the appellant did not choke M.Q. In this regard, Lewis was able to see the entire incident unobstructed and she credibly testified that the appellant did not choke M.Q. Additionally, Sekhon observed no marks on M.Q.’s neck immediately after the incident. Therefore, the record supports the ALJ’s determination that the appellant did not choke M.Q.

However, three witnesses to the event, the appellant, Stevens, and Lewis, all agreed the appellant either “pushed” or “moved back” M.Q. during the incident. As correctly noted in the appointing authority’s exceptions, such an action *could* be considered abuse under Administrative Order 4:08, depending on the circumstances. Therefore, the Commission orders that this matter be remanded to the OAL in order for the ALJ to analyze whether that action constituted abuse under the policy, and, if so, what the proper penalty should be.

ORDER

The Civil Service Commission orders that this matter be remanded to the Office of Administrative Law consistent with this decision.

**DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3rd DAY OF OCTOBER, 2012**

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, New Jersey 08625-0312**

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 1716-11

AGENCY DKT. NO. 2011-2913

**IN THE MATTER OF CURTIS
ROBINSON, DEPARTMENT OF
HUMAN SERVICES, ANN KLEIN
FORENSIC PSYCHIATRIC HOSPITAL.**

Christopher Gray, Esq., for Curtis Robinson, appellant (Alterman and Associates, LLC, attorneys)

Nicole Colon, Deputy Attorney General, for Department of Human Services (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Record Closed: January 17, 2012

Decided: April 16, 2012

BEFORE PATRICIA M. KERINS, ALJ:

STATEMENT OF THE CASE

Respondent Ann Klein Forensic Center (Ann Klein) removed appellant, Curtis Robinson (Robinson), from his position of Senior Medical Security Officer for allegedly assaulting a patient. Robinson denies that he engaged in such conduct and appeals his removal.

PROCEDURAL HISTORY

On November 8, 2010, Ann Klein, a psychiatric treatment facility within the Department of Human Services (DHS), filed a Preliminary Notice of Disciplinary Action against Robinson charging him with offenses relating to the physical abuse of a patient. Robinson was removed from his position by a Final Notice of Disciplinary Action dated January 12, 2011. On January 24, 2011, he appealed that decision, and on February 17, 2011, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.S.A. 11A:1-1 through 12.6 and N.J.S.A. 52:14B-2(b). The matter was heard on July 5, 2011, November 28, 2011, and January 17, 2012, at the OAL in Mercerville, New Jersey. The record closed on January 17, 2012. An extension for the filing of the Initial Decision was granted until April 16, 2012.

FINDINGS OF FACT

General Background Facts

Appellant Robinson has been employed by the DHS at its Ann Klein facility since 1999 as a Senior Medical Security Officer. Prior to his position at Ann Klein, he had been employed at the Trenton Psychiatric Hospital. Ann Klein is a psychiatric treatment facility operated by DHS, with a population made up of individuals needing psychiatric treatment who also are within the legal system. Robinson's duties included the safety of patients and the maintenance of order. During his employment he incurred no disciplinary infractions.

M.Q. was a patient residing at Ann Klein in August 2010. Tall and large in girth, M.Q. exhibited behavioral issues on a regular basis and was often in an agitated state. He had been the subject of numerous incident reports and was enrolled in a special therapy program to deal with his problematic and violent behaviors. As part of his duties, Robinson was familiar with M.Q. He had even sought the counsel of M.Q.'s psychiatrist when M.Q. began calling him names, on how to defuse the situation and handle M.Q. in the most appropriate manner.

Incident of August 19, 2010

This disciplinary action arises out of an incident on August 19, 2010, in which Robinson is alleged to have assaulted M.Q. by choking him around the neck. In support of its case, respondent presented the testimony of Ann Klein staff members Senior Vocational Counselor Ronald Stevens, Investigator Ramona Kirwan, and Director of Training Sandi Ferguson.

On the evening of August 19, 2010, Robinson, along with Medical Security Officer (MSO) Jeanette Lewis, was assigned to the on site store for residents from 6:30 to 8:30 p.m. The store is a "commissary" area open at set hours three days a week. It is housed in one room, approximately 16' by 8', with a counter down its length. Shelving lines the walls and refrigerator/freezer units stand at the back of the room and to the left of the counter. The area where patients line up to make purchases is no more than 2 ½ to 3' wide. The store is staffed by Ann Klein personnel and patients line up to enter the store and make their purchases. On the evening of August 19, 2010, the store was staffed by Stevens and patient workers. According to Stevens he was sitting along the wall of the store when he witnessed an altercation between M.Q. and Robinson. M.Q. was in the store, taking a long time with his purchases and trying to engage the store workers in conversations. He was asked by Stevens and then Lewis, the officer in the store, to complete his purchases as the line of waiting patients was growing. Robinson then entered the store and also asked M.Q. to complete his purchases. Standing near M.Q. at the counter, Robinson had a dollar bill in his hand to purchase a soda.

Stevens stated that out of the corner of his eye, in his peripheral vision, he saw M.Q. grab the bill from Robinson's hand. Stevens testified that in response, Robinson grabbed M.Q. by the throat and pushed him up against the counter, with the encounter lasting around 30 seconds. He then saw Robinson leave the store to return to the hall and his oversight of the waiting patients. M.Q. then left the store as well. When Stevens spoke to Lewis immediately after the incident she told him that she saw M.Q.

grab Robinson's groin area. Stevens also stated that a patient worker, R.B., told him at the time that he saw M.Q. grab Robinson's groin as he snatched the money from Robinson's hand. While Stevens testified he did not see the groin grab, he admitted that his view was obstructed from where he was seated. He did not "call a code" or seek help during the incident since it happened so quickly. Stevens finished working the store hours that evening and then went to the security office to report the incident, speaking first with a female officer and then with another security officer with whom he was more familiar. The next morning he also reported the incident to the Patient Security Compliance Unit.

Based upon Stevens' report, respondent initiated an investigation of the incident. Ann Klein presented the testimony of Ramona Kirwan, an institutional abuse investigator who oversaw the investigation. She identified various reports on the incident and the diagrams of the store prepared by the patients and staff present. She also opined that she did not consider a patient grabbing an officer's groin area to be assaultive. Respondent then presented the testimony of Sandi Ferguson, Ann Klein's Director of Training and Staff Development. In charge of training at the facility, she reviewed the training programs for staff in the handling of patients. She described the MANDT training program¹ in place at the time of the incident and the appropriate holds for the restraint of patients when necessary. With only a few "holds" allowable, she stated that grabbing a patient around the neck or bending them over a counter would be inappropriate. On cross examination she did admit that a patient grabbing a staff member's groin was not specifically dealt with in the training manual, and that there were no hard and fast rules on when restraints were to be used. Although initial training was done for the staff in MANDT, updates to that training were not done due to budgetary concerns.

¹ According to Ferguson, the training program prior to MANDT was "Handle With Care" and the current program is "Therapeutic Options."

In response to Ann Klein's case, appellant presented the testimony of Robinson, Medical Security Officer Supervisor Angela Baylor-Baker, Nurse Gyan Sekhon and Medical Security Officer Jeanette Lewis. Robinson began his testimony with a description of the training he had received in the handling of patients at Trenton Psychiatric and at Ann Klein. The MANDT program introduced at Ann Klein in 2006 emphasized more use of verbal skills and predicated fewer takedown restraints. He described MANDT hold as "more like hugging" by placing arms around the patient. He did not recall training that covered an incident such as a "groin grab" by a patient in a confined area.

Robinson was familiar with M.Q., describing him as a "pretty good size" individual, taller, heavier and younger than he was. He recalled that when M.Q. had begun calling him names in June 2010, he sought out his treating psychiatrist for assistance in how to best handle the situation. On the evening of August 19, 2010, he was assigned to the "store" and his duties included keeping the patients in line and orderly. He recalled M.Q. being in the store and taking too much time with his order, causing the other patients to become agitated with waiting. When he entered the store to purchase a soda he was standing at the counter with M.Q. who then grabbed his cash and his groin. The movements were quick and unexpected, and he felt pain in his groin area. Robinson then described trying to put space between himself and M.Q. who was still grabbing his groin. Trying to separate their bodies and dislodge his groin area from the patient's grip he pushed M.Q. back into the counter. As he did the motion caused his arm to go further up M.Q.'s chest toward his collarbone. He then held him there against the counter for a moment before releasing him.

After he and M.Q. exited the store he returned to his duties and ended his shift at 9 p.m. He did not see his supervisor around and did not report the incident. He did not seek M.Q. out further as he did not wish to agitate him. Robinson denied choking M.Q. Operating in the small confined space of the store, he described his responses to M.Q. as a reaction to the unexpected assault on his genitals. He also described M.Q.'s girth and extremely large stomach area which made a "hugging" hold difficult particularly in the confined area as he was trying to separate M.Q. from his groin area.

Appellant then presented the testimony of Nurse Sekhon and Officer Lewis. When Sekhon saw M.Q. on the ward after the incident he told her something occurred with an officer but did not describe it to her. Although she did not examine him, she did observe his neck immediately after the incident and there were no marks. Officer Lewis then presented the only other eyewitness testimony beside that of Stevens and Robinson. She said she was behind the counter across from Robinson and M.Q. She stated she saw the entire incident with no view obstruction. According to Lewis the incident was brief and she saw M.Q. grab Robinson's money and his crotch. In response, Robinson put his hands up to separate himself from M.Q. in the mid chest area moving him back against the counter. She testified that Robinson did not choke M.Q. or push him over the counter. M.Q. did not yell out and she did not intervene to aid Robinson because the incident happened so quickly. As with the testimony of his supervisor Baker, Lewis found Robinson to be truthful and without violent tendencies toward patients.

In determining the facts of this case, the testimony of Stevens is at odds with that of Robinson and Stevens. When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. In determining whether respondent has proven by a preponderance of the evidence that Robinson abused a patient, and, therefore, warrants removal from his position, it is necessary to assess the credibility of the witnesses in light of their testimony, as well as in the context of the other evidence in the record. Credibility is the value that a fact finder gives to the testimony of a witness. It envisions an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir., 1963). It has been defined as testimony, which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see also, Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a

credible witness, but it must be credible in itself as well. Spagnulo v. Bonnet, 16 N.J. 546, 554-55 (1954). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Ferrone, 5 N.J. 514 (1950).

In this matter, Robinson and Lewis have presented a different version from Stevens of what occurred between Robinson and M.Q. that evening. Reviewing the record and testimony presented I FIND Robinson's and Lewis' version to be more credible. While Stevens was articulate and coherent in his testimony, his view was obstructed during the incident and he admitted that, although he did not see M.Q. grab Robinson's groin area, it could have occurred. In his discussion with security shortly after the incident, he was uncertain whether choking had occurred. While he was correct that an incident had taken place between Robinson and M.Q., his obstructed view mitigates against his version of events. Additionally no marks were observed by Nurse Sekhon when she viewed M.Q.'s neck shortly after the incident, and it is likely that a choking of the type described by Stevens would have left some mark or redness on M.Q.

Robinson was credible and detailed in his testimony. His version of his actions fits with the reaction of a man in a confined space attempting to dislodge a larger, heavier, younger man from a hold on his groin. He first attempted to put space between them by moving the larger man back away from him and his genitals. As the area was confined he himself was limited in his movements away and back. Given M.Q.'s size and girth and the layout of store, the actions he described were consistent with a response to the assaultive action by M.Q. Significantly, Lewis corroborates Robinson's version of his actions. She had an unobstructed view of the incident and corroborates M.Q.'s "groin grab" and Robinson's actions in response. Her unobstructed view places her in a better position than Stevens to view the entirety of the interaction between Robinson and M.Q. Their testimony that M.Q. initiated the altercation by grabbing Robinson's genitals is corroborated by patient R.B., who like Lewis viewed the incident from behind the counter, closest to M.Q. and Robinson.

Robinson's credibility is buttressed further by his prior interactions with M.Q., by all accounts a difficult and sometimes violent patient. When verbally assaulted by M.Q., Robinson chose to seek out M.Q.'s treating psychiatrist to help him defuse the situation and handle M.Q. in the least confrontational manner.

Based on the record before me, I **FIND** that Robinson did not assault M.Q., a patient at Ann Klein on August 19, 2010.

Disciplinary History

Robinson has no history of disciplinary actions in his employment record.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act and the regulations promulgated thereunder, govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who engages in misconduct related to his or her duties, or who gives other just cause, may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). When an employee appeals from a disciplinary action or ruling by an appointing authority, the burden of proof is on the appointing authority to show that the removal of appellant was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). That burden is to establish by a preponderance of the competent, relevant, and credible evidence, that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

In this matter, respondent Ann Klein has not met its burden of proving the allegations against Robinson. Of the two opposing versions of the alleged incident which led to the charges, I determined Robinson's version, in light of all the evidence, to be the credible one. I therefore **CONCLUDE** that Ann Klein has not met its burden of proof that Robinson committed abuse of a patient.

ORDER

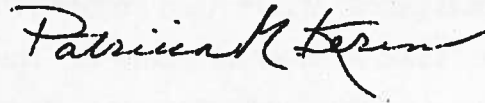
It is **ORDERED** that appellant's removal from his position is **REVERSED** and his appeal is **GRANTED**.

It is further **ORDERED** that appellant shall be restored to his position as Senior Medical Officer at Ann Klein Forensic Psychiatric Hospital with back pay, service credit, benefits and all other emoluments. The amount of back pay awarded is to be reduced by any calculated mitigation amounts for pay and salaries received or that could have been earned by appellant until the date she is restored. Pursuant to N.J.A.C. 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. Under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay.

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.



April 16, 2012
DATE

PATRICIA KERINS, ALJ

Date Received at Agency:

Date Mailed to Parties:

/lam/bal

WITNESSES

For appellant:

Angela Baylor-Baker
Gyan Sekahon
Curtis Robinson
Jeanette Lewis

For respondent:

Ronald Stevens
Ramona Kirwan
Sandi Ferguson

EXHIBITS

For appellant:

- P-1 Diagram
- P-2 Diagram
- P-3 Statement of Angela Baylor-Baker, dated August 31, 2010
- P-4 Diagram
- P-5 Diagram
- P-6 Diagram
- P-7 Diagram
- P-8 Diagram
- P-9 Diagram
- P-10 Diagram
- P-11 Diagram
- P-12 Physical Interaction Skills, revised January 1, 2006

- P-13 Interview and Statement by MSO Supervisor Angela Baylor-Baker,
dated August 20, 2010**
- P-14 Statement of Gyan Sekahon, dated August 31, 2010**
- P-15 (a) Photograph**
 - (b) Photograph**
 - (c) Photograph**
 - (d) Photograph**
 - (e) Photograph**
 - (f) Photograph**

For respondent:

- R-1 Interview Statement by Senior Rehab Counselor Ronald Stevens,
dated August 20, 2010**
- R-2 Statement of Ronald Stevens, dated August 27, 2010**
- R-3 Anne Klein Forensic Center Investigative Report Summary**
- R-4 Statement of Ramona Kirwan, dated August 23, 2010**
- R-5 Statement of Samuel Ramshany, dated August 23, 2010**
- R-6 Statement of Richard Brooks, dated August 23, 2010**
- R-7 Statement of Curtis Robinson, dated August 25, 2010**
- R-8 Statement of Jeanette Lewis, dated August 24, 2010**
- R-9 Statement of Virgil Baldwin, dated August 23, 2010**
- R-10 Student Inquiry of Curtis Robinson**
- R-11 Book entitled "The Mandt System"**
- R-12 New Jersey Department of Human Services – Disciplinary
Action Program**
- R-13 Page 246 entitled "Pain will Escalate People"**