



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 1<sup>ST</sup> DAY OF MAY, 2024

*Allison Chris Myers*

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Allison Chris Myers  
Chairperson  
Civil Service Commission

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and  
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Attachments



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**  
(CONSOLIDATED)

**D.L.**,  
Petitioner,  
v.  
**DEPARTMENT OF HUMAN SERVICES,**  
Respondent,

OAL DKT. NO. HSL 04079-19  
AGENCY DKT. NO. DRA #19-  
002

And

**IN THE MATTER OF D.L., ANN KLEIN**  
**FORENSIC CENTER, DEPARTMENT OF**  
**HEALTH.**

OAL DKT. NO. CSV 04380-19  
AGENCY DKT. NO. 2019-2468

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**William A. Nash, Esq.**, for petitioner/appellant, D.L. (Nash Law Firm, LLC, attorneys)

**Caroline Gargione**, Deputy Attorney General, for respondent, Department of Human Services (Matthew J. Platkin, Attorney General of New Jersey, attorney)

**Eric Zimmerman**, Deputy Attorney General, for respondent, Ann Klein Forensic Center, Department of Health (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: November 21, 2023

Decided: January 4, 2024

BEFORE **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant D.L., a Senior Medical Security Officer ("MSO") for the respondent Ann Klein Forensic Center ("Ann Klein"), appeals the decision of Ann Klein removing him from his position. On July 20, 2018, Ann Klein issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made of one count of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a Public Employee, and a charge of violating Administrative Order 4:08 C3, Physical or mental abuse of a patient, client or resident, and C5, Inappropriate physical contact or mistreatment of a patient, client, resident or employee. (T-2.) A departmental hearing was not requested or held, and on March 1, 2019, a Final Notice of Disciplinary Action was issued removing appellant based upon the aforementioned charges. (T-1.) On August 22, 2018, D.L. was advised by the Department of Health ("DOH") by letter that his name would be placed on the Central Registry of Offenders against Individuals with Developmental Disabilities based on the findings that his actions meet the statutory criteria for abuse as stipulated in N.J.S.A. 30:6D-73 et seq. Specifically, on February 21, 2018, it was reported and subsequently substantiated through a DOH investigation that he abused an individual receiving services from the Division of Developmental Disabilities. Specifically, the investigation determined that on February 21, 2018, he was witnessed holding an individual's face then punching the individual on the side of his face. His actions demonstrate recklessness and careless disregard for the health, safety and well-being of the individual served and your actions placed him at further risk of serious harm. Appellant then requested a hearing, and the matters were transmitted to the Office of Administrative Law ("OAL"), where the HSL case was filed on March 22, 2019, and the CSV case was filed on March 28, 2019, for determination as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The cases were consolidated for hearing by Order of Consolidation dated June 20, 2019 ("Order"). The Order also found that the Department of Human Services

would have the predominant interest in these consolidated cases. A Confidentiality and Protective Order was entered on July 16, 2019, and a second Confidentiality and Protective Order was entered on May 19, 2020. The hearing was held on March 7, April 25, and May 10, 2023. Timely post hearing submissions were received on behalf of appellant and respondents, and accordingly on November 21, 2023, the record closed.

At issue is whether respondents have proven the charges by a preponderance of the credible evidence, and if proven, whether the penalty of removal was justified and reasonable, and if the charges are proven, whether appellant's name should be placed on the Central Registry of Offenders against Individuals with Developmental Disabilities ("Central Registry").

### **FACTUAL DISCUSSION**

#### **Testimony**

##### **For respondent**

**Sandi Ferguson** has been a Program Specialist 4 since 2018, From 1989 to 2018, she was head of training and staff development. Ferguson oversees the training of MSOs, and she is familiar with Ann Klein policies and the Central Registry. She has been involved with the Central Registry since 2017. Ferguson defined abuse as hitting, punching, dragging and or neglecting a patient. In addition, threatening a patient, or verbal and/or psychological abuse is covered in their training.

Staff are trained in de-escalation, which includes incidents of spitting. There are five techniques that are used, and in the instance of spitting, staff are instructed that nothing is to be put on a patient's face. Employees get classes and updates on their training. There is an annual life, safety class that all employees receive, and in the training, abuse is discussed. A teaching guide is used which discusses therapeutic options. (R-7.) The first option in a volatile encounter is always to retreat and deflect. It is the duty of staff to back up and give an individual space, so they do not feel threatened or intimidated. While staff do not get this document, the information is

provided to the staff. An additional policy discusses personal defensive and control techniques in aggressive patient situations and emergencies. (R-8.) In this policy, staff are taught about holds that are allowed to be used to control a patient. (R-8 at DHS 184.) These control techniques should only be used when other less intrusive or more therapeutic techniques have been exhausted and cannot ensure the safety of the person or others. In addition, there is an unusual incident reporting and management system (R-9), that was in place at the time of the incident herein. There is also a policy and procedure for reporting and investigating allegations of patient abuse and professional misconduct. (R-10.) In this policy, abuse is defined as, "any act, omission or non-action in which an employee engages with service recipients that does not have as its legitimate goal, the healthful, proper, and humane care and treatment of the service recipient which causes or may cause physical or emotional harm or injury to a service recipient or deprives a service recipient of his/her rights, as defined by law or Departmental policy." (R-10 at DHS 226.)

D.L. received multiple training sessions beginning in 2010. An annual life safety course is given each year. Abuse and the reporting of abuse are covered in that course. Advanced emergency holds are also taught annually, as are techniques to de-escalate situations. A finding of "successful" indicates that the employee completed the training. D.L. has been an MSO for many years. He has been trained that threatening to strike a patient is abuse, and that physical injury is not required for a finding of abuse. There is a one arm technique taught to the employees, and it involves grabbing or holding onto an arm.

Ferguson agreed that she was not familiar with the incident herein except that she knew that the patient was spitting and was aggressive. Restraints are considered to be beyond therapeutic techniques. Verbal de-escalations are set forth in the manual, however, once an individual is at the stage of restraint, the manual does not cover how to handle that circumstance. Employees are taught that they may pivot and deflect against an aggressive patient, and that once you are at the stage of restraint, you are no longer retreating. MSO's do not receive training involving a patient who is in bed, however, they are taught how to escape a patient who is grabbing and holding. (R-7 at DHS 160 to 163.) The teaching guide does not cover instances involving spitting. (R-

7.) Ferguson stated that techniques for spitting are taught to staff and are part of the therapeutic options. Part of the management system regarding reporting of an incident is that the report should be made immediately if an assault is witnessed, or threats are overheard. (R-9.) Ferguson agreed that there was no program to practice the techniques in which to calm or subdue a patient. However, there was a skills check that employees were required to undertake.

As to the training, employees are not required to attend. (R-6.) Ferguson stated that employees can put their hand in front of a patient's face, but they are not allowed to touch or put anything directly on the patient's face. In the event of a spitting incident, the proper technique with an angry patient is to always attempt to de-escalate, and then to use other techniques. If the de-escalation does not work, techniques that are taught to de-escalate an individual in the standing position can also be used if the individual is in the prone position. When a patient is spitting, employees are taught to remove themselves from the person, or to place a hand up over their face to protect their own face.

**Nachelle Bolden** has been a Quality Assurance Specialist since 2017. Her job involves investigations of abuse, neglect, and exploitation cases, and she has received extensive training in the field. She has handled over 200 cases in her career. Bolden inherited this case from Kylie Hanisak as a reassignment investigation. Bolden reviewed an incident report (R-27), and she advised that D.L. was removed from his position as is typical with these types of investigations. Bolden also discovered that the patient had a history of assaults and is on the autism spectrum. Bolden was made aware that the patient had scratches on his face (R-15), that the patient had been appointed a guardian (R-18), and that he was under the care of a behavior plan. (R-17.) The patient has a history of altercations with hospital staff. (R-19.) Records from Capital Health also indicate the patient had scratches on his face from an altercation. (R-22.) Photos of the patient substantiated that there were scratches on the left side of M.F.'s face. (R-5.) Bolden did not know how the scratches came to be on M.F.'s face, or if they were self-inflicted. Bolden did attempt to interview M.F. on three occasions, but he refused each time. (R-26.) Bolden also reviewed M.F.'s orders. (R-16.)

A video of the incident was reviewed. (R-25.) In the video, D.L. is shown wearing a hat. There were other individuals in the room with D.L. and M.F. at the time of the alleged incident. They were Alec Gerasimowicz, Milot Dossous, and Rannan Moore. (R-4 at DHS 28.) Bolden interviewed Dossous, who stated that M.F. was aggressive, and that D.L. positioned his hand on M.F.'s face, thus redirecting M.F.'s position, to prevent further spitting. (R-4 at DHS 36.) Dossous denied witnessing D.L. strike M.F. (R-4 at DHS 37.) Bolden interviewed Gerasimowicz who stated that D.L. punched M.F. on the right side of M.F.'s face, at which time Gerasimowicz told D.L. not to ever do something like that again while Gerasimowicz was there. (R-4 at DHS 37.) Bolden interviewed Moore who stated that M.F.'s behavior caused D.L. to "go off," and that he heard a "thwack" sound coming from D.L.'s direction. Moore admitted that his head was down, and he could not tell who struck M.F. Moore heard Gerasimowicz respond by yelling, "He hit him." (R-4 at DHS 38.) The incident took place at 11:30 p.m., but it was not reported by Gerasimowicz until 3:52 a.m. the next morning. Bolden agreed that Gerasimowicz was the only individual in the room who witnessed D.L. punch M.F.

Bolden reviewed D.L.'s disciplinary history (R-4 at DHS 40), noting that three prior instances were reviewed, unsubstantiated and closed. On one instance, neglect was substantiated, but the case was administratively reviewed and closed. Bolden also reviewed D.L.'s training. (R-4 at DHS 41.) Bolden agreed that M.F. engages in dangerous behavior, and that he had a history of twenty reported incidents of assaulting others, including cases of biting, spitting, and punching. Finally, Bolden interviewed D.L. He denied punching D.L. in the face. He stated that he took both of his hands and placed them in front of M.F.'s mouth to prevent him from continuing to spit. D.L. reported that while he initially did not make contact, once M.F. attempted to bite him, his hands completely covered M.F.'s face. Bolden found D.L., as well as the other witnesses, to be credible.

Bolden was not involved in determining whether D.L. committed abuse, as Hanisak made that determination. However, Bolden agreed that MSOs cannot use any type of barrier to smother a patient's face, but they may create a shield with their hands, as long as no contact is made. Such behavior would be proper and would not be



considered abuse. She also agreed that D.L.'s statements were corroborated by her review of the video of the incident.

**Kylie Hanisak** is an investigator with the Department of Investigations at DOH. She has been involved in approximately 275 investigations since May 2017. Hanisak stated that M.F. refused to be investigated on three occasions. She also found D.L.'s statements to be inconsistent, and therefore, his testimony was not reliable. Hanisak reviewed the video. (R-25.) After concluding her investigation, she substantiated abuse, and found that there was a preponderance of evidence that abuse was committed by D.L. She based her conclusion on several factors: one witness saw D.L. punch M.F., another witness heard a "thwack" sound, and the existence of scratches on M.F.'s face in the pictures. She also indicated that the threat of abuse on a patient constitutes abuse, and clearly punching a patient would constitute abuse. Hanisak also stated that D.L. agreed that he put his hands on M.F.'s face.

Hanisak agreed that the camera is the best evidence. While one of the witnesses set forth that there was a camera in the room where the incident took place, Hanisak did not confirm that a camera was in room 12 at the time of the incident. Hanisak did not obtain video from a camera inside room 12. Her only effort to obtain such a video was with a subpoena to Capital Health.

Hanisak set forth that M.F. has broad-spectrum autism and that he receives services from DDD. There are a number of patients at Ann Klein with DDD. Hanisak was unsure what training the staff received in handling DDD patients. M.F. also has self-injurious behavior (SIB). Hanisak agreed that M.F. could have scratched himself during an altercation. M.F. had a history of twenty such incidents of SIB. Hanisak only interviewed one person herself, Mr. Gill. Hanisak stated that none of the witnesses observed D.L. scratch M.F., and that the scratches were on the left side of his face. The only person who saw a punch was Alec Gerasimowicz, who said he saw D.L. punch M.F. on the right side of his face. However, M.F. had no bruising on that side of his face. Mr. Gill did not see D.L. punch or scratch M.F. M.F. was agitated at the time of the incident. There were four people attempting to restrain him. He was resisting and spitting. Hanisak did not know about any spitting policies that existed at the facility.

She did not receive any therapeutical options training. Gerasimowicz stated that he saw D.L. punch M.F. on the right side of his face, but there was no evidence of a punch on M.F.'s right side. Hanisak agreed that Alec Gerasimowicz was the only individual involved with restraining M.F. that actually saw the punch by D.L. Hanisak agreed that Gerasimowicz did not immediately go to a supervisor and that no 911 call was made. Gerasimowicz reported the incident to someone at the reception desk, but he never made a formal report about a punch. In addition, Gerasimowicz did not prepare a written statement. Mr. Moore was interviewed, and he stated that he heard a thwack sound, but did not see a punch or a scratch. He did hear Gerasimowicz say that he hit him. Hanisak did not determine if there was any bad blood between Gerasimowicz and D.L. Hanisak was told by D.L. that the doctor questioned M.F. if he was hit or punched, and M.F. responded that he was not. (R-4 at 43.) Hanisak did not follow up to determine who the doctor was. Hanisak was told by Dossous that there was a surveillance camera in the room. (R-4 at 36.) Hanisak agreed that she did not see D.L. punch M.F. in the video.

**Alec Gerasimowicz** has been an investigator for the Mercer County Sheriffs Office for the last year. He was a security officer employed by Capital Health at the time of the incident.

Gerasimowicz knew M.F. M.F. took a liking to Gerasimowicz. Gerasimowicz enjoyed M.F.'s company. Gerasimowicz knew D.L. as a result of the incident. Gerasimowicz had no previous interactions with D.L. D.L. was a medical guard at the time of the incident. Gerasimowicz recalled M.F. returning from testing. M.F. was agitated and handcuffed to the bed. Gerasimowicz went into the room with Moore to assist with a four-point restraint. M.F. threw an object at D.L. Gerasimowicz was holding M.F.'s leg. M.F. tried to spit at D.L. D.L. turned M.F.'s face to the left and struck M.F. in the face. Gerasimowicz spoke to an investigator about the incident but was never asked for a written statement. Gerasimowicz reviewed the video tape of the incident, and while he agreed that a punch could not be seen, he stated that the punch occurred before 10:54:46 hours. When M.F. was struck his body went limp. D.L. used his right hand balled up in a fist to strike M.F. The strike was to M.F.'s face toward the top of his head. After the incident, Gerasimowicz and D.L. had words, Gerasimowicz

told D.L. not to ever do that again, and D.L. told Gerasimowicz that he should want to live a long, healthy life. Gerasimowicz interpreted that to be a threat, stating that he was appalled that D.L. would punch M.F. The two men continued to argue, and Gerasimowicz stated that he could be seen throwing his radio on the video at 11:03:12 hours. Gerasimowicz agreed that he did not report the incident immediately. Instead, he went home to think over what had happened. Gerasimowicz was not disciplined for not immediately reporting the incident. Gerasimowicz stated that he has only been disciplined one time in his career for wearing earrings. Gerasimowicz has never been disciplined for abuse. Gerasimowicz stated that room 12 did not have a camera. It was a crisis intervention room. Gerasimowicz had been in this room approximately two times each shift for one and a half years. Gerasimowicz did not have any interactions with D.L. before this incident. Gerasimowicz's job was to assist anyone in Capital Health who needed help. Gerasimowicz stated that the verbal altercation with D.L. lasted approximately ten minutes.

On cross examination, Gerasimowicz admitted that he was not 100 percent sure that room 12 did not have a camera. Gerasimowicz stated that there were four people in the room at the time of the incident. Gerasimowicz admitted that no one else reacted to D.L.'s punch. D.L. used his right hand and Gerasimowicz was unsure if D.L. was wearing a ring at the time. M.F. was not normally an aggressive patient, but he was spitting at the time of the incident. M.F. was not kicking, but he was resisting. D.L. punched M.F. at 10:54:50 hours. Gerasimowicz agreed that he did not report the strike to anyone, and he did not ask anyone to check on M.F.'s face or for any injuries thereto. Gerasimowicz did tell his boss, Lieutenant Quintine, about what occurred before he left for the day. Gerasimowicz concluded by saying he was upset, angry and anxious about what happened to M.F. It was a stressful situation as he prioritizes safety for all patients. Other people were aware of what happened because Gerasimowicz made it known to others that the incident had occurred.

For appellant

**Milot Dossous** has worked for the State of New Jersey at Ann Klein since 2003. He is a coworker with D.L. and was D.L.'s senior officer. He has observed D.L. over the

years and has watched patients spit, punch, and throw things at D.L. It is not unusual for a patient to become aggressive with the staff, and it occurs on a daily basis.

On the day of the incident, Dossous was assigned to Capital Health, and he was tasked to watch M.F. Dossous was working alongside D.L. Dossous described room 12 where the incident occurred as square with a camera in the middle of the ceiling, looking down at the patient in the room at the time.

M.F. returned from his scan in an agitated state. When M.F. was brought into room 12, Dossous took a position near the patient's left foot. To the left of the patient's head was a Capital Health security officer, and to the right of M.F.'s head was D.L. Gerasimowicz was by the patient's right foot. M.F. kicked Gerasimowicz, and Dossous heard Gerasimowicz say, "Don't ever do that again." At no time did D.L. punch or assault M.F. M.F. was spitting at everyone in the room, and he was angry with all the workers. D.L. correctly redirected M.F.'s face as he was trained to do. Dossous did not observe any bruising on M.F.'s face. Dossous did not overhear D.L. threaten Gerasimowicz nor did he hear Gerasimowicz threaten D.L. After the incident occurred, D.L. and Gerasimowicz were talking about the spitting by M.F. Dossous believed that D.L. was being accused of something and he told D.L. to let it go, stating that their job is to watch the patient. The incident arose because Gerasimowicz had gotten kicked, and he was upset. The kick caused Gerasimowicz to kneel on one knee on the floor. At that point, Gerasimowicz told M.F. to never do that again. Dossous noticed scratches on D.L.'s face several hours after the incident.

Dossous stated that he observed D.L. redirect M.F.'s face with D.L.'s right hand. He did this by using a flat hand placed just above the jawline. After being redirected, M.F. stopped spitting.

Dossous agreed that he did not put anything in his statement about M.F. kicking Gerasimowicz. He also agreed that no matter what names M.F. was calling D.L., D.L. was never permitted to strike a patient. Dossous also agreed that while D.L. was in the doorway talking to Gerasimowicz, he should have been watching his patient. He told D.L. to let them investigate the fact that Gerasimowicz had been kicked by M.F. He

agreed that this would be unusual as an investigation usually entails an incident where a worker has assaulted a patient.

D.L. has worked for the State of New Jersey since 1996. He has been with the Department of Corrections since 1998. He began working at Ann Klein in 2002. He has not had any major discipline in that time.

D.L. worked at Capital Health hundreds of times before this incident, and he has been in room 12 on ten or more occasions. There is a camera in the room, it is on the ceiling over top of the bed.

D.L. has had numerous encounters with M.F., and he knew M.F. well. M.F. was a one-to-one patient for twenty-four hours a day. Upon arriving in room 12, D.L. did a security check for contraband. M.F. was taken to imaging, and at that time he became abusive and was spitting at the technician doing the CAT scan. D.L. helped to get M.F. on the table, and then he stepped out of the imaging room. M.F. was brought back to room 12 by a transporter. When they arrived in room 12, M.F. was calling D.L. the "N" word, but this was not the first time. There are many other patients at Ann Klein with similar behaviors to M.F. This type of behavior happens regularly to all the officers. D.L. had never reacted negatively in the past to such a misbehaved patient.

D.L. and Dossous had/have no relationship other than that they work together. D.L. stated that he had been suffering from liver cancer and had physical issues at the time of the incident. He was unable to grow fingernails as a result of his cancer. At 10:54:53 on the video, D.L. testified that M.F. kicked Gerasimowicz and Gerasimowicz fell backward, but he did not take a knee.

D.L. stated that he never punched M.F. in the face. He knows that punching a patient is prohibited, and that it constitutes abuse. M.F.'s spitting did not bother him. It is normal and occurs often. It did not make D.L. mad or angry. D.L. did not put his hand over M.F.'s face. Instead, he used a technique where he puts his hand across a patient's chin to redirect their face. D.L. used the back part of his hand under M.F.'s chin. He placed his hand on the right side of M.F.'s face and pushed M.F.'s face away

from him. D.L. had no issues with Gerasimowicz prior to the incident. After the incident, D.L. was not shouting at Gerasimowicz. Instead, D.L. was trying to explain to Gerasimowicz that the patient was his responsibility as he was the senior officer. At no time did D.L. threaten Gerasimowicz. D.L. did hear Gerasimowicz say, "Don't ever do that again," but he believed it was because of the kick delivered by M.F. to Gerasimowicz. The doctor came to the facility at approximately 3.00 a.m. the next morning. He asked M.F. if anyone hit him and M.F. said no.

D.L. has worked with Dossous approximately fifteen to twenty times. In his written statement, D.L. stated that he did not put his hand on M.F. He agreed that he said he put his hand in front of M.F.'s face. D.L. also agreed that he stated that his hands completely covered M.F.'s face. D.L. did not tell anyone about M.F. kicking Gerasimowicz. After the incident, D.L. was not threatening Gerasimowicz. Gerasimowicz stated that it was his hospital and therefore they were to proceed by his rules. D.L. disagreed, stating that he was the senior officer responsible for the patient. In the video, D.L. stated that he and Gerasimowicz can be seen continuing to discuss which of the officers oversaw the handling of M.F. D.L. agreed that if the patient is a one-to-one, he must keep his eye on the patient. If the patient is a two-to-one, he is not required to always watch the patient.

### **FINDINGS OF FACT**

Given that the witnesses have different versions of the events surrounding the incident herein, it is my obligation and responsibility to weigh the credibility of the witness in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story 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, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant,

and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

The respondents' evidence was the testimony of Ferguson, Bolden, Hanisak and Gerasimowicz. The respondents' position is that the appellant's actions warrant removal, and placement of appellant's name on the Central Registry. Appellant had a responsibility to refrain from this type of action. The altercation was sufficiently egregious as to require the removal of appellant, and placement of appellant's name on the Central Registry.

Dossous and D.L. disagreed with the testimony of respondents' witnesses, stating that what actually occurred was that M.F. kicked Gerasimowicz, and in response, Gerasimowicz told M.F. not to ever do that again. At no time did D.L. punch or strike M.F.

In order to judge the credibility of the witnesses, it is imperative to begin with an analysis of how the statements and testimony of the two critical witnesses, D.L. and Gerasimowicz, hold together when viewed in total. Gerasimowicz testimony was consistent with what he stated to investigators during the DOH's internal investigation. He maintained that M.F. spit at D.L., and that D.L. used his left hand to push M.F.'s face away. D.L. then punched M.F. with his right hand. The evidence did not show the existence of any prior issues or bad blood between D.L. and Gerasimowicz. A witness in the room at the time of the incident, Moore, stated that that M.F.'s behavior caused D.L. to "go off," and that he heard Gerasimowicz yell out that D.L. hit M.F. Moore also stated that while he did not see a punch thrown, he did hear a thwack sound. In addition, the photographs do reveal the existence of scratches on M.F.'s face. All of these items corroborate the version of events as outlined by Gerasimowicz.

In addition, the video of the incident appears to substantiate Gerasimowicz' version of what occurred after the alleged punch of M.F. by D.L. The video reveals that

after the incident, Gerasimowicz and D.L. were having what appear to be heated words with each other. The two men can be seen arguing, and Gerasimowicz can be seen throwing his radio on the video, at 11:03:12 hours. This would seemingly contradict D.L.'s testimony that he and Gerasimowicz were simply discussing which of the officers oversaw the handling of M.F.

Conversely, D.L.'s statements to investigators, as well as his testimony at trial, were inconsistent. In D.L.'s initial written statement, he denied placing his hands on M.F. However, during D.L.'s interview with the investigators, he stated that he used both his hands to cover M.F.'s face. Finally, during his testimony, D.L. set forth that he used the back part of his right hand to move M.F.'s face away from where people were standing. These three separate versions of what occurred raise doubts as to the veracity of the facts that D.L. attempts to portray. In addition, according to D.L., he and Dossous had worked together approximately fifteen to twenty times. As such, Dossous and D.L. were familiar with each other. Because of this familiarity, Dossous might have had an interest in testifying favorably for his friend, D.L. And D.L., as the accused, certainly has an interest in painting the facts in a light most favorable to himself.

Also troubling is D.L.'s version of what occurred between himself and Gerasimowicz, after the alleged punch between D.L. and M.F. The video evidence clearly shows D.L. acting in a highly agitated state towards Gerasimowicz. During his testimony, D.L. stated that he was talking to no one in particular at that time. D.L. also did not provide an explanation as to why he continued speaking with Gerasimowicz, after the alleged incident was over. He again claimed that he was talking to no one in particular. Conversely, Gerasimowicz was clear in his testimony that he told D.L. to never do something like that again. In response, D.L. told Gerasimowicz to let it go, and that he should want to live a long and happy life.

Dossous agreed that no matter what names M.F. was calling D.L., D.L. was never permitted to strike a patient. Dossous was clear that while D.L. was in the doorway talking to Gerasimowicz, he should have been watching his patient M.F. However, Dossous' testimony that M.F. kicked Gerasimowicz is questionable, in that Dossous did not give this version of events to investigators in his written statement after



the incident. The version of events as outlined by both D.L. and Dossous is therefore less consistent and reliable than the testimony of Gerasimowicz, and the statement of Moore, who advised that he heard a "thwack" sound, and that he heard Gerasimowicz say, "He hit him."

Gerasimowicz was credible, and no evidence was produced as to why he may have been untruthful in his testimony, or that he exaggerated the same. There was no evidence, nor was any detected in the testimony, of any animosity between D.L. and Gerasimowicz. Nothing in the evidence revealed any prior issues between the two men, or that Gerasimowicz was acting in any retaliatory manner toward D.L. Gerasimowicz' testimony must be given at the least a reasonable degree of deference. Nothing in the record supports a determination that he was anything but credible. Gerasimowicz' failure to immediately report the incident is explained in his testimony, where he stated that he was upset, angry and anxious about what happened to M.F. It was a stressful situation for him, as he prioritized safety for all patients. For those reasons, it is likely that he did not report the incident immediately. While such a failure to report an incident by Gerasimowicz is contrary to rules and regulations, that is a separate potential disciplinary matter that does not concern me for purposes involving this incident. In considering credibility, I do not believe that such a failure to report affects in any way the credibility of Gerasimowicz, given his explanation of why he did not immediately report.

Conversely, D.L.'s accounting of the events must be considered in light of what he has at stake. As previously set forth, credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. Gerasimowicz was a credible witness, and from my experience, knowledge, and common observation, I can accept his testimony as probable under the circumstances.

Credibility does not depend on the number of witnesses presented in a matter. Credibility can be determined from the testimony of only one credible witness. The facts of a case can be determined from the testimony of only one credible witness. The facts

of this case can be determined from the testimony of one credible witness, Gerasimowicz, as well as the statement of Moore, and the video evidence.

Finally, to address the issue of the existence or non-existence of a camera on the ceiling of hearing room 12, the witnesses disagreed on whether such a camera existed. However, even if it did exist, there was no footage produced from said camera, and what it may have shown is speculative at best. Hanisak did not obtain video from a camera inside room 12. She did attempt to obtain such a video with a subpoena to Capital Health, but it was not produced. As such, I do not make a negative inference as to respondents or D.L., concerning what the camera in the room, if it existed, may, or may not, have shown.

Therefore, after hearing the testimony of the witnesses, and considering all the documentary reports and other exhibits in evidence, I make the following **FINDINGS OF FACT**: D.L. has worked for the State of New Jersey since 1996. He has been with the Department of Corrections since 1998. He began working at Anne Klein in 2002.

M.F. is a patient at Ann Klein. He has broad-spectrum autism, and he receives services from DDD. M.F. also has SIB behavior which is a self-injurious type of behavior. M.F. had a history of assaults with hospital staff, and he was under the care of a behavior plan.

Ann Klein staff are trained in de-escalation, which includes incidents of spitting. There are five techniques that are used, and in the instance of spitting, staff are instructed that nothing is to be put on a patient's face. Staff get classes and updates on their training. There is an annual life, safety class that all employees receive, and in the training, abuse is discussed. A teaching guide is used which discusses therapeutic options. Staff are advised that the first option in a volatile encounter is always to retreat and deflect. It is the duty of staff to back up and give an individual space, so they do not feel threatened or intimidated. An additional policy discusses personal defensive and control techniques in aggressive patient situations and emergencies. In this policy, staff are taught about holds that are allowed to be used to control a patient. These control

techniques should only be used when other less intrusive or more therapeutic techniques have been exhausted and cannot ensure the safety of the person or others.

D.L. received multiple training sessions beginning in 2010. Techniques for spitting are taught to staff and are part of the therapeutic options. An annual life safety course is given each year. Abuse and the reporting of abuse are covered in that course. Advanced emergency holds are also taught annually, as are techniques to de-escalate situations. As an MSO for many years, D.L. has been trained that threatening to strike a patient is abuse, and that physical injury is not required for a finding of abuse.

Ann Klein staff are permitted to put their hand in front of a patient's face, but they are not allowed to touch or put anything directly on the patient's face. In the event of a spitting incident, the proper technique with an angry patient is to always attempt to de-escalate, and then to use other techniques. If the de-escalation does not work, techniques are taught to de-escalate an individual. When a patient is spitting, employees are taught to remove themselves from the person, or to place a hand up over their face to protect their own face.

D.L. has had numerous encounters with M.F., and he knew M.F. well. M.F. was a one-to-one patient for twenty-four hours a day. On the day of the incident, M.F. was taken to imaging, and at that time he became abusive and was spitting at the technician doing the CAT scan. D.L. helped to get M.F. on the table, and then he stepped out of the imaging room. M.F. was brought back to room 12 by a transporter. M.F. was agitated and handcuffed to the bed. Gerasimowicz went into the room with Moore to assist with a four-point restraint. M.F. threw an object at D.L. At that time, Dossous took a position near M.F.'s left foot. To the left of M.F.'s head was Moore, and to the right of M.F.'s head was D.L. Gerasimowicz was by M.F.'s right foot. In the video, D.L. is shown wearing a hat. Gerasimowicz was holding M.F.'s leg. M.F. tried to spit at D.L. D.L. turned M.F.'s face to the left and struck M.F. in the face. The punch occurred before 10:54:46 hours. When M.F. was struck his body went limp. D.L. used his right hand balled up in a fist to strike M.F. The strike was to M.F.'s face toward the top of his head. Gerasimowicz responded by yelling, "He hit him."

After the incident, Gerasimowicz and D.L. had words. Gerasimowicz told D.L. not to ever do that again, and D.L. told Gerasimowicz that he should want to live a long, healthy life. Gerasimowicz interpreted that to be a threat, stating that he was appalled that D.L. would punch M.F. The two men continued to argue, and Gerasimowicz threw his radio down at 11:03:12 hours. This verbal altercation with D.L. lasted approximately ten minutes.

Gerasimowicz did not report the incident immediately. Instead, he went home to think over what had happened. Gerasimowicz did not have any interactions with D.L. before this incident.

### **LEGAL ANALYSIS**

It is the policy of this State to provide for the protection of individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). The Central Registry is intended to prevent caregivers who become offenders against individuals with developmental disabilities from working with individuals with developmental disabilities. N.J.S.A. 30:6D-73(d).

The purpose of the Central Registry is to assure the health, safety, welfare and freedom from exploitation of individuals with developmental disabilities. N.J.A.C. 10:44D-1.3. Under the Central Registry Act, "abuse" is defined as wrongfully inflicting physical abuse, sexual abuse, or verbal or psychological abuse, or mistreatment by a caregiver upon an individual with a developmental disability. N.J.A.C. 10:44D-1.2.

A "caregiver" is defined as N.J.A.C. 10:44D-1.2 as "a person who receives State funding, directly or indirectly, in whole or in part, or who volunteers to provide services or supports, or both, to an individual with a developmental disability."

Under the Central Registry Act, N.J.S.A. 30:6D-73 (b):

The safety of individuals with developmental disabilities receiving care from State operated facilities or programs . . .

licensed contracted or regulated by the Department of Human Services or from State-funded community-based services shall be of paramount concern.

The Act is designed to prevent, neglect, abuse, and exploitation of developmentally disabled individuals by prohibiting employment of those responsible for such conduct in the Division of Developmental Disabilities, its facilities, and programs. N.J.A.C. 10:44D. "The primary concern of all providers of services to individuals with developmental disabilities, who are vulnerable to abuse, neglect and exploitation, shall be to assure the safety, health, welfare and freedom from exploitation of the individual with a developmental disability." N.J.A.C. 10:44D-1.3.

The determination of whether a caregiver is a substantiated perpetrator of abuse, neglect, or exploitation involves two inquiries: 1) did the caregiver cause the type of injury, risk of injury, or harm to a service recipient that may constitute abuse, neglect or exploitation; N.J.S.A. 44D:2.1; and 2) if so, did the caregiver act intentionally, recklessly, or with careless disregard to the well-being of the service recipient resulting in an injury to an individual with a developmental disability or by exposing the latter to a potentially injurious situation; N.J.S.A. 10:44D-4.1.

"Abuse" is defined as "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability." N.J.A.C. 10:44D-1.2.

Under the Act, physical abuse is defined as "a physical act directed at an individual with a developmental disability by a caregiver of a type that causes one or more of the following: pain, injury, anguish or suffering. Such acts include but are not limited to, being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, or struck with a thrown or held object." N.J.S.A. 30:6D-74. A non-physical act that "demeans, intimidates or humiliates" an individual with a developmental disability which exposes the individual to a "potentially injurious situation" also constitutes abuse and subjects the abuser to placement on the Central Registry. Id. The caregiver must have "acted with intent, recklessness or careless disregard to cause or potentially cause injury . . . ." N.J.S.A. 30:6D-77(b)(1). The regulation defines each mental state:

1. Acting intentionally is the mental resolution or determination to commit an act.
2. Acting recklessly is the creation of a substantial and unjustifiable risk of harm, to others by a conscious disregard for that risk.

Acting with careless disregard "is the lack of reasonableness and prudence in doing what a person ought not to do, or not doing what ought to be done." N.J.A.C. 10:44D-4.1(b).

Here, D.L. directed a physical act at M.F., an individual with a developmental disability. D.L. was a caregiver, and the physical act was of a type that caused one or more of the following: pain, injury, anguish or suffering. D.L. committed one or more of the prohibited physical acts by punching, and/or hitting M.F. Anne Klein policies do not require physical injury for a finding of abuse, and so an analysis or proof of whether or not M.F. suffered scratches to his face as a result of the D.L.'s punch, or if they were self-inflicted, is not required. As such, **I CONCLUDE** that the respondents have proven, by a preponderance of the evidence, that D.L. committed an act of abuse against patient M.F., and therefore, that appellant's name should be placed on the Central Registry.

As to the Civil Service charges, appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a wrongful act related to his 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 Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (situation omitted). Stated differently, 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, 275 (1958). See also, Lowe v Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

As to the charge of “Conduct Unbecoming a Public Employee,” the law is well established. “Conduct unbecoming a public employee” is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 152 N.J. at 555 (quoting In re Zeber, 398 Pa. 35, 43, 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)).

Conduct unbecoming is grounds for discipline under N.J.A.C. 4A:2-2.3(a)(6). The New Jersey Supreme Court noted that the phrase “unbecoming conduct” is an elastic one that has been defined as “any conduct which adversely affects . . . morale or efficiency . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” Karins, 152 N.J. at 554. A finding of misconduct need not “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, 258 N.J. Super. at 40.

D.L.’s conduct against M.F. was unbecoming a public employee, and I so **CONCLUDE**. Patient abuse would certainly be the type of action which would tend to destroy public respect in the delivery of governmental services. By his actions in neglecting his duties as to M.F., appellant has violated the implicit standard of good

behavior which he was required to follow, as one who stands in the public eye. Anne Klein has carried its burden of proof, by a preponderance of the evidence, on this issue.

As to the charge of violating Administrative Order 4:08 C3, Physical or mental abuse of a patient, client or resident, and the charge of violating Administrative Order 4:08 C5, Inappropriate physical contact or mistreatment of a patient, client, resident or employee, physical abuse is defined as, "a physical act directed at a client, patient or resident of a type that could tend to cause pain, injury, anguish, and/or suffering." (R-12 at DHS248). Examples of physical acts directed towards a client, patient, or resident include, but are not limited to, kicking, biting, punching, slapping, hitting, pushing, dragging, and striking with a thrown or held object. Ibid. DOH maintains a zero-tolerance policy for physical abuse: a single offense requires removal. Id. at DHS193.

The undisputed evidence and testimony show that D.L.'s conduct fits within respondent's definition of abuse. Gerasimowicz saw D.L. punch patient M.F. Respondent's policy on patient abuse does not require any physical injury to support a finding of abuse. D.L. committed abuse because he committed a physical act directed at a patient that could tend to cause pain, injury, anguish, and/or suffering. There is no circumstance where punching a patient does not cause pain, injury, anguish, or suffering. Likely, punching a patient satisfies all four of those descriptions.

D.L.'s conduct against M.F. constituted physical or mental abuse of a patient, client or resident, as well as inappropriate physical contact or mistreatment of a patient, client, resident or employee, and I so **CONCLUDE**. The respondent has carried its burden of proof, by a preponderance of the evidence, on this issue.

### 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 Dev. 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.

D.L. testified that he has not had any prior major discipline, and the penalty of removal is substantial. But I am satisfied that D.L.'s actions herein were sufficiently egregious. D.L.'s conduct against M.F. constituted physical or mental abuse of a patient, client or resident, as well as inappropriate physical contact or mistreatment of a patient, client, resident or employee. That conduct led to an unacceptable outcome. Such conduct from an employee in the position of D.L. is unacceptable. It is impossible to see how the respondent could continue to allow D.L. to remain in his position. The removal was necessary to maintain the diligence and integrity of the respondent's staff.

The removal of D.L. is not inappropriate. Serious breaches or conduct unbecoming can result in termination. The action by Ann Klein was acceptable.

### **DISPOSITION**

**I CONCLUDE** that Ann Klein has met its burden of proof and has established that appellant did abuse patient M.F., a resident patient of the facility. Ann Klein has proven the appellant inappropriately abused M.F., and that this conduct was unbecoming a public employee. Ann Klein has also sustained its burden of proof as to the charge of physical or mental abuse of a patient, client or resident, as well as inappropriate physical contact or mistreatment of a patient, client, resident or employee. In addition, DOH has proven that D.L. committed an act of abuse against patient M.F., and therefore, that appellant's name should be placed on the Central Registry.

Accordingly, I **CONCLUDE** that the removal of D.L. from his position as an MSO was justified and warranted, and I **ORDER** that the action of Ann Klein is **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

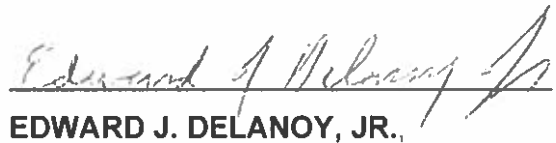
Pursuant to N.J.A.C. 1:1-17.8, upon rendering his final decision, the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

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 OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY, 222 South Warren Street, 4<sup>th</sup> Floor, PO Box 700, Trenton, NJ 08625-0700**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 4, 2024

DATE

  
\_\_\_\_\_

**EDWARD J. DELANOY, JR.,**

Deputy Director and ALAJ

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

EJD/cb

**APPENDIX**

**WITNESSES**

**For petitioner/appellant**

Milot Dossous  
D.L.

**For respondent**

Sandi Ferguson  
Nachelle Bolden  
Kylie Hanisak  
Alec Gerasimowicz

**EXHIBITS**

**For petitioner/appellant**

None

**For respondent**

- R-1 Not in evidence
- R-2 Not in evidence
- R-3 Central Registry Letter
- R-4 Ms. Bolden's investigative report
- R-5 Photographs of injuries
- R-6 LMS training records
- R-7 Therapeutic options training guide
- R-8 Policy on personal defensive and control techniques
- R-9 Administrative order 2:05
- R-10 Administrative bulletin 3:18
- R-11 Central Registry Regulation
- R-12 Disciplinary Action Administrative Order 408
- R-13 M.F.'s Admission Face Sheet

- R-14 M.F.'s Master Treatment Plan and Treatment Plan Review
- R-15 Progress notes
- R-16 Not presented
- R-17 Behavior plan
- R-18 Guardianship document
- R-19 Unusual Incident Reporting and Management System search
- R-20 Incident Report
- R-21 Observation and patient discharge instructions
- R-22 Capital Health record
- R-23 Division of Developmental Disabilities letter of eligibility
- R-24 Department of Health subpoena
- R-25 Video of incident
- R-26 Three attempted interviews of M.F. and written statements of Mr. Dossous and D.L.
- R-27 Ann Klein Forensic Center incident report
- R-28 Ann Klein Forensic Center information for CIMU UIRMS input

**For Tribunal**

- R-1 Final Notice of Disciplinary Action, dated March 1, 2019
- R-2 Preliminary Notice of Disciplinary Action, dated July 20, 2018



**PHILIP D. MURPHY**  
*Governor*

**TAHESHA L. WAY**  
*Lt. Governor*

**State of New Jersey**  
**Department of Human Services**  
**Office of Program Integrity and Accountability**  
**P.O. Box 700**  
**Trenton, NJ 08625-0700**

**SARAH ADELMAN**  
*Commissioner*

**DEBORAH ROBINSON**  
*Director*

**FINAL AGENCY DECISION**

**D.L.,**

Petitioner,

v.

**DEPARTMENT OF HUMAN SERVICES,**

Respondent.

OAL DKT. NO. HSL 04079-19

AGENCY DKT. NO. DRA #19-

002

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**William A. Nash, Esq.,** for petitioner/appellant, D.L. (Nash Law Firm, LLC, attorneys)

**Caroline Gargione,** Deputy Attorney General, for respondent, Department of Human Services (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: November 21, 2023

Decided: January 4, 2024

BEFORE **EDWARD J. DELANOY, JR.,** Deputy Director and ALAJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On July 20, 2018, Ann Klein issued a Preliminary Notice of Disciplinary Action to D.L. setting forth charges, which were later appealed in the CSV case, to the Office of Administrative Law (OAL). On August 22, 2018, Appellant D.L., a Senior Medical Security Officer (“MSO”) for Ann Klein Forensic Center (“Ann Klein”), was advised by the Department of Health (“DOH”), by letter, that his name would be placed on the Central Registry of Offenders against Individuals with Developmental Disabilities based on the findings that his actions meet the statutory criteria for abuse as stipulated in N.J.S.A. 30:6D-73 et seq. Specifically, on February 21, 2018, it was reported and subsequently substantiated through a DOH investigation that he abused an individual receiving services from the Division of Developmental Disabilities. Specifically, the investigation determined that on February 21, 2018, he was witnessed holding an individual’s face and then punching the individual on the side of his face. D.L.’s actions demonstrate recklessness and careless disregard for the health,

safety and well-being of the individual served. D.L.'s actions placed the person served at risk of serious harm. Appellant requested a hearing, and the matters were transmitted to the OAL, where the HSL (Central Registry of Offenders Against Individuals with Developmental Disabilities) case was filed on March 22, 2019, and the CSV case was filed on March 28, 2019, for determination as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The cases were consolidated for hearing by Order of Consolidation dated June 20, 2019 ("Order"). The Order also found that the Department of Human Services would have the predominant interest in these consolidated cases. A Confidentiality and Protective Order was entered on July 16, 2019, and a second Confidentiality and Protective Order was entered on May 19, 2020. The hearing was held on March 7, April 25, and May 10, 2023. Timely post hearing submissions were received on behalf of appellant and respondents, and accordingly on November 21, 2023, the record closed. An initial Order of Extension was granted to the Director of the Office of Program Integrity and Accountability extending the date on which to file a Final Agency Decision until April 4, 2024.

At issue is whether respondents have proven the charges by a preponderance of the credible evidence, and if proven, whether the penalties are justified and reasonable. The Order of Consolidation dated June 20, 2019 found that the Department of Human Services would have the predominant interest in these consolidated cases. As such, the Initial Decision in these cases were filed with the Director of the Office of Program Integrity and Accountability to write the Final Agency Decision in the Central Registry matter. The matters pertaining to the CSV charges that are not pertinent to Central Registry and will not be discussed in this decision. The Director of the Office of Program Integrity and Accountability will forward the record, including the Initial Decision and her Final Agency Decision, to the Civil Service Commission, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

### **INITIAL DECISION'S FACTUAL DISCUSSION**

#### **Testimony**

##### **For respondent**

**Sandi Ferguson** has been a Program Specialist 4 since 2018. From 1989 to 2018, she was head of training and staff development. Ferguson oversees the training of MSOs, and she is familiar with Ann Klein policies and the Central Registry. She has been involved with the Central Registry since 2017. Ferguson defined abuse as hitting, punching, dragging and or neglecting a patient. In addition, threatening a patient, or verbal and/or psychological abuse is covered in their training.

Staff are trained in de-escalation, which includes incidents of spitting. There are five techniques that are used, and in the instance of spitting, staff are instructed that nothing is to be put on a patient's face. Employees get classes and updates on their training. There is an annual life safety class that all employees receive, and in the training, abuse is discussed. A teaching guide is used which discusses therapeutic options. (R-7.) The first option in a volatile encounter is always to retreat and deflect. It is the duty of staff to back up and give an individual space, so they do not feel threatened or intimidated. While staff do not get this document, the information is provided to the staff. An additional policy discusses personal defensive and

control techniques in aggressive patient situations and emergencies. (R-8.) In this policy, staff are taught about holds that are allowed to be used to control a patient. (R-8 at DHS 184.) These control techniques should only be used when other less intrusive or more therapeutic techniques have been exhausted and cannot ensure the safety of the person or others. In addition, there is an unusual incident reporting and management system (R-9), that was in place at the time of the incident herein. There is also a policy and procedure for reporting and investigating allegations of patient abuse and professional misconduct. (R-10.) In this policy, abuse is defined as, "any act, omission or non-action in which an employee engages with service recipients that does not have as its legitimate goal, the healthful, proper, and humane care and treatment of the service recipient which causes or may cause physical or emotional harm or injury to a service recipient or deprives a service recipient of his/her rights, as defined by law or Departmental policy." (R-10 at DHS 226.)

D.L. received multiple training sessions beginning in 2010. An annual life safety course is given each year. Abuse and the reporting of abuse are covered in that course. Advanced emergency holds are also taught annually, as are techniques to de-escalate situations. A finding of "successful" indicates that the employee completed the training. D.L. has been an MSO for many years. He has been trained that threatening to strike a patient is abuse, and that physical injury is not required for a finding of abuse. There is a one arm technique taught to the employees, and it involves grabbing or holding onto an arm.

Ferguson agreed that she was not familiar with the incident herein, except that she knew that the patient was spitting and was aggressive. Restraints are considered to be beyond therapeutic techniques. Verbal de-escalations are set forth in the manual, however, once an individual is at the stage of restraint, the manual does not cover how to handle that circumstance. Employees are taught that they may pivot and deflect against an aggressive patient, and that once you are at the stage of restraint, you are no longer retreating. MSO's do not receive training involving a patient who is in bed, however, they are taught how to escape a patient who is grabbing and holding. (R-7 at DHS 160 to 163.) The teaching guide does not cover instances involving spitting. (R-7.) Ferguson stated that techniques for spitting are taught to staff and are part of the therapeutic options. Part of the management system regarding reporting of an incident is that the report should be made immediately if an assault is witnessed, or threats are overheard. (R-9.) Ferguson agreed that there was no program to practice the techniques in which to calm or subdue a patient. However, there was a skills check that employees were required to undertake.

As to the training, employees are not required to attend. (R-6.) Ferguson stated that employees can put their hand in front of a patient's face, but they are not allowed to touch or put anything directly on the patient's face. In the event of a spitting incident, the proper technique with an angry patient is to always attempt to de-escalate, and then to use other techniques. If the de-escalation does not work, techniques that are taught to de-escalate an individual in the standing position can also be used if the individual is in the prone position. When a patient is spitting, employees are taught to remove themselves from the person, or to place a hand up over their face to protect their own face.

**Nachelle Bolden** has been a Quality Assurance Specialist since 2017. Her job involves investigations of abuse, neglect, and exploitation cases, and she has received extensive training in the field. She has handled over 200 cases in her career. Bolden inherited this case from Kylie Hanisak as a reassignment investigation. Bolden reviewed an incident report (R-27), and she advised that D.L. was removed from his position as is typical with these types of investigations.



Bolden also discovered that the patient had a history of assaults and is on the autism spectrum. Bolden was made aware that the patient had scratches on his face (R-15), that the patient had been appointed a guardian (R-18), and that he was under the care of a behavior plan. (R- 17.) The patient has a history of altercations with hospital staff. (R-19.) Records from Capital Health also indicate the patient had scratches on his face from an altercation. (R-22.) Photos of the patient substantiated that there were scratches on the left side of M.F.'s face. (R-5.) Bolden did not know how the scratches came to be on M.F.'s face, or if they were self-inflicted. Bolden did attempt to interview M.F. on three occasions, but he refused each time. (R-26.) Bolden also reviewed M.F.'s orders. (R-16.)

A video of the incident was reviewed. (R-25.) In the video, D.L. is shown wearing a hat. There were other individuals in the room with D.L. and M.F. at the time of the alleged incident. They were Alec Gerasimowicz, Milot Dossous, and Rannan Moore. (R-4 at DHS 28.) Bolden interviewed Dossous, who stated that M.F. was aggressive, and that D.L. positioned his hand on M.F.'s face, thus redirecting M.F.'s position, to prevent further spitting. (R-4 at DHS 36.) Dossous denied witnessing D.L. strike M.F. (R-4 at DHS 37.) Bolden interviewed Gerasimowicz, who stated that D.L. punched M.F. on the right side of M.F.'s face, at which time Gerasimowicz told D.L. not to ever do something like that again while Gerasimowicz was there. (R-4 at DHS 37.) Bolden interviewed Moore who stated that M.F.'s behavior caused D.L. to "go off," and that he heard a "thwack" sound coming from D.L.'s direction. Moore admitted that his head was down, and he could not tell who struck M.F. Moore heard Gerasimowicz respond by yelling, "He hit him." (R-4 at DHS 38.) The incident took place at 11:30 p.m., but it was not reported by Gerasimowicz until 3:52 a.m. the next morning. Bolden agreed that Gerasimowicz was the only individual in the room who witnessed D.L. punch M.F.

Bolden reviewed D.L.'s disciplinary history (R-4 at DHS 40), noting that three prior instances were reviewed, unsubstantiated and closed. On one instance, neglect was substantiated, but the case was administratively reviewed and closed. Bolden also reviewed D.L.'s training. (R-4 at DHS 41.) Bolden agreed that M.F. engages in dangerous behavior, and that he had a history of twenty reported incidents of assaulting others, including cases of biting, spitting, and punching. Finally, Bolden interviewed D.L. He denied punching D.L. in the face. He stated that he took both of his hands and placed them in front of M.F.'s mouth to prevent him from continuing to spit. D.L. reported that while he initially did not make contact, once M.F. attempted to bite him, his hands completely covered M.F.'s face. Bolden found D.L., as well as the other witnesses, to be credible.

Bolden was not involved in determining whether D.L. committed abuse, as Hanisak made that determination. However, Bolden agreed that MSOs cannot use any type of barrier to smother a patient's face, but they may create a shield with their hands, as long as no contact is made. Such behavior would be proper and would not be considered abuse. She also agreed that D.L.'s statements were corroborated by her review of the video of the incident.

**Kylie Hanisak** is an investigator with the Department of Investigations at DOH. She has been involved in approximately 275 investigations since May 2017. Hanisak stated that M.F. refused to be investigated on three occasions. She also found D.L.'s statements to be inconsistent, and therefore, his testimony was not reliable. Hanisak reviewed the video. (R-25.) After concluding her investigation, she substantiated abuse, and found that there was a preponderance of evidence that abuse was committed by D.L. She based her conclusion on several factors: one witness saw D.L. punch M.F., another witness heard a "thwack" sound, and the existence of scratches on M.F.'s face in the pictures. She also indicated that the threat

of abuse on a patient constitutes abuse, and clearly punching a patient would constitute abuse. Hanisak also stated that D.L. agreed that he put his hands on M.F.'s face.

Hanisak agreed that the camera is the best evidence. While one of the witnesses set forth that there was a camera in the room where the incident took place, Hanisak did not confirm that a camera was in room 12 at the time of the incident. Hanisak did not obtain video from a camera inside room 12. Her only effort to obtain such a video was with a subpoena to Capital Health.

Hanisak set forth that M.F. has broad-spectrum autism and that he receives services from DDD. There are a number of patients at Ann Klein with DDD. Hanisak was unsure what training the staff received in handling DDD patients. M.F. also has self-injurious behavior (SIB). Hanisak agreed that M.F. could have scratched himself during an altercation. M.F. had a history of twenty such incidents of SIB. Hanisak only interviewed one person herself, Mr. Gill. Hanisak stated that none of the witnesses observed D.L. scratch M.F., and that the scratches were on the left side of his face. The only person who saw a punch was Alec Gerasimowicz, who said he saw D.L. punch M.F. on the right side of his face. However, M.F. had no bruising on that side of his face. Mr. Gill did not see D.L. punch or scratch M.F. M.F. was agitated at the time of the incident. There were four people attempting to restrain him. He was resisting and spitting. Hanisak did not know about any spitting policies that existed at the facility. She did not receive any therapeutic options training. Gerasimowicz stated that he saw D.L. punch M.F. on the right side of his face, but there was no evidence of a punch on M.F.'s right side. Hanisak agreed that Alec Gerasimowicz was the only individual involved with restraining M.F. that actually saw the punch by D.L. Hanisak agreed that Gerasimowicz did not immediately go to a supervisor and that no 911 call was made. Gerasimowicz reported the incident to someone at the reception desk, but he never made a formal report about a punch. In addition, Gerasimowicz did not prepare a written statement. Mr. Moore was interviewed, and he stated that he heard a thwack sound, but did not see a punch or a scratch. He did hear Gerasimowicz say that he hit him. Hanisak did not determine if there was any bad blood between Gerasimowicz and D.L. Hanisak was told by D.L. that the doctor questioned M.F. if he was hit or punched, and M.F. responded that he was not. (R-4 at 43.) Hanisak did not follow up to determine who the doctor was. Hanisak was told by Dossous that there was a surveillance camera in the room. (R-4 at 36.) Hanisak agreed that she did not see D.L. punch M.F. in the video.

**Alec Gerasimowicz** has been an investigator for the Mercer County Sheriff's Office for the last year. He was a security officer employed by Capital Health at the time of the incident.

Gerasimowicz knew M.F. M.F. took a liking to Gerasimowicz. Gerasimowicz enjoyed M.F.'s company. Gerasimowicz knew D.L. as a result of the incident. Gerasimowicz had no previous interactions with D.L. D.L. was a medical guard at the time of the incident. Gerasimowicz recalled M.F. returning from testing. M.F. was agitated and handcuffed to the bed. Gerasimowicz went into the room with Moore to assist with a four-point restraint. M.F. threw an object at D.L. Gerasimowicz was holding M.F.'s leg. M.F. tried to spit at D.L. D.L. turned M.F.'s face to the left and struck M.F. in the face. Gerasimowicz spoke to an investigator about the incident but was never asked for a written statement. Gerasimowicz reviewed the video tape of the incident, and while he agreed that a punch could not be seen, he stated that the punch occurred before 10:54:46 hours. When M.F. was struck his body went limp. D.L. used his right hand balled up in a fist to strike M.F. The strike was to M.F.'s face toward the top of his head. After the incident, Gerasimowicz and D.L. had words, Gerasimowicz told D.L. not to ever do

that again, and D.L. told Gerasimowicz that he should want to live a long, healthy life. Gerasimowicz interpreted that to be a threat, stating that he was appalled that D.L. would punch M.F. The two men continued to argue, and Gerasimowicz stated that he could be seen throwing his radio on the video at 11:03:12 hours. Gerasimowicz agreed that he did not report the incident immediately. Instead, he went home to think over what had happened. Gerasimowicz was not disciplined for not immediately reporting the incident. Gerasimowicz stated that he has only been disciplined one time in his career for wearing earrings. Gerasimowicz has never been disciplined for abuse. Gerasimowicz stated that room 12 did not have a camera. It was a crisis intervention room. Gerasimowicz had been in this room approximately two times each shift for one and a half years. Gerasimowicz did not have any interactions with D.L. before this incident. Gerasimowicz's job was to assist anyone in Capital Health who needed help. Gerasimowicz stated that the verbal altercation with D.L. lasted approximately ten minutes.

On cross examination, Gerasimowicz admitted that he was not 100 percent sure that room 12 did not have a camera. Gerasimowicz stated that there were four people in the room at the time of the incident. Gerasimowicz admitted that no one else reacted to D.L.'s punch. D.L. used his right hand and Gerasimowicz was unsure if D.L. was wearing a ring at the time. M.F. was not normally an aggressive patient, but he was spitting at the time of the incident. M.F. was not kicking, but he was resisting. D.L. punched M.F. at 10:54:50 hours. Gerasimowicz agreed that he did not report the strike to anyone, and he did not ask anyone to check on M.F.'s face or for any injuries thereto. Gerasimowicz did tell his boss, Lieutenant Quintine, about what occurred before he left for the day. Gerasimowicz concluded by saying he was upset, angry and anxious about what happened to M.F. It was a stressful situation as he prioritizes safety for all patients. Other people were aware of what happened because Gerasimowicz made it known to others that the incident had occurred.

#### For Respondent

**Milot Dossous** has worked for the State of New Jersey at Ann Klein since 2003. He is a coworker with D.L. and was D.L.'s senior officer. He has observed D.L. over the years and has watched patients spit, punch, and throw things at D.L. It is not unusual for a patient to become aggressive with the staff, and it occurs on a daily basis.

On the day of the incident, Dossous was assigned to Capital Health, and he was tasked to watch M.F. Dossous was working alongside D.L. Dossous described room 12 where the incident occurred as square with a camera in the middle of the ceiling, looking down at the patient in the room at the time.

M.F. returned from his scan in an agitated state. When M.F. was brought into room 12, Dossous took a position near the patient's left foot. To the left of the patient's head was a Capital Health security officer, and to the right of M.F.'s head was D.L. Gerasimowicz was by the patient's right foot. M.F. kicked Gerasimowicz, and Dossous heard Gerasimowicz say, "Don't ever do that again." At no time did D.L. punch or assault M.F. M.F. was spitting at everyone in the room, and he was angry with all the workers. D.L. correctly redirected M.F.'s face as he was trained to do. Dossous did not observe any bruising on M.F.'s face. Dossous did not overhear D.L. threaten Gerasimowicz nor did he hear Gerasimowicz threaten. D.L. After the incident occurred, D.L. and Gerasimowicz were talking about the spitting by M.F. Dossous believed that D.L. was being accused of something and he told D.L. to let it go, stating that their job is to watch the patient. The incident arose because Gerasimowicz had gotten kicked, and he was upset. The kick caused Gerasimowicz to kneel on one knee on the floor. At that

point, Gerasimowicz told M.F. to never do that again. Dossous noticed scratches on D.L.'s face several hours after the incident.

Dossous stated that he observed D.L. redirect M.F.'s face with D.L.'s right hand. He did this by using a flat hand placed just above the jawline. After being redirected, M.F. stopped spitting.

Dossous agreed that he did not put anything in his statement about M.F. kicking Gerasimowicz. He also agreed that no matter what names M.F. was calling D.L., D.L. was never permitted to strike a patient. Dossous also agreed that while D.L. was in the doorway talking to Gerasimowicz, he should have been watching his patient. He told D.L. to let them investigate the fact that Gerasimowicz had been kicked by M.F. He agreed that this would be unusual as an investigation usually entails an incident where a worker has assaulted a patient.

D.L. has worked for the State of New Jersey since 1996. He has been with the Department of Corrections since 1998. He began working at Ann Klein in 2002. He has not had any major discipline in that time.

D.L. worked at Capital Health hundreds of times before this incident, and he has been in room 12 on ten or more occasions. There is a camera in the room, it is on the ceiling over top of the bed.

D.L. has had numerous encounters with M.F., and he knew M.F. well. M.F. was a one-to-one patient for twenty-four hours a day. Upon arriving in room 12, D.L. did a security check for contraband. M.F. was taken to imaging, and at that time, he became abusive and was spitting at the technician doing the CAT scan. D.L. helped to get M.F. on the table, and then he stepped out of the imaging room. M.F. was brought back to room 12 by a transporter. When they arrived in room 12, M.F. was calling D.L. the "N" word, but this was not the first time. There are many other patients at Ann Klein with similar behaviors to M.F. This type of behavior happens regularly to all the officers. D.L. had never reacted negatively in the past to such a misbehaved patient. D.L. and Dossous had/have no relationship other than that they work together.

D.L. stated that he had been suffering from liver cancer and had physical issues at the time of the incident. He was unable to grow fingernails as a result of his cancer. At 10:54:53 on the video, D.L. testified that M.F. kicked Gerasimowicz and Gerasimowicz fell backward, but he did not take a knee.

D.L. stated that he never punched M.F. in the face. He knows that punching a patient is prohibited, and that it constitutes abuse. M.F.'s spitting did not bother him. It is normal and occurs often. It did not make D.L. mad or angry. D.L. did not put his hand over M.F.'s face. Instead, he used a technique where he puts his hand across a patient's chin to redirect their face. D.L. used the back part of his hand under M.F.'s chin. He placed his hand on the right side of M.F.'s face and pushed M.F.'s face away from him. D.L. had no issues with Gerasimowicz prior to the incident. After the incident, D.L. was not shouting at Gerasimowicz. Instead, D.L. was trying to explain to Gerasimowicz that the patient was his responsibility as he was the senior officer. At no time did D.L. threaten Gerasimowicz. D.L. did hear Gerasimowicz say, "Don't ever do that again," but he believed it was because of the kick delivered by M.F. to Gerasimowicz. The doctor came to the facility at approximately 3:00 a.m. the next morning. He asked M.F. if anyone hit him and M.F. said no.

D.L. has worked with Dossous approximately fifteen to twenty times. In his written statement, D.L. stated that he did not put his hand on M.F. He agreed that he said he put his hand in front of M.F.'s face. D.L. also agreed that he stated that his hands completely covered M.F.'s face. D.L. did not tell anyone about M.F. kicking Gerasimowicz. After the incident, D.L. was not threatening Gerasimowicz. Gerasimowicz stated that it was his hospital and therefore they were to proceed by his rules. D.L. disagreed, stating that he was the senior officer responsible for the patient. In the video, D.L. stated that he and Gerasimowicz can be seen continuing to discuss which of the officers oversaw the handling of M.F. D.L. agreed that if the patient is a one-to-one, he must keep his eye on the patient. If the patient is a two-to-one, he is not required to always watch the patient.

### **INITIAL DECISION'S FINDINGS OF FACT**

Given that the witnesses have different versions of the events surrounding the incident herein, it is the ALJ's obligation and responsibility to weigh the credibility of the witness in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story 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, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

The respondents' evidence was the testimony of Ferguson, Bolden, Hanisak and Gerasimowicz. The respondents' position is that the appellant's actions warrant removal, and placement of appellant's name on the Central Registry. Appellant had a responsibility to refrain from this type of action. The altercation was sufficiently egregious as to require the removal of appellant, and placement of appellant's name on the Central Registry.

Dossous and D.L. disagreed with the testimony of respondents' witnesses, stating that what actually occurred was that M.F. kicked Gerasimowicz, and in response, Gerasimowicz told M.F. not to ever do that again. At no time did D.L. punch or strike M.F.

In order to judge the credibility of the witnesses, it is imperative to begin with an analysis of how the statements and testimony of the two critical witnesses, D.L. and Gerasimowicz, hold together when viewed in total. Gerasimowicz testimony was consistent with what he stated to investigators during the DOH's internal investigation. He maintained that M.F. spit at D.L., and that D.L. used his left hand to push M.F.'s face away. D.L. then punched M.F. with his right hand. The evidence did not show the existence of any prior issues or bad blood between D.L. and Gerasimowicz. A witness in the room at the time of the incident, Moore, stated that that M.F.'s behavior caused D.L. to "go off," and that he heard Gerasimowicz yell out that D.L. hit M.F. Moore also stated that while he did not see a punch thrown, he did hear a thwack sound. In addition, the photographs do reveal the existence of

scratches on M.F.'s face. All of these items corroborate the version of events as outlined by Gerasimowicz.

In addition, the video of the incident appears to substantiate Gerasimowicz' version of what occurred after the alleged punch of M.F. by D.L. The video reveals that after the incident, Gerasimowicz and D.L. were having what appear to be heated words with each other. The two men can be seen arguing, and Gerasimowicz can be seen throwing his radio on the video, at 11:03:12 hours. This would seemingly contradict D.L.'s testimony that he and Gerasimowicz were simply discussing which of the officers oversaw the handling of M.F.

Conversely, D.L.'s statements to investigators, as well as his testimony at trial, were inconsistent. In D.L.'s initial written statement, he denied placing his hands on M.F. However, during D.L.'s interview with the investigators, he stated that he used both his hands to cover M.F.'s face. Finally, during his testimony, D.L. set forth that he used the back part of his right hand to move M.F.'s face away from where people were standing. These three separate versions of what occurred raise doubts as to the veracity of the facts that D.L. attempts to portray. In addition, according to D.L., he and Dossous had worked together approximately fifteen to twenty times. As such, Dossous and D.L. were familiar with each other. Because of this familiarity, Dossous might have had an interest in testifying favorably for his friend, D.L. And D.L., as the accused, certainly has an interest in painting the facts in a light most favorable to himself.

Also troubling is D.L.'s version of what occurred between himself and Gerasimowicz, after the alleged punch between D.L. and M.F. The video evidence clearly shows D.L. acting in a highly agitated state towards Gerasimowicz. During his testimony, D.L. stated that he was talking to no one in particular at that time. D.L. also did not provide an explanation as to why he continued speaking with Gerasimowicz, after the alleged incident was over. He again claimed that he was talking to no one in particular. Conversely, Gerasimowicz was clear in his testimony that he told D.L. to never do something like that again. In response, D.L. told Gerasimowicz to let it go, and that he should want to live a long and happy life.

Dossous agreed that no matter what names M.F. was calling D.L., D.L. was never permitted to strike a patient. Dossous was clear that while D.L. was in the doorway talking to Gerasimowicz, he should have been watching his patient M.F. However, Dossous' testimony that M.F. kicked Gerasimowicz is questionable, in that Dossous did not give this version of events to investigators in his written statement after the incident. The version of events as outlined by both D.L. and Dossous is therefore less consistent and reliable than the testimony of Gerasimowicz, and the statement of Moore, who advised that he heard a "thwack" sound, and that he heard Gerasimowicz say, "He hit him."

Gerasimowicz was credible, and no evidence was produced as to why he may have been untruthful in his testimony, or that he exaggerated the same. There was no evidence, nor was any detected in the testimony, of any animosity between D.L. and Gerasimowicz. Nothing in the evidence revealed any prior issues between the two men, or that Gerasimowicz was acting in any retaliatory manner toward D.L. Gerasimowicz' testimony must be given at the least a reasonable degree of deference. Nothing in the record supports a determination that he was anything but credible. Gerasimowicz' failure to immediately report the incident is explained in his testimony, where he stated that he was upset, angry and anxious about what happened to M.F. It was a stressful situation for him, as he prioritized safety for all patients. For those reasons, it is likely that he did not report the incident immediately. While such a failure to

report an incident by Gerasimowicz is contrary to rules and regulations, that is a separate potential disciplinary matter that does not concern the ALJ for purposes involving this incident. In considering credibility, The ALJ did not believe that such a failure to report affects in any way the credibility of Gerasimowicz, given his explanation of why he did not immediately report.

Conversely, D.L.'s accounting of the events must be considered in light of what he has at stake. As previously set forth, credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. Gerasimowicz was a credible witness, and from the ALJ's experience, knowledge, and common observation, the ALJ can accept his testimony as probable under the circumstances.

Credibility does not depend on the number of witnesses presented in a matter. Credibility can be determined from the testimony of only one credible witness. The facts of a case can be determined from the testimony of only one credible witness. The facts of this case can be determined from the testimony of one credible witness, Gerasimowicz, as well as the statement of Moore, and the video evidence.

Finally, to address the issue of the existence or non-existence of a camera on the ceiling of hearing(sic) room 12, the witnesses disagreed on whether such a camera existed. However, even if it did exist, there was no footage produced from said camera, and what it may have shown is speculative at best. Hanisak did not obtain video from a camera inside room 12. She did attempt to obtain such a video with a subpoena to Capital Health, but it was not produced. As such, I do not make a negative inference as to respondents or D.L., concerning what the camera in the room, if it existed, may, or may not, have shown.

Therefore, after hearing the testimony of the witnesses, and considering all the documentary reports and other exhibits in evidence, the ALJ made the following **FINDINGS OF FACT**: D.L. has worked for the State of New Jersey since 1996. He has been with the Department of Corrections since 1998. He began working at Anne Klein in 2002.

M.F. is a patient at Ann Klein. He has broad-spectrum autism, and he receives services from DDD. M.F. also has SIB behavior which is a self-injurious type of behavior. M.F. had a history of assaults with hospital staff, and he was under the care of a behavior plan.

Ann Klein staff are trained in de-escalation, which includes incidents of spitting. There are five techniques that are used, and in the instance of spitting, staff are instructed that nothing is to be put on a patient's face. Staff get classes and updates on their training. There is an annual life safety class that all employees receive, and in the training, abuse is discussed. A teaching guide is used which discusses therapeutic options. Staff are advised that the first option in a volatile encounter is always to retreat and deflect. It is the duty of staff to back up and give an individual space, so they do not feel threatened or intimidated. An additional policy discusses personal defensive and control techniques in aggressive patient situations and emergencies. In this policy, staff are taught about holds that are allowed to be used to control a patient. These control techniques should only be used when other less intrusive or more therapeutic techniques have been exhausted and cannot ensure the safety of the person or others.

D.L. received multiple training sessions beginning in 2010. Techniques for spitting are taught to staff and are part of the therapeutic options. An annual life safety course is given each

year. Abuse and the reporting of abuse are covered in that course. Advanced emergency holds are also taught annually, as are techniques to de-escalate situations. As an MSO for many years, D.L. has been trained that threatening to strike a patient is abuse, and that physical injury is not required for a finding of abuse.

Ann Klein staff are permitted to put their hand in front of a patient's face, but they are not allowed to touch or put anything directly on the patient's face. In the event of a spitting incident, the proper technique with an angry patient is to always attempt to de-escalate, and then to use other techniques. If the de-escalation does not work, techniques are taught to de-escalate an individual. When a patient is spitting, employees are taught to remove themselves from the person, or to place a hand up over their face to protect their own face.

D.L. has had numerous encounters with M.F., and he knew M.F. well. M.F. was a one-to-one patient for twenty-four hours a day. On the day of the incident, M.F. was taken to imaging, and at that time he became abusive and was spitting at the technician doing the CAT scan. D.L. helped to get M.F. on the table, and then he stepped out of the imaging room. M.F. was brought back to room 12 by a transporter. M.F. was agitated and handcuffed to the bed. Gerasimowicz went into the room with Moore to assist with a four-point restraint. M.F. threw an object at D.L. At that time, Dossous took a position near M.F.'s left foot. To the left of M.F.'s head was Moore, and to the right of M.F.'s head was D.L. Gerasimowicz was by M.F.'s right foot. In the video, D.L. is shown wearing a hat. Gerasimowicz was holding M.F.'s leg. M.F. tried to spit at D.L. D.L. turned M.F.'s face to the left and struck M.F. in the face. The punch occurred before 10:54:46 hours. When M.F. was struck, his body went limp. D.L. used his right hand balled up in a fist to strike M.F. The strike was to M.F.'s face toward the top of his head. Gerasimowicz responded by yelling, "He hit him."

After the incident, Gerasimowicz and D.L. had words. Gerasimowicz told D.L. not to ever do that again, and D.L. told Gerasimowicz that he should want to live a long, healthy life. Gerasimowicz interpreted that to be a threat, stating that he was appalled that D.L. would punch M.F. The two men continued to argue, and Gerasimowicz threw his radio down at 11:03:12 hours. This verbal altercation with D.L. lasted approximately ten minutes.

Gerasimowicz did not report the incident immediately. Instead, he went home to think over what had happened. Gerasimowicz did not have any interactions with D.L. before this incident.

### LEGAL ANALYSIS

It is the policy of this State to provide for the protection of individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). The Central Registry is intended to prevent caregivers who become offenders against individuals with developmental disabilities from working with individuals with developmental disabilities. N.J.S.A. 30:6D-73(d).

The purpose of the Central Registry is to assure the health, safety, welfare and freedom from exploitation of individuals with developmental disabilities. N.J.A.C. 10:44D-1.3. Under the Central Registry Act, "abuse" is defined as wrongfully inflicting physical abuse, sexual abuse, or verbal or psychological abuse, or mistreatment by a caregiver upon an individual with a developmental disability. N.J.A.C. 10:44D-1.2.



A "caregiver" is defined as N.J.A.C. 10:44D-1.2 as "a person who receives State funding, directly or indirectly, in whole or in part, or who volunteers to provide services or supports, or both, to an individual with a developmental disability."

Under the Central Registry Act, N.J.S.A. 30:6D-73 (b):

The safety of individuals with developmental disabilities receiving care from State operated facilities or programs, licensed contracted or regulated by the Department of Human Services or from State-funded community-based services shall be of paramount concern.

The Act is designed to prevent neglect, abuse, and exploitation of developmentally disabled individuals by prohibiting employment of those responsible for such conduct in the Division of Developmental Disabilities, its facilities, and programs. N.J.A.C. 10:44D.

"The primary concern of all providers of services to individuals with developmental disabilities, who are vulnerable to abuse, neglect and exploitation, shall be to assure the safety, health, welfare and freedom from exploitation of the individual with a developmental disability." N.J.A.C. 10:44D-1.3.

The determination of whether a caregiver is a substantiated perpetrator of abuse, neglect, or exploitation involves two inquiries: 1) did the caregiver cause the type of injury, risk of injury, or harm to a service recipient that may constitute abuse, neglect or exploitation; N.J.S.A. 44D:2.1; and 2) if so, did the caregiver act intentionally, recklessly, or with careless disregard to the well-being of the service recipient resulting in an injury to an individual with a developmental disability or by exposing the latter to a potentially injurious situation; N.J.S.A. 10:44D-4.1.

"Abuse" is defined as "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability." N.J.A.C. 10:44D-1.2.

Under the Act, physical abuse is defined as "a physical act directed at an individual with a developmental disability by a caregiver of a type that causes one or more of the following: pain, injury, anguish or suffering. Such acts include but are not limited to, being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, or struck with a thrown or held object." N.J.S.A. 30:6D-74. A non-physical act that "demeans, intimidates or humiliates" an individual with a developmental disability which exposes the individual to a "potentially injurious situation" also constitutes abuse and subjects the abuser to placement on the Central Registry. Id. The caregiver must have "acted with intent, recklessness or careless disregard to cause or potentially cause injury." N.J.S.A. 30:6D-77(b)(1).

The regulation defines each mental state:

1. Acting intentionally is the mental resolution or determination to commit an act.
2. Acting recklessly is the creation of a substantial and unjustifiable risk of harm, to others by a conscious disregard for that risk.

Acting with careless disregard "is the lack of reasonableness and prudence in doing what a person ought not to do, or not doing what ought to be done." N.J.A.C. 10:44D- 4.1(b).

Here, D.L. directed a physical act at M.F., an individual with a developmental disability. D.L. was a caregiver, and the physical act was of a type that caused one or more of the following: pain, injury, anguish or suffering. D.L. committed one or more of the prohibited physical acts by punching, and/or hitting M.F. Anne Klein policies do not require physical injury for a finding of abuse, and so an analysis or proof of whether or not M.F. suffered scratches to his face as a result of the D.L.'s punch, or if they were self-inflicted, is not required. As such, **THE ALJ CONCLUDED** that the respondents have proven, by a preponderance of the evidence, that D.L. committed an act of abuse against patient M.F., and therefore, that appellant's name should be placed on the Central Registry.

#### INITIAL DECISION DISPOSITION

**THE ALJ CONCLUDED** that the Department of Human Services has met its burden of proof and has established that appellant did abuse patient M.F., a resident patient of Ann Klein. The Department of Human Services has sustained its burden of proof as to the charge of physical or mental abuse of a patient, client or resident, as well as inappropriate physical contact or mistreatment of a patient, client, resident or employee. In addition, the Department of Human Services has proven that D.L. committed an act of abuse against patient M.F., and therefore, that appellant's name should be placed on the Central Registry. Accordingly, **THE ALJ ORDERED** that the that appellant's placement on the Central Registry is **AFFIRMED**.

**The ALJ hereby FILED** this Initial Decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering her final decision, the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

## FINAL AGENCY DECISION

### EXCEPTIONS

On January 17, 2024 Respondent D.L.'s attorney entered exceptions to the OAL's determination that D.L.'s name should remain on the Central Registry, stating that the evidence does not support the decision. (Appendix 1). Among the declarations were that the witness A.G. was unbelievable.

- A.G.'s animus against the appellant was sufficient to fabricate false charges against D.L.
- A.G. failed to immediately notify medical staff of the punch to the victim's face.
- A.G. did not recall stating that the appellant hit the victim,
- There might have been a camera inside of the room where the incident occurred.
- A.G. did not recall being disciplined for earlier cell phone use or being kicked in the incident at trial.
- A.G. did not recall to whom he reported the punching incident, hours after it occurred.

On January 24, 2024, the DAG representing the Respondent replied to the Petitioner's exceptions (Appendix 2), asserting that the Initial Decision's placement of D.L. on the Central Registry should be upheld.

- Reciting the ALJ's legal analysis of witness credibility.
- The history of the investigation into the incident.
- The ALJ's analysis each witness's credibility used in his decision.

On January 29, 2024, Respondent D.L.'s attorney entered a reply to the DAG's submission (Appendix 3), stating that the Initial Decision's credibility findings warranted a rejection of the findings

- a punch was so loud to generate a "thwack" sound but was only observed by A.G. and left no bruising.
- Moore heard A.G. respond by yelling, "He hit him." But A.G. did not recall yelling "he hit him."
- The incident took place at 11:30 p.m., but it was not reported by A.G. until 3:52 a.m. the next morning.
- The finding that the evidence did not show any prior issues or "bad blood" between D.L. and A.G.

### **Discussion of the exceptions and reply**

In the almost four pages of the Initial Decision's analysis of the testimony and evidence presented at trial, the ALJ began with the value of the credibility of the witnesses to make his determination. The following is quoted from the Initial Decision with initials substituted for the full names of the witnesses:

"Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story 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, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common

experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

In reviewing A.G.'s testimony, the ALJ found it was consistent with what A.G. stated to investigators during the DOH's internal investigation. A.G. maintained that M.F. spit at D.L., and that D.L. used his left hand to push M.F.'s face away. D.L. then punched M.F. with his right hand. The evidence did not show the existence of any prior issues or bad blood between D.L. and A.G.<sup>1</sup>. A witness in the room at the time of the incident, Moore, stated that that M.F.'s behavior caused D.L. to "go off," and that he heard A.G. yell out that D.L. hit M.F. Moore also stated that while he did not see a punch thrown, he did hear a thwack sound. In addition, the photographs do reveal the existence of scratches on M.F.'s face. All of these items corroborate the version of events as outlined by A.G. The video of the incident appears to substantiate A.G.'s version of what occurred after the alleged punch of M.F. by D.L. The video reveals that after the incident, A.G. and D.L. were having what appear to be heated words with each other. The two men can be seen arguing, and A.G. can be seen throwing his radio on the video, at 11:03:12 hours. This would seemingly contradict D.L.'s testimony that he and A.G. were simply discussing which of the officers oversaw the handling of M.F.

Conversely, D.L.'s statements to investigators, as well as his testimony at trial, were inconsistent. In D.L.'s initial written statement, he denied placing his hands on M.F. However, during D.L.'s interview with the investigators, he stated that he used both his hands to cover M.F.'s face. Finally, during his testimony, D.L. set forth that he used the back part of his right hand to move M.F.'s face away from where people were standing. These three separate versions of what occurred raise doubts as to the veracity of the facts that D.L. attempts to portray. In addition, according to D.L., he and M.D. had worked together approximately fifteen to twenty times. As such, M.D. and D.L. were familiar with each other. Because of this familiarity, M.D. might have had an interest in testifying favorably for his friend, D.L. And D.L., as the accused, certainly has an interest in painting the facts in a light most favorable to himself.

Also troubling in the ALJ's analysis of D.L.'s credibility, is D.L.'s version of what occurred between himself and A.G., after the alleged punch between D.L. and M.F. The video evidence clearly shows D.L. acting in a highly agitated state towards A.G. During his testimony, D.L. stated that he was talking to no one in particular at that time. D.L. also did not provide an explanation as to why he continued speaking with A.G., after the alleged incident was over. He again claimed that he was talking to no one in particular. Conversely, A.G. was clear in his testimony that he told D.L. to never do something like that again. In response, D.L. told A.G. to let it go, and that he should want to live a long and happy life.

M.D. agreed that no matter what names M.F. was calling D.L., D.L. was never permitted to strike a patient. M.D. was clear that while D.L. was in the doorway talking to

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<sup>1</sup> D.L.'s Testimony at ID p. 12 "D.L. had no issues with A.G. prior to the incident. After the incident, D.L. was not shouting at A.G. Instead, D.L. was trying to explain to A.G. that the patient was his responsibility as he was the senior officer. At no time did D.L. threaten A.G." The footnote was NOT a part of the ALJ's original credibility analysis, but was added later as part of the Final Agency Decision.

A.G., he should have been watching his patient M.F. However, M.D.'s testimony that M.F. kicked A.G. is questionable, in that M.D. did not give this version of events to investigators in his written statement, after the incident. The version of events as outlined by both D.L. and M.D. is therefore less consistent and reliable than the testimony of A.G., and the statement of Moore, who advised that he heard a "thwack" sound, and that he heard A.G. say, "He hit him."

A.G. was credible, and no evidence was produced as to why he may have been untruthful in his testimony, or that he exaggerated the same. There was no evidence, nor was any detected in the testimony, of any animosity between D.L. and A.G. Nothing in the evidence revealed any prior issues between the two men, or that A.G. was acting in any retaliatory manner toward D.L. A.G.'s testimony must be given at the least a reasonable degree of deference. Nothing in the record supports a determination that he was anything but credible. A.G.'s failure to immediately report the incident is explained in his testimony, where he stated that he was upset, angry and anxious about what happened to M.F. It was a stressful situation for him, as he prioritized safety for all patients. For those reasons, it is likely that he did not report the incident immediately. While such a failure to report an incident by A.G. is contrary to rules and regulations, that is a separate potential disciplinary matter that does not concern me for purposes involving this incident. In considering credibility, I do not believe that such a failure to report affects in any way the credibility of A.G., given his explanation of why he did not immediately report.

Conversely, D.L.'s accounting of the events must be considered in light of what he has at stake. As previously set forth, credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. A.G. was a credible witness, and from my experience, knowledge, and common observation, I can accept his testimony as probable under the circumstances.

Credibility does not depend on the number of witnesses presented in a matter. Credibility can be determined from the testimony of only one credible witness. The facts of a case can be determined from the testimony of only one credible witness. The facts of this case can be determined from the testimony of one credible witness. A.G., as well as the statement of Moore [in the initial investigation], and the video evidence.

Finally, to address the issue of the existence or non-existence of a camera on the ceiling of hearing (sic) room 12, the witnesses disagreed on whether such a camera existed. However, even if it did exist, there was no footage produced from said camera, and what it may have shown is speculative at best. K.H. did not obtain video from a camera inside room 12. She did attempt to obtain such a video with a subpoena to Capital Health, but it was not produced. As such, I do not make a negative inference as to respondents or D.L., concerning what the camera in the room, if it existed, may, or may not, have shown." Initial Decision pages 12 to 16.

Petitioner has asked the Director of the Office of Program Integrity and Accountability to reverse the Initial Decision of the Office of Administrative Law based upon its allegations that the findings were not supported by credible evidence in the trial evidence. The ALJ, as noted above, carefully and thoroughly reviewed and explained each of the credibility decisions used in this decision. "In administrative proceedings, no agency head may reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record, under N.J. Stat.

Ann. § 52:14B-10(c)." In re Frank, 2007 N.J. Super. LEXIS 236 (App.Div. July 12 2007). The ALJ's credibility findings are not arbitrary, capricious or unreasonable and they are supported by sufficient, competent, and credible evidence in the record.

The ALJ considered the credibility of each of the witnesses who appeared at trial. His analysis cited two respected cases for guidance: "In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience." Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). "Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness." In re Perrone's Estate, 5 N.J. 514. The ALJ determined that the Petitioner's "statements to investigators, as well as his testimony at trial, were inconsistent." However, the ALJ found that "A.G. was credible, and no evidence was produced as to why he may have been untruthful in his testimony, or that he exaggerated the same. There was no evidence, nor was any detected in the testimony, of any animosity between D.L. and A.G. Nothing in the evidence revealed any prior issues between the two men, or that A.G. was acting in any retaliatory manner toward D.L. A.G.'s testimony must be given at the least a reasonable degree of deference. Nothing in the record supports a determination that he was anything but credible." The allegation that A.G. falsified his testimony in any way against D.L., was not proven at trial.

The review of an Initial Decision of the OAL by an agency head is not equivalent to the review of appellate courts, however, their opinions are instructive as to considering the credibility of witnesses' testimony at trial. Several New Jersey cases demonstrate the deference that courts pay to first hand credibility judgements, fact finding, and evidentiary support. Among them:

**New Jersey Div. of Youth and Family Services v. E.P.** "We will not disturb the family court's decision to terminate parental rights when there is substantial credible evidence in the record to support the court's findings. 7 *In re Guardianship of J.N.H.*, 172 N.J. 440, 472, 799 A.2d 518 (2002). We ordinarily defer to the factual findings [\*\*\*32] of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a "feel of the case" that can never be realized by a review of the cold record. *N.J. Div. of Youth & Family Servs. v. M.M.*, 189 N.J. 261, 293, 914 A.2d 1265 (2007) (internal quotation marks omitted). Only when the trial court's conclusions are so "clearly mistaken" or "wide of the mark" should an appellate court intervene and make its own findings to ensure that there is not a denial of justice. *N.J. Div. of Youth & Family Servs. v. G.L.*, 191 N.J. 596, 605, 926 A.2d 320 (2007); see also *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484, 323 A.2d 495 (1974). New Jersey Div. of Youth and Family Services v. E.P., 196 N.J. 88, 104

**Reese v. Weis** "In our review, we are obliged to accord deference to the trial judge's credibility [\*\*\*19] determinations. *Cesare, supra*, 154 N.J. at 412, 713 A.2d 390. Such deference is appropriate because the trial judge has "a feel of the case" and is in the best position to "make first-hand credibility judgments about the witnesses who appear on the stand[.]" *N.J. Div. of Youth & Family Servs. v. E.P.*, 196 N.J. 88, 104, 952 A.2d 436 (2008) (internal quotation marks and [\*568] citation omitted). "When the credibility of witnesses is an important factor, the trial court's conclusions must be given great weight and must be accepted by the appellate court unless clearly lacking in reasonable support." *N.J. Div. of Youth & Family Servs. v. F.M.*, 375 N.J. Super. 235, 259, 867 A.2d 499 (App.Div.2005)

(citing *In re Guardianship of D.M.H.*, 161 N.J. 365, 382, 736 A.2d 1261 (1999)). Consequently, when a reviewing court concludes there is satisfactory evidentiary support for the trial court's findings, "its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." *Beck v. Beck*, 86 N.J. 480, 496, 432 A.2d 63 (1981) (quoting *State v. Johnson*, 42 N.J. 146, 161-62, 199 A.2d 809 (1964))." *Reese v. Weis*, 430 N.J. Super. 552, 567-568

**In re Return of Weapons to J.W.D.** "Ordinarily, an appellate court should accept a trial court's findings of fact that are supported by substantial credible evidence. *Bonoco Petrol, [\*117] Inc. v. Epstein*, 115 N.J. 599, 607, 560 A.2d 655 (1989). Deference to a trial court's fact-findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility. *Ibid*. Thus, an appellate court should not disturb a trial court's fact-findings unless those findings would work an injustice. *Rova Farms [\*\*\*18] Resort v. Investors Ins. Co.*, 65 N.J. 474, 483-84, 323 A.2d 495 (1974)." *In re Return of Weapons to J.W.D.*, 149 N.J. 108, 116-117

The above cited cases stress the importance of the trial judge's conclusions about credibility and the deference that should be given to those conclusions. In reviewing the exceptions put forth by the Petitioner, the credibility determinations made by the ALJ, and the reasoning behind them are reasonable. There is satisfactory evidence to support the ALJ's findings.

### **CONCLUSION**

The Initial Decision properly assessed the evidence in the record. The ALJ properly weighed the evidence in the record and acted within his proper discretion in making credibility determinations, findings of fact and conclusions of law. In all, the preponderance of the evidence showed that Petitioner committed an act of abuse against an individual with developmental disabilities under the Central Registry Act and its rules and regulations. D.L. acted with intention, recklessness, or a disregard for M.F.'s safety. As such, the Director should affirm the Initial Decision and uphold Petitioner's placement on the Central Registry due to committing physical abuse.

### **FINAL AGENCY DECISION**

Pursuant to N.J.A.C. 1:1-18.1(f) and based upon a review of the ALJ's Initial Decision and the entirety of the OAL file, including submissions and transcripts; I concur with the Administrative Law Judge's findings and conclusions. The ALJ had the opportunity to assess the credibility and veracity of the witnesses. I defer to the ALJ's opinions concerning these matters, based upon the extremely detailed and well-reasoned observations described in the Initial Decision, by the ALJ. The Petitioner's exceptions to the Initial Decision fell short, failing to identify any flaws in the evidence, credibility evaluations, legal or logical interpretations – merely disagreeing with the well-reasoned credibility assessments explained by the ALJ. The Respondent's exceptions were comprehensive and coherent, explaining the credible evidence as it applied to the elements of the Central Registry statute and regulations.

**I CONCLUDE and AFFIRM** that the Department has met its burden of proving by a preponderance of the evidence that D.L. committed acts of abuse against M.F., an individual with developmental disabilities. Abuse is defined as "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse, or verbal or psychological abuse or mistreatment by a caregiver upon

an individual with a developmental disability.” N.J.S.A. 30:6D-74; N.J.A.C. 10:44D-1.2. I **CONCLUDE and AFFIRM** that D.L.’s conduct in the incident was intentional, reckless, and/or with careless disregard. I **CONCLUDE and AFFIRM** that D.L. acted against the individual protected by N.J.S.A. 30:6D-73. I **CONCLUDE and AFFIRM** that D.L.’s placement on the Central Registry is appropriate.

Pursuant to N.J.A.C 1:1-18.6(d), it is the Final Decision of the Department of Human Services that I **ORDER** the placement of D.L.’s name on the Central Registry of Offenders Against Individuals with Developmental Disabilities, having intentionally committed a physically abusive act against M.F.

Date: 4/3/2024

*Deborah L Robinson*  
Deborah Robinson, Director  
Office of Program Integrity and Accountability

Attachments:

- Appendix 1
- Appendix 2
- Appendix 3