



STATE OF NEW JERSEY

In the Matter of Frederick Brown
Ancora Psychiatric Hospital,
Department of Human Services

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2015-685
OAL DKT. NO. CSV 11815-14

:
:
:
:
:
:
:
:
:
:
:
:

ISSUED: MAY 20, 2015 BW

The appeal of Frederick Brown, Human Services Technician, Ancora Psychiatric Hospital, Department of Human Services, removal effective May 21, 2014, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on April 30, 2015. Exceptions were filed on behalf of the appellant and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge’s initial decision, and having made an independent evaluation of the record, including a review of the video of the incident, the Civil Service Commission, at its meeting on May 20, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge’s initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Frederick Brown.

Re: Frederick Brown

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
MAY 20, 2015

A handwritten signature in blue ink that reads "Robert M. Czech". The signature is written in a cursive style and is positioned above a solid horizontal line.

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 11815-14

AGENCY REF. NO. 2015-685

**IN THE MATTER OF FREDERICK BROWN,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.**

William B. Hildebrand, Esq., for appellant

Stephen Hahn, Deputy Attorney General, for petitioner (John J. Hoffman, Acting
Attorney General of New Jersey, attorney)

Record Closed: March 17, 2015

Decided: April 30, 2015

BEFORE JOHN S. KENNEDY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Human Services Technician (HST) Frederick Brown appeals the action by the Department of Human Services, Ancora Psychiatric Hospital (Ancora) terminating his employment on grounds of conduct unbecoming and other sufficient cause, specifically, physical abuse of a patient.

HST Brown (appellant) was served with a Preliminary Notice of Disciplinary Action (PNDA) on April 21, 2014. Following a departmental hearing on August 18,

2014, HST Brown was advised by a Notice of Final Disciplinary Action dated August 28, 2014, that he had been terminated effective April 21, 2014. HST Brown appealed the termination to the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), as required under N.J.S.A. 40A:14-202(d). The matter was heard on March 17, 2015, and at the conclusion of the hearing, the record closed.

FACTUAL DISCUSSION

Tom Gersiek is a risk management investigator and has worked for Ancora for three years. He investigated an incident that occurred between the appellant and a patient (N.C.) on March 2, 2014. He was assigned the case and began his investigation on that date. Gersiek interviewed N.C. and viewed a video tape of the incident. He also interviewed everyone he could identify in the video. During his review of the video, Gersiek noticed appellant place his arm around N.C.'s neck while attempting to restrain him in the hallway at Ancora. Appellant was standing behind N.C. at the time he placed his arm around his neck while N.C. was pushed up against a wall. Gersiek described this maneuver as a choke hold. A review of the video revealed that the appellant kept his arm around N.C.'s neck for approximately twenty-nine seconds, from 10:56:36 p.m. until 10:57:05 p.m. (J-10).

Gersiek interviewed N.C. the next day, March 3, 2014, at approximately 8:00 p.m. N.C. initially stated, "He choked me, that's all I'm gonna say" (R-1). The interview was conducted in the presence of HST Brian Price (R-2). Appellant was also in the room during the interview. It was extremely difficult to keep N.C. focused on the incident. N.C. demanded that Ancora be shut down and stated, "I got choked and stuff" and "I told him I couldn't breathe" (R-2). Although appellant was in the room during the interview, N.C. couldn't identify him and did not elaborate as to who was involved in the incident. Gersiek, however, did not ask him who was involved in the incident.

On March 17, 2014, Gersiek interviewed N.C. a second time privately to ensure that N.C. was not influenced by the others in the room during the first interview. After explaining the general background of the incident and showing N.C. a photo of him in a

restraint chair, N.C. remembered the event and stated that he was "pissed off" because he was required to keep the door to the bathroom open. He remembered fighting with hospital staff but remarked "everything is cool, I'm fine" (P-1). During his investigation, Gersiek did not observe any injuries, bleeding or bruising on N.C. No staff reported that N.C. was injured or abused.

Barbara Bleifuss is a charge nurse with Ancora and has worked for the hospital since 2008. On March 2, 2014, she was working and witnessed a portion of the incident. She did not witness anyone being choked but her view was limited as she was in the nurse's station for a portion of the incident. The incident was deescalating and appellant was walking away from N.C. when N.C. punched him in the back of the head. Bleifuss issued a "code blue" as a result of the incident. A code blue is issued when there is an emergency in the hospital concerning a patient and assistance is needed. Bleifuss prepared a Confidential Unusual Incident Report Form (104 form) of the incident (J-4). She issued the code blue because she witnessed N.C. punch appellant. The code blue was called after appellant was punched which occurred after the choke hold according to the video recording of the incident (J-10). As a result of the code blue, N.C. was placed in a restraint chair and given medication to calm him down. N.C. has been violent and aggressive in the past and tries to do as much as he can to cause problems for the staff.

When she filled out the 104 form, Bleifuss recorded N.C.'s comments and he stated, "I wasn't doin' nothing", "I want them all fired!", "I was choked" (J-4). She observed no injuries on N.C. Although she did not observe a choke hold, Bleifuss was trained never to put her arm around a patient's neck. There is no scenario that would warrant hospital staff to put their arm around a patient's neck, even in an emergency situation. Bleifuss observed no inappropriate behavior by hospital staff during the March 2, 2014 incident.

Lisa Givens is a charge nurse and has worked in the training department for the past three years. She teaches the crisis management program at Ancora which is provided to hospital staff and includes instruction on physical intervention and restraints. Ancora follows a physical intervention program called Therapeutic Options. Givens

oversees and trains other teaching staff. All teaching staff is provided with a Therapeutic Options Instructor manual (R-3). Appellant completed a two-day training course on Therapeutic Options in March 2013 (R-5, p. 8). The first day of the training was provided by another trainer whom she does not supervise. While the second day was completed, there is no indication which trainer taught the class. She does not know what the other trainer taught in his class, but Givens is aware that choke holds are not part of the Therapeutic Options training. She trains staff how to escape choke holds and instructs them to get out of a choke hold within ten seconds. Otherwise serious injury could result. Givens was shown the video of the incident and observed appellant place his arm around N.C.'s neck in what appeared to be a choke hold. This maneuver is not a technique taught to hospital staff and is not part of the Therapeutic Options program.

Edmond Dillon is a section chief and assistant hospital administrator. He has worked for respondent for twenty-nine years and is familiar with hospital policies and procedures. Dillon provided assistance to determine what actions should have been taken as a result of this incident. After the video recording of the incident was reviewed and witnesses were interviewed, appellant was charged with abuse pursuant to section C-3 of the Department of Human Services Disciplinary Action Program (R-9). The Division of Mental Health and Addiction Services Administrative Bulletin 3:18 provides the policies and procedures for reporting and investigating allegations of patient abuse and professional misconduct (R-8). Physical Abuse is defined in Bulletin 3:18 (R-8, p. 3). Ancora's Executive Policy and Procedure manual defines abuse differently than Bulletin 3:18 and requires an intentional act on behalf of the staff member. Dillon acknowledged that N.C. was not injured as a result of the incident but the patient need not be injured in order for a finding of abuse pursuant to Bulletin 3:18. Once a staff member is charged with physical abuse under C-3 of the Disciplinary Action Program, removal is the only option. If a staff member is injured or misses any time from work due to an injury, they are required to be cleared for full duty, with no restrictions, before they are permitted to return to work at Ancora.

Calvin Glosson is a Human Services Assistant (HAS) and has worked at Ancora for eight years. He was involved in the incident on March 2, 2014 and assisted

appellant in restraining N.C. He prepared a statement of the incident on March 4, 2014 which accurately reflects the events as he recalls them (P-6). He did not observe N.C. being choked. N.C. can be difficult and was accused just prior to the incident of taking shampoo. Glosson, appellant and another staff member asked N.C. to remove the items he placed in his pockets while he was in the hallway. Glosson was behind N.C. while appellant and the other staff member were on either side of him. N.C. was pushed towards the wall and Glosson reached into his pockets to remove the shampoo. He was focused on removing the items from N.C.'s pockets and did not observe any abuse. They did not call a code blue during this portion of the incident because the staff did not want to restrain N.C. They just wanted to get the items from his pockets. The code blue was called after the items were retrieved and the staff began to walk away from N.C. N.C. charged at appellant and struck him in the back. Glosson has been trained in Therapeutic Options which does not permit choke holds or arms being placed around patient's necks.

Appellant **Frederick Brown** testified on his own behalf. He is a US Air Force veteran having retired after twenty years of service. He started working at Ancora in 2003 as an HSA and has been an HST since November 2013. He tore his rotator cuff in his right shoulder in a code blue in January of 2013 and was out of work from January 15, 2013 until November 6, 2013. He had surgery to repair the injury in April 2013. He lost 30% of his muscle strength in his right arm as a result of the injury and cannot perform quick motions or lift more than forty-five pounds.

N.C. is a violent patient who had attacked another staff member earlier on March 2, 2014. When he was first advised that N.C. had taken shampoo, he asked Barbara Bleifuss to call a code blue before he confronted N.C. because of his behavior earlier that day. Bleifuss would not call a code blue at that time and told him to get the items from N.C. Appellant asked Calvin Glosson to assist him and they asked N.C. to give him what was in his pockets. Immediately prior to the incident that is captured on the video tape in the hallway, appellant and Glosson confronted N.C. in his bedroom. N.C. attacked Glosson and punched appellant while they were in his room just a few minutes before the incident that was captured on J-10. The incident in the hallway was a result of the nurse instructing them to place N.C. in a restraint chair. Appellant rested his arm

on N.C.'s chest and it was pushed up around his neck. He did not place him in a choke hold or intend to injure N.C. in any way. During the altercation, N.C.'s head moved back which caused his arm to move up around his neck. Due to the struggle and the weakness in his arm as a result of his previous injury, appellant could not prevent his arm from moving up around N.C.'s neck. Appellant provided an accurate report of the incident on March 3, 2014 (J-7). J-7 does not mention the incident in N.C.'s room.

Appellant was shown the video recording of the incident. He does not know why the video does not show himself, Glosson and N.C. going to N.C.'s room as it occurred during the same time that was being recorded on J-10. He viewed N.C. striking him on the video at 10:57:44 pm. He must have been hit a second time and did not feel it. He specifically remembers being struck by N.C. in his bedroom, not in the hallway. Appellant is aware that choke holds and headlocks are not permitted. He did not place N.C. in either a headlock or a choke hold.

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates 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).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, I **FIND** that the testimony offered by the appellant is not credible. He insists that he was attacked by N.C. in his bedroom but no other witness, including Calvin Glosson who appellant asserts was also attacked in N.C.'s bedroom, testified to the incident in the bedroom. His own statement given just two days later fails to mention the incident in the bedroom (J-7). Furthermore, the video recording (J-10) that captured the incident does not show appellant, Glosson and N.C. going into N.C.'s bedroom even though the

timing of the incident in the bedroom would have been captured on the video according to appellant's testimony. Therefore, I **FIND** as **FACT** that the entire incident was captured on J-10 and appellant, Glosson and N.C. did not have an altercation in N.C.'s bedroom where N.C. assaulted both Glosson and appellant.

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional **FACTS**:

Appellant was involved in an altercation with N.C. on March 2, 2014. During the incident, appellant placed his arm around N.C.'s neck while attempting to restrain him in the hallway at Ancora. Appellant was standing behind N.C. at the time he placed his arm around his neck while N.C. was pushed up against a wall. Appellant kept his arm around N.C.'s neck for approximately twenty-nine seconds, from 10:56:36 p.m. until 10:57:05 p.m. N.C. was not injured as a result of the altercation. A code blue was called as a result of N.C. striking appellant at 10:57:44 p.m. N.C. was placed in a restraint chair and administered medication to calm him down. N.C. complained that he was choked and could not breathe. Appellant was trained in Therapeutic Options which does not permit choke holds or staff placing an arm around a patient's neck.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to

lead a reasonably cautious mind to a given conclusion.” Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

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

I **CONCLUDE** that appellant’s behavior did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was appellant placing his arm around the neck of a patient. His arm stayed around the patient’s neck for approximately twenty-nine seconds. Appellant’s conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), “Other sufficient cause.” Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Specifically, appellant has been charged with violating Administrative Order 4:08 C-3.1, Physical or mental abuse of a patient. “Physical Abuse”, as defined in Administrative Order 4:08, Supplement 1, refers to a physical act directed at a service recipient by a DHS employee of a type that

could tend to cause pain, injury, anguish, and/or suffering. (See R-8). While the patient in this case was not injured, it is clear that appellant's placing his arm around a patient's neck could tend to cause pain, injury, anguish, and/or suffering particularly since he complained of being choked and he could not breathe. Appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that appellant's actions fit this charge.

Appellant has also been charged with violating Administrative Order 4:08 E-1.2 Violation of a rule, regulation, policy, procedure, or administrative decision. Specifically, appellant has been charged with violating HR0500, Ethical Interactions and HR 15, patient Abuse and Neglect. HR0500 defines abuse as "Knowingly inflicting physical, mental, or emotional pain or injury including but not limited to physical and sexual assault, the use of excessive force when restraining individuals, and the use of disrespectful language and gestures." (See R-7). There has been no evidence that appellant's actions of placing his arm around the patient's neck were done so knowingly so as to inflict pain or injury upon the patient. As such, I **CONCLUDE** that appellant's actions do not fit this charge.

HR 15 requires employees to report any abuse or professional misconduct within twenty-four hours and fully participate in on-going investigations and provide written statements when asked by investigators. (See R-6). There has been no evidence that appellant failed to comply with the investigation in this matter and he did provide a written statement. Therefore, I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant committed an act in violation of HR 0500 and HR 15.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523-24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

. . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Pursuant to the New Jersey Department of Human Services Disciplinary Action Program, ¶ C3 does not call for a range of discipline and removal is the only option for a violation of physical or mental abuse of a patient, client, resident or employee. I am satisfied that appellant's actions herein were egregious. The act of placing an arm around the neck of a patient, even a patient known to have violent tendencies, has the potential of causing serious injury to the patient and cannot be tolerated. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**, as set forth above.

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.

April 30, 2015
DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency:

April 30, 2015

Date Mailed to Parties:

April 30, 2015

cmo

WITNESSES

For Appellant:

Calvin Gosson
Frederick Brown, appellant

For Respondent:

Tom Gersiek
Barbara Bleifuss
Lisa Givens
Edmond Dillon

EXHIBITS

Joint Exhibits:

- J-1 Preliminary Notice of Disciplinary Action dated 4/17/14
- J-2 Amended Preliminary Notice of Disciplinary Action dated 4/21/14
- J-3 Final Notice of Disciplinary Action dated 8/28/14
- J-4 Confidential Unusual Incident Report Form
- J-5 Staff assignment Sheet dated 3/2/14
- J-6 Daily sign in record dated 3/2/14
- J-7 Statement of Frederick Brown dated 3/3/14
- J-8 Statement of Barbara Bleifuss dated 3/3/14
- J-9 Employee statement form dated 3/2/14
- J-10 Surveillance video dated 3/2/14

For Appellant:

- P-1 Statement of N.C. dated 3/17/14
- P-2 Statement of J.B. dated 3/20/14

- P-3 Statement of Daniel Dow dated 3/9/14
- P-4 Statement of S. Williams dated 3/3/14
- P-5 Statement of B. Price dated 3/3/14
- P-6 Statement of C. Glosson dated 3/4/14
- P-7 Statement of D. Dow dated 3/3/14
- P-8 Results of Mental Status Exam 3/5/14
- P-9 Admin Bulletin 3:18
- P-10 HR 0500
- P-11 HR 15

For Respondent:

- R-1 Patient Statement of N.C. dated 3/3/14
- R-2 Investigation interview of N.C. dated 3/3/14
- R-3 Therapeutic Options, Instructor Manual
- R-4 Therapeutic Options teaching guide – physical intervention skills
- R-5 Employee training history of Appellant
- R-6 HR 15
- R-7 HR 0500
- R-8 Administrative Bulletin 3:18
- R-9 Administrative Order 4:08