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STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Kareem Turbeville,
Department of Human Services

CSC Docket No. 2014-1269
OAL Docket No. CSV 16531-13

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ISSUED: MAR 04 2015 (DASV)

The appeal of Kareem Turbeville, a Human Services Assistant with Ancora Psychiatric Hospital (Ancora), Department of Human Services (DHS), of his removal, effective May 8, 2013, on charges, was heard by Administrative Law Judge Joseph A. Ascione (ALJ), who rendered his initial decision on December 3, 2014. Exceptions were filed on behalf of the appointing authority, and cross exceptions were filed on behalf of 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 February 4, 2015, did not adopt the ALJ's recommendation to reverse the appellant's removal. Rather, the Commission modified the removal to a six-month suspension.

DISCUSSION

The appellant was removed, effective May 8, 2013,¹ on charges of conduct unbecoming a public employee, other sufficient cause, physical or mental abuse of a patient, client, resident or employee, and violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, it was asserted that on April 28, 2013, the appellant pushed patient C.G., who had been banging on the plexi-glass window of one of the nursing stations. The appellant also grabbed C.G.

¹ The ALJ indicated in the initial decision that the appellant had been terminated on October 29, 2013, which was the date of the Final Notice of Disciplinary Action (FNDA). However, the appellant was immediately suspended and removed effective May 8, 2013.

around the waist and picked him up from the floor. He then turned C.G. around and threw him face down to the floor. It was also claimed that the appellant laid his entire body on C.G.'s back and pressed his forearm against C.G.'s neck. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ set forth that a video recorded the events of April 28, 2013, which included capturing the aggressive behavior of C.G. who had been pounding on the plexi-glass window of the nurse's station because he wanted to change the station on the television. C.G. had also attempted to punch a nurse at the medication window and was verbally threatening staff with physical harm. The appellant initially tried to defuse C.G.'s anger without physical contact, but he eventually picked up C.G. and took him to the floor. C.G., however, did not sustain any injuries from the incident. One witness heard C.G. state, "If you let me get up I will hurt you." Moreover, witnesses testified as to the methods taught by Ancora to handle patients. It was found that Therapeutic Options, which was described as body positioning and movement, was the current technique being taught by the facility for the past three years. Employees were previously trained in MANDT, which also focused on resolving a situation without physical action against a patient. Prior to that technique, employees had been trained in Handle with Care which provided for "patient takedowns." The appellant received training in MANDT and Handle with Care. However, he had not yet been fully trained in Therapeutic Options, which consisted of a 10-minute video presentation and a full day training class, prior to the incident with C.G. The appellant only had the opportunity to view the video on April 8, 2013. Regardless, a trainer testified that the appellant's response to C.G. was not consistent with MANDT training notwithstanding that Ancora never communicated to employees that the last training taught should be utilized.

Based on the foregoing and a review of the video, the ALJ determined that C.G. had pushed the appellant after he attempted to punch a nurse at the medication window. The appellant then pushed C.G. towards the nurse's station and "shifted C.G.'s body and placed him on the floor." The appellant had "instinctively responded with a takedown of C.G." to the floor where C.G. could not inflict any injury. The ALJ also indicated that the appellant had used his Handle with Care training to defuse the situation. Further, although Ancora argued that the appellant should have used MANDT training, the ALJ noted that the appointing authority had found that training ineffective and replaced it with Therapeutic Options. The appellant was not fully trained in Therapeutic Options. The ALJ reiterated that the appellant's conduct could not be considered unbecoming a public employee or a violation of a protocol or training, "rather, it is viewed as an instinctive response to being placed at risk of physical harm to oneself" and "potentially protecting other residents and/or staff." Thus, the ALJ concluded that the appellant's actions were not patient abuse. Moreover, the ALJ did not find any

evidence that the appellant had placed pressure on C.G.'s neck with his elbow, as asserted in the specifications of the FNDA. Accordingly, the ALJ recommended dismissing the charges and reversing the appellant's removal.

In its exceptions, the appointing authority states that the basis for the appellant's charges was his takedown and restraint of C.G., which were neither approved nor permitted under the circumstances. The appellant took C.G. to the floor in a forceful manner, including laying on top of him and pressing his arm against C.G.'s neck, and in doing so, violated the appointing authority's policy against physical abuse. In that regard, the appointing authority indicates that it has a zero tolerance policy which requires removal of the employee on his or her first offense of physical abuse.² Furthermore, it submits that the video depicts that after C.G. pushed the appellant, they separated and only after the separation did the appellant charge C.G. and pin him against the wall. Additionally, the appointing authority contends that the appellant should have used MANDT in dealing with C.G. since he had received MANDT training, which did not include takedown procedures or laying on top of the patient to restrain him. The appointing authority notes that the appellant received Handle with Care training in 2002, 2003, and 2006 and then MANDT training in 2009 and 2010. The incident took place on April 28, 2013, which was almost seven years after the appellant last trained in Handle with Care. Moreover, the appointing authority indicates that C.G.'s history of violence or aggression is not relevant in considering how the appellant responded on the day in question. It further notes that the appellant worked over 10 years and was well aware of the hazards of working at a psychiatric hospital. The appointing authority maintains that the appellant's actions clearly went against his training and what was expected of him.

In his cross exceptions, the appellant asserts that the ALJ correctly found that the appointing authority failed to provide him with training in Therapeutic Options. Rather, he appropriately applied his training in Handle with Care to protect other patients and staff. As verified by witnesses, the appellant submits that he attempted to re-direct C.G. and was never confrontational towards him. However, C.G. "bolted" at the appellant and pushed him. The appellant states that he then quickly applied his training and controlled C.G., who eventually was restrained to a chair. Because of his proper restraint application, the appellant indicates that C.G. suffered no injury. The appellant emphasizes that, according to the video recording, his interaction with C.G. lasted only four seconds. Furthermore, he asserts that he applied the Handle with Care technique because it was his understanding that the MANDT technique was abandoned for safety reasons. He was never told not to utilize his Handle with Care training. In addition, the appellant argues that the appointing authority presents no evidence that he committed physical or mental abuse against C.G. or that he violated any

² The appointing authority's policy defines physical abuse as a physical act "that could tend to cause pain, injury, anguish, and/or suffering."

rule, regulation, or policy. Rather, he executed a technique which was taught by Ancora. Therefore, the appellant urges the Commission to adopt the ALJ's recommendation.

Upon its *de novo* review of the record, including viewing the video of the incident, the Commission disagrees with the ALJ's recommendation to dismiss the charges. There is no dispute that the appellant had been pushed by C.G., and in response, the appellant pushed C.G. towards the nurse's station and eventually took him to the floor. While the ALJ found that the appellant acted "instinctively" and applied his Handle with Care training, the Commission finds that the appellant's actions were excessive regardless of what method he applied. The appellant is a Human Services Assistant at a psychiatric hospital, and as suggested by the appointing authority, the appellant is well aware that patients may become agitated and even hostile, as in the case of C.G, and he must be prepared for such a situation. The ALJ clearly found that the appellant pushed C.G. after he was pushed. Such a reaction may be instinctive but absolutely not appropriate for a Human Services Assistant. Furthermore, and more egregious, was the ALJ's finding that the appellant "shifted C.G.'s body and placed him on the floor." The ALJ describes this takedown action lightly, as it is clear from the video recording that the appellant's "shifting" and "placement" was forceful and akin to a body slam. It is emphasized that a Human Services Assistant must at all times show restraint even under the most stressful situations. The appellant did not show such restraint. Therefore, under these circumstances, contrary to the appellant's exceptions, he is guilty of the charges levied against him, including the charge of physical abuse as defined by the appointing authority's policy.

Regarding the penalty, the Commission's review of the penalty is also *de novo*. In addition to considering 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). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980). It is settled that the principle 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 the present case, although the Commission finds that the appellant's instinctive response was inappropriate, the appellant did not act maliciously nor did he have the intent to harm C.G., given that the appellant initially attempted to defuse the situation without physical contact and the physical altercation occurred so quickly. Indeed, C.G. was without question extremely aggressive and had been verbally threatening staff. As the ALJ indicated, the appellant's conduct was an "instinctive response to being placed at

risk of physical harm to oneself” and “potentially protecting other residents and/or staff.” Therefore under these circumstances, the Commission finds removal too harsh a penalty and modifies the penalty to a six-month suspension. The Commission is mindful that the penalty, the most severe suspension the Commission can impose, should serve as a warning to the appellant that future offenses may result in his removal from employment. *See e.g., In the Matter of Isaiah Knowlden*, Docket No. A-4963-11T2 (App. Div. April 30, 2014). In *Knowlden*, the appellant punched a patient in the course of an altercation, but the ALJ found that the action was reflexive and the appellant’s conduct during the rest of the incident was proper. The Commission concluded that the appellant was guilty of inappropriate physical contact, which warranted only a six-month suspension. Upon DHS’ petition for reconsideration, the Commission upheld the charge of physical abuse based on DHS’s revised definition, but reaffirmed the modification to a six-month suspension. The Appellate Division affirmed, quoting with approval from the Commission’s conclusion: “While malicious intent is not necessary to sustain a finding of physical abuse, the employee’s intent is certainly relevant to the penalty to be imposed.” *See also, In the Matter of Nicholas Manla*, Docket No. A-6118-T3 (App. Div. April 28, 2014). In *Manla*, the Appellate Division affirmed the decision of the Commission, which accepted the ALJ’s recommendation to modify the appellant’s removal to a 20-day suspension. While the Commission found that the appellant’s “horseplay” with the resident constituted “abuse” under DHS’ revised definition of that term, nevertheless, due to the appellant’s lack of malicious intent, his employment record, and the nature of the incident, a 20-day suspension was appropriate in that matter.

Since the penalty has been modified, the appellant is entitled to back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10, following the six-month suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

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, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay 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 position.

ORDER

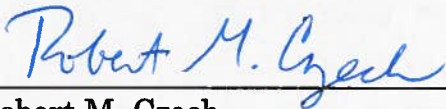
The Commission finds that the appointing authority's action in removing Kareem Turbeville was not justified. Therefore, the Commission modifies the removal to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following his six-month suspension to the date of actual 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.

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. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF FEBRUARY, 2015



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 16531-13
AGENCY DKT. NO. 2014-1269

**IN THE MATTER OF KAREEM
TURBEVILLE, DEPARTMENT OF
HUMAN SERVICES, ANCORA
PSYCHIATRIC HOSPITAL.**

William Nash, Esq., for Kareem Turbeville, appellant (Nash Law Firm, LLC, attorneys)

Christopher Kurek, Deputy Attorney General, for Department of Human Services, Ancora Psychiatric Hospital, respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 4, 2014

Decided: December 3, 2014

BEFORE **JOSEPH A. ASCIONE, ALJ**:

STATEMENT OF THE CASE

Kareem Turbeville (Turbeville) appeals his October 29, 2013, termination by the Ancora Psychiatric Hospital (Ancora) for his April 28, 2013, forceful slamming of patient C.G., on his face, to the floor, laying his entire body over C.G., and pressing his forearm against C.G.'s neck to pin C.G. down and maintain him in that position. Turbeville disputes the charges and maintains he acted to prevent C.G. from injuring himself, other

staff or patients at Ancora. He denies training in Therapeutic Options techniques or knowledge that the force used violated any policy of Ancora.

PROCEDURAL HISTORY

The, May 6, 2013, October 9, 2013, and October 29, 2013, Preliminary Notice of Disciplinary Action (PNDA), Amended Preliminary Notice of Disciplinary Action (PNDA) and Final Notice of Disciplinary Action (FNDA), respectively, sustained charges of violation of N.J.A.C. 4A:2-3(a)(6), Conduct Unbecoming a Public Employee and N.J.A.C. 4A:2-3(a)(12), Other Sufficient Cause. Specific charges included violation of Administrative Order 4.08 of the Department of Human Services Disciplinary Action Program, C-3.1, Physical or mental abuse of a patient, client; resident, or employee; and E-1-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. On May 8, 2013, respondent suspended petitioner from employment without pay pending the pretermination hearing.

On October 29, 2013, a formal hearing occurred which resulted in the issuance of the FNDA terminating Turbeville effective May 8, 2013. On November 7, 2013, Turbeville filed a notice of appeal, this matter was transmitted to and filed with the Office of Administrative Law (OAL) on November 15, 2013, by the Civil Service Commission for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on August 8, 2014, and continued on August 11, 2014. At the conclusion of the hearing, the parties requested time to submit written closing statements and legal memorandums. The record closed on September 4, 2014, upon the receipt of the post-hearing submissions. On October 20, 2014, the Office of Administrative law requested an extension of time to file the Initial Decision to December 4, 2014.

INITIAL DISCUSSION

An April 28, 2013, Ancora video surveillance tape captured the entire actions of Turbeville, including his attempts to diffuse the agitated C.G., C.G.'s initial aggressive behavior toward Turbeville, and Turbeville's actions in taking C.G. to the floor. It is

Turbeville actions which resulted in the charges that led to his termination. Ancora's position is that Turbeville should not have used physical force to subdue C.G., rather only defensive maneuvers pursuant to their Therapeutic Options policy, until such time as it was necessary to call a Code Blue ("Code") which would have brought more staff to the incident location to resolve the situation. Ancora's had no testimony to support that they trained Turbeville in Therapeutic Options. Turbeville did have training in Handle with Care and MANDT policies. Prior to the incident in question, Ancora abandoned teaching the MANDT policy due to its limitations. Ancora's position is that Turbeville should have relied, if not on the Therapeutic Option policy, on the MANDT training, as the most recent training Turbeville received. According to Ancora, Turbeville's actions violated the MANDT and Therapeutic Options training policies, and supported Ancora's dismissal of Turbeville.

Turbeville questions the absence of training he received from Ancora in Therapeutic Options, and the confusion created by the abandonment of teaching the MANDT policy. The take down of C.G., occurred in four seconds, Turbeville posits his actions were defending himself, other staff or residents, and did not rise to a violation of the specifications charged.

FINDINGS OF FACT

As some of the **FACTS** in this matter are not in dispute, I **FIND** the following:

1. Turbeville is a Human Services Assistant employed in that position by Ancora since February 24, 2002. On April 28, 2013, Turbeville used force to bring patient C.G. to the floor and restrain him.
2. At the moment before Turbeville's action identified above, C.G. had intentionally used force against Turbeville, and otherwise acted in an aggressive behavior, including physically pounding on the plexi-glass window which protected the nurses' station, punching through the medicine window at other staff, and otherwise verbally threatening staff with physical harm. See R-19, Camera 11, and 12, approximately 10:55 a.m. to 10:57 a.m.

TESTIMONY

Gloria Banner (Banner)

Banner is a twenty-six year employee of Ancora, the last fourteen as an investigator of abuse. Banner investigated the April 28, incident. She reviewed the R-19 video, and doctor's report, as well as the incident reports R-6 and R-7 of C.G. and Turbeville. Banner related that the Doctor's mental status report on C.G. concluded that C.G. suffers from paranoia, is delusional, and is otherwise not a credible witness. Banner testified that her report confirmed the incident, the initial aggressive behavior of C.G. at the nurses' station plexi-glass window when C.G. did not receive the change of channel he sought. Banner further testified to the arrival of Turbeville, the actions of C.G. in regard to the medication window; the non-physical attempts by Turbeville to diffuse C.G.'s anger; and the eventual contact C.G. made with Turbeville. The testimony concluded with Turbeville picking up C.G. and "slamming" him to the floor. Banner further testified that the doctor's found C.G. suffered no injury from the incident.

Lisa Gibens (Gibens)

Gibens is an eleven-year employee of Ancora, and served as a charge nurse for the floor. The past three years she has also performed training in Therapeutic Options. She describes the training as body position and movement. Prior to Therapeutic Options the facility taught MANDT which focused on restraints and avoidance techniques. Gibens testified that MANDT training had been discontinued approximately three years before. Therapeutic Options replaced the MANDT training. Therapeutic Options and MANDT training focused on diffusing the situation and not taking physical action against a patient. Gibens testified that she did not teach Handle with Care which provided for patient takedowns as performed by Turbeville here. Gibens reviewed the training record history of Turbeville, it reflects that Turbeville had training in Handle with care in 2002, 2003 and 2006, in MANDT in 2009 on two occasions and a review in 2010; and a video review of Therapeutic Options in April 2013, less than three weeks before the incident here.

Mark C. Woods (Woods)

Woods is a thirty-two-year employee of Ancora, for the last twelve years he served as a trainer. He testified for the respondent and the petitioner. He taught all three training areas, Handle with Care, MANDT, and Therapeutic Options. He testified that three years ago neither Handle with Care or MANDT were taught. Training within the last three years, consisted of part two of Therapeutic Options. Therapeutic Options training is usually two days but part two is covered in one day. The review is a ten-minute video and does not address hands on activities in the video. The class should precede the review. Turbeville never had the full day training in Therapeutic Options, he only had the opportunity to view the ten-minute video. Woods testified to the training courses Turbeville took related to interaction with residents, they include the following:

COURSE DATE	NAME OF COURSE	R-10 PAGE
9/11/02	Handle with Care	157
5/02/03	Handle with Care	157
10/31/06	Handle with Care-Recert.	158
8/06/09	MANDT	159
8/07/09	MANDT	159
10/5/09	MANDT-Recert.	160
10/04/10	MANDT-Recert.	161
4/03/12	RESTRAINT APPLICATION-COMP	162
4/08/13	THERAPEUTIC OPTIONS REVIEW	164
4/08/13	CRISIS INTERVENTION	164

Woods testified to the abandonment of MANDT training in anticipation of training Therapeutic Options, and he described Therapeutic Options as similar to the Handle with Care training. Woods also testified that the audio would not have assisted the circumstances, though, he did not know that C.G. had threatened to kill people including Turbeville. Woods testified that Turbeville's response reflected in the images of the video is not consistent with the MANDT training. Woods testified that the current policy that Turbeville should follow should have been the MANDT training, as he had not received the Therapeutic Options training at the time of the incident. Woods acknowledged that Ancora never communicated in a memo to employees that the training to use is the last training taught, nor could he provide an Ancora communication advising that MANDT replaced Handle with Care. Woods also acknowledged Turbeville's numerous applications of verbal redirection and passive posture in an attempt to diffuse the circumstances.

Woods testified that takedowns were taught until a training fracture incident ended teaching takedowns. MANDT is an entirely passive system, but in dealing with adults in a psychiatric hospital is ineffective. MANDT's initial design was for use with children. Therapeutic Options does not allow for takedowns but if verbal redirection fails then the recommendation is for escorts and holds. Woods testified that Turbeville could have done some things differently but that determination is very subjective. Woods testified Turbeville has a good demeanor, and it is Woods's opinion that there was, "no malicious intent in dealing with the client." Wood said that Turbeville's actions were consistent with his training.

Jaqueline Norton (Norton)

Norton is a twelve-year employee of Ancora and serves as a Human Service Technician. She arrived at the scene of the incident after the "Code". She did hear the commotion. She acknowledged that there is a responsibility to protect oneself, other residents and staff from violent behavior of another resident.

Agatha Lewis (Lewis)

Lewis is an eight-year employee of Ancora and serves as a Licensed Practical Nurse. She directly observed some of the incident between C.G. and Turbeville. She testified that C.G. had a reputation for making threats and the relocation to the present resident location resulted from those threats. She observed Turbeville respond to the nurse's station. She saw Turbeville attempt to diffuse C.G.'s hostility toward the nurse. She saw Turbeville attempt to get C.G. to return to the day room. Lewis saw C.G. pushed Turbeville and she advised the nurse to call the "Code." Lewis commented, "Talking did not always work." "C.G. threatened the nurse and Turbeville with injury. She did not see Turbeville actually take C.G. to the floor but it did not stop C.G.'s hostility. The nurse inside the station called the "Code." She testified that Turbeville's action prevented injury to others, most likely the nurse. She did not know why the "Code" had not been called immediately when C.G. started aggressively banging the window. Lewis testified, "C.G. would have hurt someone that day."

Tramell Grant (Grant)

Grant is an employee of Ancora and serves as a Human Service Technician. He was teaching line dancing to the other residents when he heard the commotion from the nurses' station. He testified that C.G. makes threats every day, but he takes them seriously, as C.G. can be very aggressive. C.G. was very aggressive the day of the incident.

Tihomir Gueorguiv (Gueorguiv)

Gueorguiv is a seven-year employee of Ancora and for the last five years served as a Charge Nurse. He is familiar with C.G. C.G. is a very violent client, verbally assaultive of other residents and staff. Working with C.G. is difficult. Calling a "Code" is disruptive to the other staff and clients, so staff try to use it infrequently and wait till the last moment to call the "Code" to avoid unnecessary chaos. He arrived at the scene of the incident with C.G. and Turbeville on the floor. He observed no respiratory distress. Calling the "Code" occurred approximately thirty seconds after C.G. hit

Turbeville. Turbeville continued to restrain C.G. C.G. said, "If you let me get up I will hurt you." Because of the continuing threatening behavior, it was determined to restrain C.G. on the floor. Once restrained C.G. was examined for injuries, there were none. Gueorguiv believes that Turbeville did his job properly.

Kareem Turbeville

Turbeville, aged thirty-five, prior to this incident worked for Ancora for twelve years, initially as an Assistant Human Services Assistant (HSA), then as a Temporary HSA, and in 2002 as a HSA. He received training in Handle with Care regarding takedowns. He received MANDT training but does not remember the course and heard Ancora discontinued MANDT. He understands that MANDT is now replaced by Therapeutic Options but he only received ten minutes of training by video, and it did not deal with hands on actions. Ancora assigned him to Large Hall D, due to manpower requirements. He had heard of C.G. prior to the incident as a patient placed in the hall because C.G. assaulted other clients. He tried to redirect C.G. and diffuse his aggressive behavior toward the nurses and the nurse station. C.G. pushed and punched at him. C.G. threatened to kill people. Turbeville testified Ancora never advised him a client could not be taken down. Turbeville testified he responded to protect the safety of the other staff. He did not call a "Code" as the incident happened so fast. He acknowledged receiving MANDT training in 2009 and 2010 but described the recertification as viewing a ten-minute video.

DISCUSSION

There are four violations charged here; conduct unbecoming a public employee, other sufficient cause, violation of an administrative order involving physical abuse of a patient, and a general violation of a policy. One can understand Ancora's liability concerns and the desire to eliminate, if possibly, physical interaction with residents of the facility. Here, though, factually, one can find little support from Ancora's presentation to justify Ancora's imposition of the removal of appellant.

Turbeville acted in an emergent and fluid situation in an attempt to diffuse the aggressive behavior of a troubled resident, it appeared from the video tape and the witnesses' testimony that it had worked. Then, the resident, C.G. attacked Turbeville, Turbeville defended himself, and in seconds obtained control of C.G. by taking him to the floor, where C.G. could not inflict further injury on himself, Turbeville, other residents and/or staff. A nurse called a "Code" and additional staff restrained C.G.

Turbeville had less than a second to respond to C.G.'s attack. Turbeville instinctively responded with a take down of C.G., training he had received years before under the training called Handle with Care. Ancora claims that Turbeville's MANDT training did not provide for a take down, only passive actions, but Ancora determined that the MANDT training ineffective for these situations and replaced it with Therapeutic Options as the current training program. Turbeville, however, other than a ten-minute video never received training in Therapeutic Options. Ancora posits that Turbeville should have known, that the MANDT policy, at the time of the incident was the operative training protocol. Ancora, however, provided no written documentation to its employees that they would be held to the standards of the MANDT policy, rather than Handle with Care in connection with any physical interaction with the residents. Ancora adopted the Therapeutic Options training protocol sometime during the three years prior to the incident, however, Turbeville did not have the basic training in that protocol. Turbeville did receive a ten-minute video presentation, in regard to the Therapeutic Options protocol, but Ancora did not provide testimony as to the contents of the video, and how it would apply to the present situation. Rather, the training instructor, Woods testified that Turbeville could not be expected to operate under the Therapeutic Options protocol without having received the full basic training in that protocol.

Each of the witnesses testimony appeared credible, and without bias. The video of the incident added to the eyewitnesses' testimony. Turbeville's testimony needs to be viewed under a closer analysis as it is his employment at stake on the outcome of this decision, and it is reasonable to assume that his testimony would be biased to preserve his job. The weakest part of his testimony is his absence of memory regarding an understanding of the MANDT training he received three years before the incident. This absence of memory does not appear to be deceit on the part of

Turbeville. Testimony elicited from various witnesses raised the confusion and inadequacies of the MANDT training. The understanding of Turbeville and many of the witnesses that Therapeutic Options replaced the MANDT training, left Turbeville in a position of uncertainty as he had not yet completed the Therapeutic Options training.

This tribunal is cognizant of the fact that Ancora, motivated by patient/resident safety concerns, public perception, or liability issues, desires the physical interaction with a patient by staff be severely limited. They could not produce documentation providing previous notification to Turbeville of the conduct it expected. The sole testimony is the testimony from Woods that Turbeville should have known that the MANDT training, as the last taught, directed Turbeville's conduct. This, despite the introduction of Therapeutic Options training which Turbeville had not received training. At the same time Wood testified that Turbeville's actions were consistent with Handle with Care training. This tribunal submits that Turbeville's actions were instinctive in his own defense and his determination to neutralize C.G.'s aggressive behavior also falls in the category of instinctive behavior to protect oneself and potentially others within the area of C.G.'s aggressiveness.

This tribunal finds it difficult to equate Turbeville's actions in these specific circumstances as a violation of conduct unbecoming a public employee, protocol, or training; rather, it is viewed as an instinctive response to being placed at risk of physical harm to oneself. Accordingly, this tribunal cannot view Turbeville's actions as patient abuse as they occurred in his own self-defense, in neutralizing C.G.'s aggressive actions.

ADDITIONAL FINDINGS OF FACT

As a result of the testimony and documentary evidence, I **FIND** the following **ADDITIONAL FACTS**:

3. C.G. on April 28, 2013, became agitated at the inability to have the communal T.V. set to a station of his choice.

4. C.G. left the day room and proceeded to the nurse's station, where he pounded his fists on the plexi-glass window protecting the nurses' station.
5. Turbeville became aware of the commotion started by C.G. and went to the nurses' station.
6. Turbeville approached C.G. in an attempt to verbally redirect him away from the nurse's station. C.G. at various times during the encounter threatened to hurt staff. Turbeville at said times presented a defensive/non confrontational presentation to C.G.
7. As Turbeville walked away from C.G., C.G. went to the medical window of the nurses' station and attempted to punch the nurse at that station. C.G. then came around toward Turbeville and pushed him. C.G. then sought to punch Turbeville at which time Turbeville protected himself and pushed C.G. toward the nurse's station.
8. At the nurse's station Turbeville promptly shifted C.G.'s body and placed him on the floor, covering him to gain control over C.G.
9. The time elapsed from the C.G. push of Turbeville to his placement on the floor occurred in less than ten seconds.
10. C.G. continued to threaten the staff of Ancora with physical harm. A nurse called a "Code" and staff restrained C.G.
11. C.G. sustained no detectable injury from the placement on the floor.
12. The violation specification reflect that Turbeville used his elbow to put pressure on C.G.'s neck, no evidence supports that portion of the specification.
13. Turbeville filed appropriate incident reports.

14. Turbeville relied on his training in Handle with Care for the take down maneuver.
15. Ancora, prior to the incident, did not communicate to Turbeville that MANDT or Therapeutic Options training proscribed take downs at Ancora.
16. Ancora presented no evidence that Turbeville had any animosity or ill will toward C.G.
17. Ancora presented no evidence that Turbeville's actions were other than to protect himself, other residents or staff of Ancora.

LEGAL ANALYSIS AND CONCLUSION

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

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

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, Inc.

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

Ancora has not shown by a preponderance of the evidence that appellant violated N.J.A.C. 4A:2-3(a)(6), Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-3(a)(12), Other Sufficient Cause, Administrative Order 4.08 of the Department of Human Services Disciplinary Action Program, C-3.1, physical or mental abuse of a patient, client; resident, or employee or E-1-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. The facts presented reflect that Turbeville in a very charged and fluid moment acted instinctively to being placed at risk of physical harm by protecting himself, and potentially protecting other residents and/or staff by placing C.G. on the floor without injury to C.G.

I **CONCLUDE** that Turbeville did not violate N.J.A.C. 4A:2-3(a)(6), Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-3(a)(12), Other Sufficient Cause, Administrative Order 4.08 of the Department of Human Services Disciplinary Action Program, C-3.1, physical or mental abuse of a patient, client; resident, or employee or E-1-1, Violation of a rule, regulation, policy, procedure, order or administrative decision.

ORDER

For the reasons stated above, I hereby **ORDER** that the removal imposed upon Turbeville by Ancora is **REVERSED**, and I **ORDER** that Ancora immediately reinstate Turbeville to the position of Human Service Assistant.


I further **ORDER** that Turbeville be awarded back pay, benefits and seniority from May 8, 2013, the effective day of his removal.

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

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

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

December 3, 2014
DATE


JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

12/3/14

Date Mailed to Parties:

12/3/14

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APPENDIX
LIST OF WITNESSES

For Appellant:

Tihomir Gueorguiv
Mark C. Woods
Kareem Turbeville

For Respondent:

Gloria Banner
Lisa Gibens
Agatha Lewis
Jaqueline Norton
Tramell Grant

LIST OF EXHIBITS

For Appellant:

P-3 Incident Report, dated 4/28/13
P-5 Incident Report, dated 4/28/13

For Respondent:

R-1 PNDA, dated 10/9/13
R-2 FNDA, dated 10/29/14
R-4¹ Discipline of Nursing Staff Duty Assignment Sheet for building/ward LARD, Day Shift, dated 4/28/13
R-5 LARD 24-hour Ward Report, dated 4/28/13
R-6 Patient Statement by C.G, dated 4/29/13
R-7 Kareem Turbeville Interview, dated 4/30/13
R-8 Kareem Turbeville Statement, dated 4/30/13

- R-9 Tihomir Guerorguiv statement, dated 5/3/13
- R-10 Employee Training History for Kareem Turbeville
- R-11 Employee Disciplinary History for Kareem Turbeville (sealed)
- R-12 Job Specifications for Human Service Assistant
- R-13 APH Policy HR-15 Patient Neglect and Abuse
- R-14 Administrative Bulletin 3:18
- R-15 APH AD LD 401-Reporting and Investigating Allegations of Patient abuse and Professional Misconduct
- R-16 Administrative Order 4:08
- R-19 DVD

¹ Exhibit R-3, an item prepared for litigation, R-17, an item related to the Therapeutic Options Teaching Guide, where Ancora introduced no evidence of Turbeville's training under this policy, and R-18, an employee statement, otherwise testified to at the hearing were not accepted into evidence.