



STATE OF NEW JERSEY

In the Matter of Joseph Ehiosa
Hunterdon Developmental Center,
Department of Human Services

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-3550
OAL DKT. NO. CSV 07315-17

ISSUED: APRIL 20, 2018 BW

The appeal of Joseph Ehiosa, Cottage Training Technician, Hunterdon Developmental Center, Department of Human Services, removal effective January 6, 2017, on charges, was heard by Administrative Law Judge Catherine A. Tuohy, who rendered her initial decision on March 14, 2018 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

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 April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority for the period of separation to the actual date of reinstatement. See *N.J.A.C. 4A:2-2.10*. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

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 Public Safety*, 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 or 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 Joseph Ehiosa. 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 and an affidavit of mitigation 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
THE 18TH DAY OF APRIL, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07315-17

AGENCY DKT. NO. 2017-3550

**IN THE MATTER OF JOSEPH EHIOSA,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPEMENT CENTER.**

John F. McDonnell, Esq., for appellant (McDonnell, Artigliere, P.C., attorneys)

**Rimma Razhba, Deputy Attorney General, for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorney)**

Record Closed: January 29, 2017

Decided: March 14, 2018

BEFORE CATHERINE A. TUOHY, ALJ:

STATEMENT OF THE CASE

Appellant, Joseph Ehiosa, a Cottage Training Technician (CTT) at the Hunterdon Developmental Center (HDC), Department of Human Services (DHS), respondent appeals his removal, effective January 6, 2017 for alleged violations of various internal rules and policies including physical abuse of a client (C3.1); inappropriate physical contact or mistreatment of a client (C5.1); any improper conduct which violates common decency (C11.1); and violation of a rule, regulation, policy, procedure or administrative decision (E1.1). Appellant was also charged with violations of N.J.A.C. 4A:2-2.3(a)(1), Failure to

perform duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause.

PROCEDURAL HISTORY

On January 6, 2017, and revised and amended on February 22, 2017, respondent issued a Preliminary Notice of Disciplinary Action (R-8) setting forth the charges and specifications made against the appellant. After a departmental hearing on March 22, 2017, the respondent issued a Final Notice of Disciplinary Action (R-9) on April 18, 2017 sustaining the charges in the Preliminary Notice and removing appellant from employment, effective January 6, 2017. Appellant appealed on April 25, 2017 and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on May 22, 2017 for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. The matter was heard on September 26 and September 28, 2017. The record remained open to allow the parties to submit post-hearing submissions and the record closed on November 28, 2017. The record was reopened to allow for submission of the internal policies referred to in the notices of discipline. The record closed on January 29, 2018 after receipt of the New Jersey Department of Human Services Disciplinary Action Program (R-23).

FACTUAL DISCUSSIONS AND FINDINGS

Irene Carozza testified on behalf of the respondent. She is employed by the HDC as a Supervisor of Professional and Residential Services (SPR) and has held this position for the past two and a half years. She has worked for the state for twenty-three years. HDC provides twenty-four hour total care for developmentally disabled adults that reside in the facility. Cottage Training Technicians are direct care staff and take care of the residents that they are assigned. HDC Administrative Procedure # 30 is their procedure for abuse, neglect and mistreatment and how to report same (R-1). HDC has a zero tolerance for abuse. If an allegation of abuse is substantiated, the person is removed from employment because their main goal is to protect their residents. Physical abuse is defined as "a physical act directed at a service recipient by a DHS employee, volunteer, intern, or

consultant/contractor of a type that could tend to cause pain, injury, anguish and/or suffering. Such acts include but are not limited to the service recipient being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/ or struck with a thrown or held object." (R-1, page 1). The staff are trained on physical abuse and on reporting abuse. The supervisor, the DHS, and the Office of Program Integrity and Accountability (OPIA) are all notified. An investigator is assigned to the case to conduct an investigation to determine whether the allegations of abuse are substantiated or unsubstantiated. If allegations of abuse are substantiated, removal proceedings are initiated. There is no progressive discipline for instances of abuse of a client. The HDC October 3, 2016 Memorandum dealing with the Mistreatment of Clients summarizes the policy regarding abuse and neglect which is provided to all employees. Mr. Ehiosa signed and acknowledged that he read the policy and understands the content of the Memorandum (R-2). Direct care employees receive an overview of "handle with care" techniques (R-17) which is a state approved physical restraint policy that allows employees to control a violent client. Physical control techniques shall be used in an emergency to control an individual to protect them or others from harm.

A 'code green' is called when a client is in a crisis situation or having a behavioral episode and assistance is needed. This request is made by telephone and announced over the loudspeaker. Employees are also made aware of each client's "Behavior Support Plan" (BHP). The employees receive in-service training by the psychology department as to the target behaviors of each client that they care for. Mr. Ehiosa was a CTT at cottage 20 where client J.C. resided. He received in-service training as to resident J.C.'s BHP which indicated that J.C. engages in aggressive and self-injurious behavior (R-3). He also received numerous classes from staff development at HDC, including handle with care training on May 31, 2016 and preventing abuse and neglect on July 8, 2016 (R-4).

On cross-examination, Ms. Carozza admitted that there are certain times when a direct care worker can touch a client in order to prevent injury to themselves or others. Grabbing or pulling a client to prevent the client from hurting themselves is not a permissible handle with care technique. Blocking a kick would be appropriate if a client is kicking you, but you cannot grab their legs.

Enock Berluche, testified on behalf of the respondent. He has been employed by HDC since 2003 and currently holds the title of Habitation Program Coordinator (HPC). He coordinates services for all of their clients, including doctor visits, psychological services and oversees all of the resident's treatment plans. He has provided training for direct care staff and is a certified trainer of the "Handle with Care" program developed by Bruce Chapman. The initial training is two days, eight hours each day. There is a recertification class that is four hours long. Handle with care is a program that uses self-defense techniques to get out of grabs and holds. It is intended to not be punitive, but to keep staff and clients safe. All CTTs are instructed in handle with care techniques and take a refresher course each year. The grabbing and pulling of a client is not an approved technique. If a client is in a state of crisis, blocks or a physical control technique can be used. If a client is just yelling, they can just be let be or attempts made to verbally redirect them. Intervention is not required until a client becomes a danger to themselves or staff. If a client is posing a threat to themselves or someone else, a physical control technique (PCT) could be employed. One of these techniques involves coming from behind a client and giving them a chest bump, then placing hands over their shoulders and under their arms, with the palm of the hands on the side of the client's back. The client would be held tight until they calm down for up to fifty minutes. The client can also be brought down to their knees in this hold. If a client is in a serious crisis, the supine position is employed which requires two staff members to implement. The client would be lying flat on their back and the staff member would be lying on their stomach with their shoulder in the crease of the client's shoulder. An ariel view of this position would resemble a "T". Physical control techniques are used as a last resort. If a client is attempting suicide by trying to wrap a cord around his neck, Mr. Berluche would remove the cord off his neck or apply a restraint if he could not remove it. There is a code green procedure to call for assistance. If an attempt to redirect a client is unsuccessful, a code green can be called which involves dialing extension 1400 on the phone. The operator will announce the code overhead on the radio and people will respond to assist. A code green can also be called in anticipation of a problem to prevent one from occurring.

Mr. Berluche is familiar with client J.C. He has never seen J.C. hiding under his bed or on top of his bed. He has heard reports of this fact but never witnessed it. If J.C. was hurting himself Mr. Berluche would call for help or move the bed. If J.C. was not

hurting himself, Mr. Berluche would attempt to talk him out from under the bed. Mr. Berluche recalls the incident involving appellant and J.C. It was close to the end of his shift and he received a call from the cottage training supervisor (CTS) Jacinta Goodwin to go to cottage 20. He was on his way there with another staff member, Kathy Kyne when he saw Joseph Ehiosa leaving to head to the unit office. Ms. Kyne proceeded to cottage 20 and Mr. Berluche walked with appellant and asked him what had happened. Mr. Ehiosa stated that he grabbed J.C. by the ankles. He demonstrated that he put his hands forward with his hands open and he stated he grabbed him by the ankles. He said J.C. was under the bed and he had to get him out. The incident was documented by an HDC-15 form which is a confidential incident report (R-5). According to the incident report, on January 3, 2017 at 7:55 a.m. Jacinta Goodwin, CTS reported to Mr. Berluche that J.C. accused Mr. Ehiosa of choking him and dragging him out of his room by his neck. J.C. had redness around his neck. The supervisor Kathy Kyne reviewed the incident report and completed the form (R-5). Mr. Berluche prepared a confidential incident statement the same day (R-6). Mr. Berluche stated that Mr. Ehiosa admitted to him that he had grabbed J.C. by the ankles in an attempt to prevent him from crawling underneath the bed (R-6). Mr. Berluche recalls being interviewed by an investigator from the Office of Integrity, an outside organization that investigates allegations of abuse. Mr. Berluche provided a written statement to the investigator, dated February 2, 2017 (R-7) which indicated that Mr. Ehiosa told Mr. Berluche that he grabbed J.C. by the ankles.

On cross-examination, Mr. Berluche stated that Mr. Ehiosa told him that he grabbed J.C. by the ankles but never said that he pulled J.C. Mr. Berluche made a point of telling the investigator, Kyle Smith that Mr. Ehiosa never said that he pulled J.C. by the ankles. Mr. Berluche received a call from Mr. Ehiosa's supervisor, Jacinta Goodwin who was the cottage training supervisor of cottage 20, that J.C. made an abuse allegation against Mr. Ehiosa. This occurred at approximately 7:50 and the shift ended at 8:00 a.m. Mr. Berluche did not recall Ms. Goodwin advising him that J.C. claimed that Mr. Ehiosa choked him and dragged him out of his room and down the hallway. Mr. Berluche admitted that one of the responsibilities of a direct care worker is to keep a client safe and to prevent a client from harming themselves. Mr. Berluche was asked what the difference was between a hold and a grab and Mr. Berluche indicated that a 'grab' implies an aggressive act. He explained that he 'holds' his wife but would 'grab' his child to prevent them from running into the

street. Nothing in the handle with care policy is aggressive. It is self-defensive and the purpose is to keep the individual safe. There are training materials for the "Handle with Care" procedures that describes the various moves and how to do each of the moves. He had not seen that document at the hearing.

Kathy D. Kyne testified on behalf of the respondent. She has been employed by the HDC for thirty-four years and has been an Assistant Supervisor of Professional and Residential Services (ASPR) for three years. She is in charge of two buildings and makes sure the clients are being taken care of and procedures are being followed. Ms. Kyne identified R-5 as their "Unusual Incident Report" or HDC-15 form. She filled out section two of the report and prepared the narrative. Ms. Kyne indicated that Jacinta Goodwin had reported that client J.C. indicated that Mr. Ehiosa grabbed client J.C. by the neck and dragged him out of the room into the hallway. She noted that there was a red line on J.C.'s neck. Ms. Kyne indicated that Mr. Ehiosa stated that J.C. had just received his medications and when Mr. Ehiosa noticed J.C. was not with the group he went looking for J.C. and found him under his bed. He lifted the bed to help J.C. out from under the bed, but J.C. would not come out. Mr. Ehiosa grabbed his feet to get him out from under the bed. Ms. Kyne explained that Mr. Ehiosa has a heavy accent and is sometimes difficult to understand.

On cross-examination, Ms. Kyne admitted that she did not write in her report that Mr. Ehiosa stated he pulled J.C.

Mark Piccolo testified on behalf of the respondent. He has been employed by the HDC for ten years, the last five years as a staff clinical psychologist. He writes behavioral support plans for the clients which basically instructs how staff should deal with a clients' behavior. He also conducts in-service training with staff as to how to deal with client's behaviors, crisis intervention and positive behavior supports to allow the clients to be as independent as possible. A 'code green' is called whenever there is a behavior crisis or one is imminent. A person would call in a code green on the telephone and the operator would announce the code green over the loudspeaker. Qualified Intellectual Disability Professionals (QIDP's) would respond to the code and render assistance in managing the behavioral crisis. However, sometimes there is not enough time to call a code green, if for

instance, a client was banging his head into a wall, then it would be necessary to intervene to protect the client. Sometimes, just a call for help is required but if there is no one else around to assist, a physical restraint would have to be applied. The "restraint" policy utilized at HDC is called "Handle with Care". The positions used are the "settle" and "supine" positions for restraining a client as well as a two person escort technique as well as blocking techniques. If a client is trying to harm themselves, they would probably have to be physically restrained. The settle technique can be done with one person and involves hooking somebody's arms from behind and going down on the knees with the person cradled in between the crotch. The supine restraint requires two people and involves laying the client down on their back and laying on top of the client with a shoulder placed in the clients' armpit and forming a "T".

Mr. Piccolo works with the clients in cottage 20 and is familiar with client J.C. He has a moderate intellectual disability and is very manipulative with the staff. J.C. also is very anxious and gets aggressive. He is a very difficult client to manage. Mr. Piccolo developed J.C.'s Behavioral Support Plan (BSP). The plan tries to focus on minimizing's J.C.'s anxiety and gives instructions on how to deal with J.C. when he is agitated and also deals with suicide precautions. All of the employees who work with the clients in cottage 20 receive in-service training on J.C.'s BSP (R-10). J.C. gets very anxious over going on trips or going to activities so they try and encourage him to communicate and provide other options. J.C. sometimes runs to his room in an attempt to escape demands and will not come out. Mr. Piccolo has seen J.C. run to his room and go under his bed because he is anxious or to avoid an activity. Usually, Mr. Piccolo can get J.C. to come out by talking to him because he is familiar with him and frequently works with J.C. He has never had to physically attempt to get J.C. from out from under his bed because there was no need to. J.C. was not in imminent danger to himself or others.

When asked if grabbing a client to try and get them out from under a bed was ever a method Mr. Piccolo would use he indicated that he could not answer that because he has never had an episode where someone has been in danger underneath their bed. J.C.'s BSP indicates that he has verbalized thoughts of committing suicide and made gestures such as putting cords, ropes, shirts and belts around his neck (R-10, page 7).

When asked what would he do if he had seen J.C. under his bed with something around his neck, Mr. Piccolo testified that was a difficult question to answer and that probably trying to get someone to help or calling for a code green is the correct answer but questioned whether you would be putting the client at risk by leaving him to get somebody to assist.

On cross-examination, Mr. Piccolo stated that he did see J.C. on the date of this incident after the incident and he observed that J.C. had red marks around the front of his neck. These marks would be consistent with J.C. having had something wrapped around his neck and trying to harm himself. Cottage 20 is one of the most difficult cottages at HDC housing the most violent males on the grounds who engage in aggressive and self-injurious behaviors. In Mr. Piccolo's opinion, J.C. is the most difficult client at HDC. J.C. is forty-three years old approximately 5' 8" and 200 lbs. In J.C.'s BSP, the target behaviors are the most pathological behaviors J.C. engages in and they are listed as aggressive and self-injurious behaviors (R-10, page 1). J.C. has a long history of engaging in these behaviors, including intentionally slamming his head on hard objects. Certain factors that cause J.C. to engage in aggressive or self-injurious behaviors are listed as "Antecedent Factors" in his BSP (R-10, page 2). One of those factors is telling J.C., he has to do something he does not want to do. Mr. Piccolo is aware that on the day of this incident January 3, 2017, J.C. was told he had to go on a trip. If he does not want to go on a trip he will engage in aggressive or self-injurious behavior to avoid going on the trip, including gestures such as putting cords, ropes or shirts around his neck. Anything that heightens his anxiety level would trigger these behaviors. J.C. also has a lengthy history of making false allegations against the staff. J.C. accused Mr. Ehiosa of choking him, which is consistent with J.C.'s past behavior of making false allegations of abuse against the staff.

Kyle Smith testified on behalf of the respondent. He is employed by the Office of Investigations, Department of Human Services which is an investigatory body that investigates allegations of abuse, neglect and exploitation. Mr. Smith has been employed as a Quality Assurance Specialist for twelve years and his job is to collect and review evidence and prepare an investigation report. Mr. Smith conducted an investigation and prepared a report concerning this incident involving the allegations of abuse against Mr. Ehiosa (R-14). Mr. Smith interviewed and obtained written statements from Mr. Ehiosa on

two occasions, January 5, 2017 (R-15) and February 3, 2017(R-16). The purpose of the second interview was to follow-up and clarify some of the answers from the first interview. Mr. Smith believed Mr. Ehiosa's answers were contradictory. Mr. Ehiosa was aware that J.C.'s behavioral support plan called for checking on J.C. every fifteen minutes if he was under his bed. Mr. Ehiosa explained that he found J.C. under his bed wrapped in blankets and believed J.C. was trying to commit suicide and that was the reason he did not just leave him under his bed. Mr. Ehiosa stated that he held J.C.'s legs to prevent him from injuring himself on the bed frame. The second interview focused on how Mr. Ehiosa was able to physically gain control of J.C.'s legs if he was kicking. Mr. Ehiosa indicated that he did not grab or pull J.C. but made a swiping gesture as if to bring J.C.'s legs into a hold against Mr. Ehiosa's body. Also, if Mr. Ehiosa thought J.C. was engaged in a suicide attempt, he should have called for a code green. Mr. Ehiosa told Mr. Smith that he could handle the situation.

Mr. Smith explained that there was a lack of evidence to substantiate a claim of abuse regarding J.C.'s allegation that Mr. Ehiosa grabbed J.C. by the neck and dragged him out of the room into the hall. However, Mr. Smith stated that the substantiation of abuse against Mr. Ehiosa was based upon Mr. Ehiosa's self-reported statement to his immediate supervisor and then to Mr. Berluche, that he grabbed J.C. and pulled him from underneath the bed.

On cross-examination, Mr. Smith admitted that he did not conduct the demonstration utilizing the bed or any props when he was questioning Mr. Ehiosa as to how he was able to control J.C. on the date of the incident. Mr. Smith also admitted that Mr. Ehiosa appeared for both interviews and was cooperative throughout the process. Mr. Smith was requested to read the written statement of Mr. Berluche contained in Mr. Smith's investigation report (R-14, page 3) and then admitted that Mr. Berluche submitted a statement saying Mr. Ehiosa admitted grabbing J.C. by the ankles, but there is no mention that Mr. Ehiosa pulled J.C. As part of the investigation, photographs were taken of client J.C.'s neck, although they were not attached to Mr. Smith's investigation report that was produced. Mr. Smith indicated that the photographs were taken by another investigator and depicted red marks around J.C.'s neck. Mr. Ehiosa had stated that the red marks were caused by J.C. wrapping something tightly around his neck. Mr. Smith found that

the allegations against Mr. Ehiosa by J.C. that Mr. Ehiosa grabbed J.C. by the neck and dragged him across the floor were not substantiated.

Joseph Ehiosa testified on his own behalf. Mr. Ehiosa has worked for the State of New Jersey since 2007, first at a northern New Jersey developmental center until it closed and he was reassigned to HDC in June 2014. He was employed as a Cottage Training Technician at cottage 20 where J.C. resides. Mr. Ehiosa is familiar with J.C. and has dealt with him daily. He is also familiar with J.C.'s behavioral support plan (R-10). J.C. is an aggressive, self-injurious client who will threaten the staff about losing their jobs and lie about the staff if he does not get what he wants. He also frequently threatens suicide and is then placed on a suicide watch.

On January 3, 2017, Mr. Ehiosa reported to work at 7:00 a.m. He was assigned to group 2 that day which consisted of seven clients including J.C. J.C. was the most difficult client to work with. Mr. Ehiosa described J.C. as approximately forty-two years old and weighing 200 pounds. Mr. Ehiosa is 5'8" and said J.C. is the same size as him except that Mr. Ehiosa is slightly taller. At approximately 7:20 a.m. medications were being dispensed to the clients and J.C. went to get his medication and failed to return to group 2. Mr. Ehiosa went looking for J.C. and found him under his bed with a bed sheet around his neck and a sweatshirt and blanket covering his body. Mr. Ehiosa believed that J.C. was going to harm himself. Mr. Ehiosa asked him why he left the group and J.C. responded that someone told him that he had to go on a trip. Mr. Ehiosa could not hear him clearly so he lifted up the bed and removed the blanket from him but the bedsheet was still around his neck. He attempted to calm J.C. down and told him that he did not have to go on the trip. J.C. was kicking his legs so Mr. Ehiosa tried to hold his legs down because he could not grab them as J.C. was kicking. He wanted to make sure J.C. did not hurt himself. Mr. Ehiosa was familiar with the Handle with Care policy and received training on the policy. He also was familiar with the abuse policy and was aware of the HDC zero tolerance for abuse policy. He was familiar with J.C.'s behavioral support plan which indicated if J.C. goes under his bed, check on him every fifteen minutes. However, that was only to be done if J.C. was not presenting any harm to himself which was not the case in this instance. If something happened to J.C. it would be Mr. Ehiosa's responsibility if he did not prevent injury to J.C. Mr. Ehiosa understood the HDC policy to allow physical

contact with a client to prevent them from injuring themselves. Mr. Ehiosa said that it is permissible to hold a client's feet down in order to prevent him from getting injured and that was included in the handle with care training taught at HDC.

On cross-examination, Mr. Ehiosa admitted that his first written statement dated January 3, 2017 did not indicate that J.C. had anything around his neck or that J.C. was kicking his feet. He explained that he wrote the first statement quickly for Mr. Berluce, as Mr. Berluce was in a rush to go home the morning of the incident. Mr. Ehiosa also indicated that J.C. may have gotten the marks on his neck when he was squeezing himself under the bed when he was being directed to come out (R-20). The psychology log collection report also makes no mention of J.C. attempting suicide or being wrapped in blankets (R-13). The January 5, 2017 statement given by Mr. Ehiosa to Mr. Smith included these facts. Mr. Ehiosa also indicated in that statement that J.C. went under the bed a second time and Mr. Ehiosa lifted up the bed with one hand and used the other hand to hold his feet down so when he lowered the bed back down it would not hurt J.C. When he found J.C. under the bed with clothes wrapped around his neck Mr. Ehiosa did not call for help because there was no one else there and it was an emergency situation so he could not leave J.C. Mr. Ehiosa believed the marks on J.C.'s neck may have been caused by the bedsheet, blanket and pullover in which he was wrapped (R-15). Mr. Ehiosa stated that Mr. Smith's interviews were longer and more detailed because he spent hours with him going over the facts. At times during the interview, Mr. Ehiosa felt that Mr. Smith was trying to twist his words. Mr. Ehiosa indicated that he did not tell anyone that he grabbed J.C. He held his legs down to prevent him from injuring himself on the bed. Mr. Ehiosa believed there was a conspiracy against him because he and Jacinta Goodwin do not get along.

On January 3, 2017 shortly following this incident, Mr. Ehiosa was directed to leave the cottage and was suspended. He has never returned. Mr. Ehiosa did not observe any marks on J.C.'s neck and only learned of same during his interview with Mr. Smith.

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).

Mr. Berluche testified that it was not permissible to grab a client and that "grabbing" implies an aggressive action. I do not find that testimony to be credible. The definition of 'grab' as set forth in the Merriam-Webster's Deluxe Dictionary, Tenth Collegiate Edition is: "to take or seize by or as if by a sudden motion or grasp." Mr. Berluche used an example of 'holding' his wife and 'grabbing' his child to prevent them from running into the street. That very example Mr. Berluche gave in describing the difference between a hold and a grab supports the position that a grab is not necessarily an aggressive action but a quick and sudden action that may be required to prevent harm from coming to someone. Certainly, grabbing a child's hand to prevent them from running into the street does not constitute child abuse. Likewise, grabbing a client to prevent them from sustaining harm is not abuse. Furthermore, the personal control techniques Mr. Berluche described as permissible according to the "Handle with Care" protocol would not only appear to be more personally offensive and intrusive than a simple grab to gain control, but also, those techniques cannot be utilized when someone is underneath a bed.

Although Mr. Ehiosa's written statements regarding the incident appear to get more detailed following his repeated interviews, I **FIND** that his testimony is credible based upon the overall assessment of the facts in this case, and especially in conjunction with the testimony of respondents' witness, Mr. Piccolo, the staff psychologist at HDC whose testimony was highly credible.

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 as **FACTS**:

On January 3, 2017, appellant, Mr. Ehiosa was employed by HDC as a CTT and assigned to cottage 20 and responsible for the direct care of client J.C. Mr. Ehiosa was

familiar with the Handle with Care policy and received training on the policy. He also was familiar with the abuse policy and was aware of the HDC abuse policy of zero tolerance for abuse. Mr. Ehiosa was very familiar with J.C. and J.C.'s behavioral support plan (BSP) which indicated if J.C. goes under his bed, he should be allowed to remain there and be checked on every fifteen minutes. However, that was only to be done if J.C. was not presenting any harm to himself, which was not the case in this instance. J.C. was the most aggressive and difficult client at HDC and was well known to engage in certain behaviors when he is anxious including: aggression; making accusations of abuse against staff; and self-injurious behaviors such as intentionally slamming his head on hard objects and making suicidal gestures such as putting cords, ropes, shirts and belts around his neck. Certain factors trigger this behavior such as when J.C.'s anxiety level increases, including when J.C. is told to do something he does not want to do such as going on a trip. J.C. is also known to avoid something he does not want to do by leaving the group and going to his room and hiding underneath his bed. On January 3, 2017 J.C. was told that he was going on a trip, became anxious and left the group while they were receiving their medications. Mr. Ehiosa searched for J.C. and found him hiding underneath his bed stating he did not want to go on the trip. Appellant believed J.C. was going to harm himself because he had a bedsheet around his neck and a sweatshirt and a blanket over his body. There was no one else around. Appellant did not call for a code green because he could not leave J.C. alone and he thought he would be able to handle the situation. Mr. Ehiosa picked up the bed and removed the blanket off J.C. and was trying to calm J.C. down by telling him that he did not have to go on the trip. J.C. was kicking his feet and Mr. Ehiosa was able to get a hold of J.C.'s legs and held J.C.'s legs down so J.C. would not injure himself on the bed. Mr. Ehiosa was able to verbally direct J.C. out from under the bed. Appellant did not grab J.C. by the ankles and pull him out from under his bed. Appellant took no action against J.C. that could tend to cause pain, injury, anguish and/or suffering. Following the incident, J.C.'s neck was observed to have red marks around the front of his neck, consistent with something being wrapped around his 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 a 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).

Respondent has alleged that on January 3, 2017, at approximately 7:55 a.m. while in cottage 20, Mr. Ehiosa grabbed and pulled client J.C. by his feet and ankles to get him out from underneath his bed. Respondent alleged that this was considered physical abuse of a client, mistreatment of a client and conduct that violates common decency. It was further alleged that appellants actions were contrary to the redirection techniques specified in client J.C.'s Level 1 BSP. Respondent has charged appellant with the following violations of the Department of Human Services Disciplinary Rules set forth in Administrative Order 4:08: (C3.1) Physical or mental abuse of a client; (C5.1) Inappropriate physical contact or mistreatment of a client; (C11.1) Any improper conduct which violates common decency; (E1.1) Violation of a rule, regulation, policy, procedure order or administrative decision; as well as violations of N.J.A.C. 4A:2-2.3(a)(1), Failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause (R-9).

Physical abuse of a client is defined as “a physical act directed at a service recipient by a DHS employee, volunteer, intern, or consultant/contractor of a type that could tend to cause pain, injury, anguish, and/or suffering. Such acts include but are not limited to the service recipient being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object.” (R-1, page 1). It is noted that “grabbing” is conspicuously absent from this definition. The facts indicate that the actions of appellant in this case did not constitute physical abuse of J.C. in that appellant did not grab appellant by the feet and ankles and pull him out from underneath his bed as respondent has alleged. There was testimony from both supervisors, Mr. Berluche and Ms. Kyne that Appellant never told them that he pulled J.C. out from under his bed. Appellant did admit that he held J.C.’s legs to prevent him from injuring himself on the bed and that this was permissible to prevent injury to the client. Even if appellant had ‘grabbed’ J.C.’s legs in order to prevent him from harm as opposed to ‘holding’ his legs to prevent him from harm it would not be considered abuse. J.C. was not kicked, pinched, bitten, punched, slapped, hit, pushed, dragged and/or struck with a thrown or held object. There was no physical act by appellant directed at J.C. that could tend to cause pain, injury, anguish or suffering. Therefore, I **CONCLUDE** that the respondent has not met its burden of proof that appellant physically abused J.C.

Mistreatment of a client is defined as “inappropriate treatment and can include vexing, verbal teasing, exposing a client to unnecessary danger, hardship, fatigue or strain. This also includes any indecent, immoral or unlawful act that may tend to endanger the morals of a client and withdrawing of personal items or foods that are not required by a medical order or approved Level III behavior support program” (R-2, page 1). Mr. Ehiosa was responsible for the safety of his client, J.C. and admitted that he held J.C.’s legs while he was kicking them to prevent J.C. from injuring himself. There was no testimony that Appellant pulled J.C. out from underneath his bed by the ankles. Therefore, I **CONCLUDE** that respondent has not met its burden of proof that appellant mistreated J.C.

Although respondent has charged appellant with improper conduct which violates common decency, this offense is not defined in the Disciplinary Action Program (R-23). This charge is based on the allegation that appellant grabbed and pulled J.C. by his feet and ankles to get him out from underneath his bed. Dragging a client out from underneath

their bed by their feet or ankles would offend notions of common decency, however, there has been no testimony that appellant grabbed and pulled J.C. by his ankles and feet to get him out from underneath his bed. Therefore, I **CONCLUDE** that respondent has not met its burden of proof that appellant engaged in conduct that violates common decency.

Appellant's actions were also alleged to be contrary to the redirection techniques specified in J.C.'s BSP. The BSP indicates that J.C. may at times run to his room in order to avoid something he does not want to do. Staff are directed to follow J.C. to his room and let him know that he can have time to calm down and that he will be checked on in a few minutes. If J.C. stays in his room he should be allowed ten minutes and then staff should approach him and ask him to talk about what is bothering him. If J.C. talks about his problems, he will usually comply with requests. (R-10, page 5, paragraph 11). The BSP also indicates that J.C. may verbalize thoughts of committing suicide and make gestures such as putting cords, ropes, shirts and belts around his neck. If J.C. makes suicidal ideations or gestures, the staff is not to discuss it with him, only keep him safe without conversing about the incident (R-10, page 7, paragraph H). On the day of this incident, January 3, 2017 J.C. did run to his room and hide underneath his bed when he became anxious when he learned he was to go on a trip that day. Appellant testified that J.C. had a sheet, a sweatshirt and a blanket around his neck and appellant believed J.C. would harm himself. Therefore, he could not leave him and go back and check on him. Mr. Ehiosa stayed with J.C. and talked to him and calmed him down and eventually was able to verbally redirect him out from under the bed. Mr. Ehiosa's primary obligation was to keep the client safe. One of the most compelling facts in this case supporting appellants testimony is that J.C. was found to have red marks around his neck following this incident that was consistent with his target behaviors of suicidal gestures when he becomes anxious. Therefore, I **CONCLUDE** that appellants actions were not contrary to the redirection techniques specified in J.C.'s BSP and that respondent has not sustained its burden of proof that appellant violated a rule, regulation, policy, procedure order or administrative decision as set forth in (E1.1).

Appellant was also charged with violating N.J.S.A. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. There is no definition in the New Jersey Administrative Code for incompetency, inefficiency or failure to perform duties. However,

case law has determined incompetence is a “lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position.” Sotomayer v. Plainfield Police Dep’t, CSV 9921-98, Initial Decision (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000), <http://njlaw.rutgers.edu/collections/oal/final/> (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep’t of Agric., 1 N.J.A.R. 315 (1980)). Mr. Ehiosa has worked at the HDC since June 2014 and has had daily contact with J.C., the most difficult client at the facility. He is trained on client abuse prevention and is familiar with J.C.’s BSP. One of the main duties of the appellant is to provide for the safety of the client’s entrusted to his care. The facts in this case indicate that J.C. was in danger of harming himself and that appellant acted appropriately in protecting J.C. from injury by not allowing him to remain under the bed with a bedsheet and sweatshirt around his neck and by holding his legs while J.C. was kicking to prevent J.C. from hitting the bedframe while appellant was lowering the bed back down. Therefore, I **CONCLUDE** that the appointing authority has not met its burden of proof on this issue.

Appellant was also 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)).

The basis for the charge of conduct unbecoming was the alleged physical abuse of a client by appellant grabbing and pulling client J.C. by his feet and ankles from underneath his bed. Appellant did not pull J.C. from under the bed by his ankles him but he did admit he held his legs to avoid the client from becoming injured while J.C. was kicking and could have injured himself on the bed. Furthermore, appellant acted appropriately by not allowing J.C. to remain under the bed with a bedsheet and sweatshirt wrapped around his neck. Following this incident, J.C. was found to have an injury to his neck which is consistent with appellant's testimony that when he found J.C. underneath his bed he had a sheet and a sweatshirt wrapped tightly around his neck and appellant believed J.C. was going to harm himself. Appellant's conduct was not such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. To the contrary, appellants behavior was necessary and appropriate under the circumstances. Appellant was responsible for the safety of J.C. and his actions were reasonable. Therefore, I **CONCLUDE** that the appellant did not engage in conduct unbecoming a public employee and that the appointing authority has not met the burden on this issue.

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 HDC Procedure #30/ Administrative Order 4:08 Physical abuse of a patient (R-1) for allegedly grabbing and pulling client J.C. by his feet and ankles to get him out from underneath his bed. There was testimony from two of appellants supervisors that appellant never stated to them that he pulled J.C. out from under his bed. Appellant testified that he believed J.C. would harm himself as he was under the bed with a sheet and sweatshirt wrapped around his neck. J.C. was upset that he was going to have to go on a trip which he did not want to go on. Appellant was able to talk to J.C., calm him down and eventually able to get him out from underneath the bed with verbal directions. However, appellant did admit that when he lifted the bed up to get J.C. to come out, J.C. was kicking his feet and appellant had to hold his feet to prevent J.C. from hurting himself on the bed while he placed the bed down again. Following this incident, J.C. was found to have red marks around his neck consistent with appellants testimony that J.C. was

underneath the bed with a sheet and sweatshirt wrapped around his neck. Appellant believed J.C. was attempting to harm himself which behavior is documented in J.C.'s BSP. "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-1). Appellant's actions did not constitute physical abuse. Appellant was attempting to keep J.C. safe and prevent him from harming himself. Individuals who are developmentally disabled are entitled to humane treatment and care. Appellants actions were reasonable and necessary under the circumstances and did not violate this standard of good behavior. As such, I **CONCLUDE** that this charge should be **DISMISSED**.

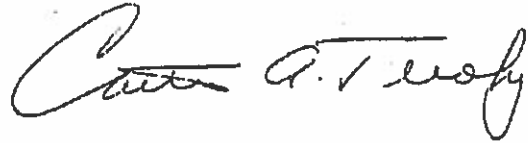
ORDER

Based upon the foregoing, I **ORDER** that the action of the respondent is **REVERSED** and the appellant's appeal is **GRANTED**. I further **ORDER** that all charges filed against appellant in this matter are hereby **DISMISSED**.

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.



March 14, 2018

DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency:

March 14, 2018 (emailed)

Date Mailed to Parties:

March 14, 2018 (emailed)

/mel

APPENDIX

WITNESSES

For Petitioner:

Joseph Ehiosa

For Respondent:

Irene Carozza
Enock Berluce
Kathy D. Kyne
Mark Piccolo
Kyle Smith

EXHIBITS

For Petitioner:

None

For Respondent:

- R-1 Hunterdon Developmental Center (HDC) Procedure #30 Abuse, Neglect, Mistreatment and Reporting Reasonable Suspicion of a Crime (eight pages)
- R-2 HDC Interoffice Memorandum dated October 3, 2016 re: Mistreatment of Clients (three pages)

- R-3 HDC Psychology In-service Roster for J.C. (three pages)
- R-4 Learner Transcripts Report for Joseph Ehiosa
- R-5 Confidential Incident Report – HDC-15 dated January 3, 2017
- R-6 Confidential Incident Report HDC dated January 3, 2017 by Enock Berluce
- R-7 Written Statement Enock Berluce dated February 2, 2017
- R-8 Revised Amended Preliminary Notice of Discipline (31-A)
- R-9 Final Notice of Discipline (31-B)
- R-10 HDC Behavior Support Plan (eight pages)
- R-11 photocopy of picture of bed
- R-12 Written Statement of Mark Piccolo dated January 12, 2017
- R-13 Psychology Data Collection Sheet
- R-14 Investigation Report (thirty-five pages)
- R-15 Joseph Ehiosa Questionnaire dated January 5, 2017 (seven pages)
- R-16 Written Statement of Joseph Ehiosa dated February 3, 2017 (two pages)
- R-17 HDC Administrative Procedure No. 4 dated November 1, 2014
Defensive and Physical Control Techniques (fifteen pages)
- R-18 Jacinta Goodwin Q & A dated January 11, 2017
- R-19 Jacinta Goodwin Written Statement dated February 6, 2017 (two pages)
- R-20 Confidential Incident Statement of Joseph Ehiosa dated January 5, 2017 (two pages)
- R-21 HDC Interoffice Memorandum dated April 3, 2017 (ten pages)
- R-22 Corrective/Disciplinary Action History – Joseph Ehiosa (three pages)
- R-23 New Jersey Department of Human Services Disciplinary Action Program (twenty-two pages)