

IN THE MATTER OF THE TENURE :  
HEARING OF ANDREW GALL, : COMMISSIONER OF EDUCATION  
NEW JERSEY STATE DEPARTMENT : DECISION  
OF HUMAN SERVICES, NEW LISBON :  
DEVELOPMENTAL CENTER. :  
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### SYNOPSIS

The New Jersey State Department of Human Services (DHS) certified tenure charges of unbecoming conduct against respondent – a tenured teacher in an institution for the developmentally disabled – for allegedly committing physical abuse of a resident client following an unprovoked attack on respondent by the client. Respondent contends that he struck the client in self defense after he received a blow to his chest, near his implanted defibrillator.

The ALJ adopted the parties’ stipulation of facts, and found that there were internal inconsistencies in the testimony of petitioner’s two witnesses, but that respondent’s testimony was credible. The ALJ concluded that respondent’s reflexive action to protect himself does not constitute client abuse; that respondent’s testimony that he did not intend to strike the client, but to shield himself from a fatal blow was credible; and that the tenure charges against respondent should be dismissed. The ALJ ordered that respondent be reinstated to his former position.

The Commissioner rejected the Initial Decision, finding that: the respondent’s own credible testimony states that he struck the client from behind after unsuccessfully attempting to shield himself from a blow to the chest; respondent’s strike to the client was not defensive, but rather a “spontaneous reactive assault” which cannot be fairly characterized as self-defense; respondent violated the DHS’s policy that unequivocally prohibits the striking of clients, and classifies even the least of such actions as client abuse; and that the DHS policy requiring dismissal for even one substantiated instance of abuse is clear on its face, and has been applied and upheld elsewhere in the interest of ensuring the safety of the uniquely vulnerable clientele served by the Division of Developmental Disabilities. The Commissioner directed that respondent be dismissed from his tenured teaching position, and that a copy of this decision be transmitted to the State Board of Examiners for action as it deems appropriate.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>
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December 26, 2007

**RECORD SEALED<sup>1</sup>**

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the Department of Human Services' (DHS) exceptions and the respondent's reply, both duly filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

On exception, the DHS urges the Commissioner to reject the Initial Decision as fundamentally flawed because the Administrative Law Judge's (ALJ) findings of fact are based on inaccurate recollection and reporting of hearing testimony<sup>2</sup> and thus cannot be found to be based on sufficient, competent or credible evidence. Specifically, the DHS asserts, the ALJ erroneously discounted the testimony of DHS witness Marsha Bush because it was (purportedly) internally inconsistent and also inconsistent with her prior written statement (Exhibit P-12); according to the DHS, however, examination of the hearing transcript at T85, 7-8 and T90, 17-24<sup>3</sup> shows that

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<sup>1</sup> Although not referenced in the Initial Decision, a Consent Confidentiality and Protective Order – issued on August 8, 2007 and duly executed by the parties – is included within the case file. (See also the transcript of hearing, at 4-6.) To ensure the confidentiality of all information about DHS clients, the Commissioner deems the record of this matter sealed in its entirety.

<sup>2</sup> The DHS notes that the ALJ's decision was prepared without benefit of a transcript, which was ordered subsequent to issuance of the Initial Decision. (DHS's Exceptions at 4-5)

<sup>3</sup> These and all subsequent similar citations refer to the transcript of the hearing held on August 8, 2007, indicating page number(s), followed by line number(s).

Ms. Bush – who was the only eyewitness to the actual contact between the respondent’s hand and the back of D.K.’s head, and whose testimony is thus integral to the DHS’s ability to prove that the respondent affirmatively struck a client – was entirely consistent and unwavering in her assertion that she saw the respondent hit D.K. (Petitioner’s Exceptions at 3-7) The DHS contends that “the misrepresentation of Ms. Bush’s testimony as to whether or not she saw Respondent hit D.K. corrupts the entire initial decision,” and entitles the Commissioner to make new or modified findings of fact pursuant to *N.J.S.A. 52-14B-10(c)* and (d). (*Id.* at 6-7)

Because the ALJ discounted Ms. Bush’s testimony, the DHS asserts, he did not consider that time must necessarily have lapsed between D.K.’s striking of the respondent (which Ms. Bush did not see) and the respondent’s striking of D.K. (which she did), leading him to conclude – without sufficient credible evidence in the record – that the respondent’s action was “reflexive,” an automatic response to a stimulus in order to defend himself. (Petitioner’s Exceptions at 8-12) In addition to the time that must have lapsed in order for Ms. Bush to have missed D.K.’s action but seen the respondent’s, the DHS observes, the respondent was sitting when D.K. struck him but standing when he struck D.K., and the respondent himself admitted at several points that he hit D.K. because D.K. hit him. Clearly, the DHS reasons, the respondent was no longer defending himself when he slapped D.K., and his action was not a reflexive defensive reaction as found by the ALJ, but a separate act of physical abuse in response to being punched by D.K. The DHS explains:

D.K.’s body position (back toward Respondent) demonstrates that he was no longer a threat to Respondent. Slapping an individual with a developmental disability in the back of the head as that person is turned to walk away cannot be construed as a reflexive

action of self defense. The evidence supports [the DHS's] position because when Respondent struck D.K., D.K. was no longer a threat to Respondent. Respondent's reaction was not to defend himself; Respondent had already unsuccessfully defended himself. Respondent went after D.K. to get back at him. The fact that Respondent was concerned for his personal safety and has a pacemaker/defibrillator does not justify Respondent hitting a client who has his back turned to Respondent. (*Id.* at 9)

The DHS additionally renews its argument, set forth in the Initial Decision at 14-17, that even if the respondent's action is found to have been reflexive in nature or in self-defense, termination is still mandated under controlling agency policy as set forth in Administrative Order 4:08 and Supplement 3. The DHS reiterates that the "physical abuse" for which this policy permits no tolerance expressly: 1) includes slapping; 2) need not result in physical harm to the victim; and 3) does not require the perpetrator to have acted with intent to harm the victim, or indeed, even to strike the victim. Citing, as it did before the ALJ, the upholding of employee terminations in *In the Matter of Joshua Famakinwa, Hagedorn Gero-Psychiatric Hospital, Department of Human Services*, decided by the Merit System Board on July 14, 2004, and *In the Matter of Monica Romans, North Jersey Developmental Center, Department of Human Services*, decided by the Merit System Board on February 9, 2005, the DHS notes that many clients receiving services from the Division of Developmental Disabilities tend to be violent, and that the referenced Administrative Order and Supplement – with which the respondent was undisputedly familiar – have been promulgated precisely so that employees are aware of what is considered abuse and understand that they cannot respond in certain ways when a client engages in physical aggression. (Petitioner's Exceptions at 12-19)

In reply, the respondent first takes issue with the DHS's contention that the Initial Decision is fatally flawed due to the ALJ's recollection of testimony and

assessment of witness credibility. The respondent contends that: 1) the ALJ's confusion about – and consequent dismissal of – Ms. Bush's testimony is not a "critical error" as claimed by the DHS, since the respondent never denied slapping D.K.; 2) the ALJ's conclusion that Ms. Jones' testimony was incredible was entirely correct based on its internal inconsistencies and its conflict with her prior written statement; and 3) the ALJ's assessment of the respondent's credibility is fully supported by the record and cannot be shown to be – in any way – arbitrary, capricious or unreasonable, as is required in order to be reversed pursuant to *N.J.S.A. 52:14B-10(c)*. Therefore, the respondent contends, his version of events must be accepted as found by the ALJ, who concluded that the respondent's action was one of reflexive self-defense in response to D.K.'s unexpected and potentially life-threatening blow. (Respondent's Reply at 3-5)

The respondent then dismisses as "absurd" the DHS's contention that – even if taken reflexively in self-defense as found by the ALJ – respondent's action still constituted abuse of a client. According to the respondent, an unthinking reflex under the circumstances here present – especially in a man who has worked at New Lisbon for over 40 years without ever hitting clients, even when they hit him – cannot be viewed as similar to cases where there was no threat to the staff member's life; nor can it be viewed as a failure to apply the self-defense policies and procedures in which DHS staff members are trained, since nothing therein "directs an employee how to handle a situation where a client embarks on a surprise attack and punches an employee in the chest area where a life-saving device is implanted." Simply stated, the respondent concludes, the incident underlying the DHS's tenure charge must be viewed as "an aberration in a career of more than 40 years in a most unusual circumstance," so that the

ALJ's decision reinstating the respondent with full back pay and benefits is correct and should be adopted by the Commissioner. (Respondent's Reply at 6-7, quotations at 7)

Upon careful review and consideration, the Commissioner has determined to reject the Initial Decision.

Initially, the Commissioner concurs with the DHS that several of the ALJ's credibility determinations are subject to question. As to Ms. Bush, the DHS is correct in its contention that the Initial Decision does not accurately reflect her testimony as recorded in the hearing transcript, and that the inconsistency on which the ALJ relies in discounting such testimony does not, in fact, exist. As to Ms. Jones – although some of her responses do, indeed, reveal a lack of precision in recollection and articulation, and a questionable sense of time – during the course of her testimony on direct and cross-examination, it became clear that when she said she “saw” the respondent hit D.K., what she meant was that – while in the vicinity, but turned away from the two men – she heard a slap that caused her to turn back toward them, whereupon she saw the respondent's hand retreating from behind D.K.; thus, although she did not, in fact, “see” the actual physical contact between the two men, she clearly witnessed its sound and immediate aftermath, and her account of these events is consonant with those of other witnesses, including the respondent. As to Mr. Waite, his reliance on the accounts of others without independent investigation or inquiry is not at all inappropriate, since, once the fact that the respondent struck D.K. was established – as it was by the respondent's own admission – Mr. Waite's actions were guided by policies that did not allow for consideration of circumstances or mitigating factors, so that no further inquiry or investigation was required; indeed, the primary import of his testimony lies in his

descriptions of applicable DHS policies and procedures, rather than in his personal knowledge of the event underlying the charges.

However, even assuming *arguendo* that the ALJ erred in his credibility determinations, the Commissioner finds no need to rely on the testimony of any external witness in order to reconstruct the events underlying the DHS's tenure charge because there is no dispute about the credibility of the respondent, and his account is both internally consistent and substantially corroborated by the record.

There is no doubt – based on the testimony of all witnesses, including the respondent – that: 1) the respondent was seated when D.K. unexpectedly came up to him and punched him in the chest, in the area of his implanted pacemaker and defibrillator; 2) the respondent did not see D.K. coming and was unable to shield himself from the blow, although he had raised his arms in a last-minute attempt to do so; 3) the respondent was shocked by the blow and horrified by its potential consequences to his implant; 4) after D.K. had turned and begun to walk away from the respondent immediately after punching him, the respondent – who by now was standing with arms still raised – struck D.K. by smacking him from behind. In the respondent's own words on direct examination:

Q. And what was your reaction when you saw D.K. coming towards you with a closed fist?

A. I put my arms up to block him, but he got through anyway, and then he turned and I smacked him on the back.

Q. Okay. And why did you do that?

A. Why?

Q. Why did you slap him on the back?

A. It was a defensive reaction.

Q. Okay. And were you at all concerned that he would come back to you?

A. Yes, but he didn't.

Q. Okay. And when you say “defensive reaction,” describe what you mean by that.

A. Well, I was concerned, you know, being hurt, being punched. I wanted to stop him.

Q. And what was your concern?

A. My safety.

Q. And—

A. My life even, maybe.

Q. What – well what did you – what did you think could have happened as a result of being punched?

A. Well, if he caught me in the defibrillator, he might detach a wire and I don’t know what would happen then.

....

Q. Okay. And in your view, were you protecting yourself on that day?

A. Yes.

....

Q. ...Was there any period of time between – any significant period of time between when Mr. K punched you in the chest and when you put your hands up and slapped him?

A. This all went in a second.

Q. Okay. And could you describe why, when you slapped him, shoved him, whatever you want to call it, why it was in the back?

A. It was in the back, not in the head.

Q. Right, but why was it – if he’s punching you why –

A. Yeah, he punched me and turned immediately.

Q. Can you do a description of that for the Judge, how this happened? Just show him how D.K. hit you?

A. Yeah. He punched me and turned around to go.

Q. Show the Judge again.

A. Yeah. He punched me and turned to flee.

Q. And then you?

A. Yeah.

Q. And this was all within a matter of seconds?

A. Two seconds at the most.

Ms. Manus: Your honor, I just want to reflect for the record that Mr. Gall raised his hand and made a slapping motion in the air for the record....After Mr. D.K. turned around the respondent raised his hand and made a slapping motion in the air for the Court to see.

The Court: Thank you.

Ms. Cipparulo: And I would just like to clarify Mr. Gall was demonstrating what occurred. He showed D.K. punch him in the chest and turn.

....

Reading from R-2: "I was struck by an individual, D.K., on my chest, just missing my pacemaker defibrillator. I put my arm up to block his strike but was struck anyway. My first reaction was to slap him on his back. I did not punch him.

...

Reading from R-6: "My slapping was not premeditated, it was a reaction of self-defense."

(T106-114)

On Cross-Examination:

Q. And isn't it true that after the incident, when questioned by Ms. Jones, you're still in the cottage, Ms. Jones asked you "Why have you hit him?" You responded, "Because he hit me?"

A. Yes.

....

Q. ....as D.K. came towards you, you put your hands up to defend yourself, but you got hit anyway. Is that correct, that you stated that?

A. When he was right there I put my arms up.

Q. Hands up and you got hit?

A. I didn't realize what he was going to do until that point.

Q. But you got hit anyway?

A. Yes.

Q. So weren't there two different things going on here? One was the putting your hands up to defend yourself, and the second part was that – after Mr. D.K. turned around, you slapped him? So first, you defended yourself, but unfortunately, you got hit. And then you turned around and slapped D.K., isn't that really what happened?

A. My arms were still up and I came down as he turned around and slapped him.

(T117-119)

On Redirect Examination:

Q. When your hand came down on D.K., what was your intention?

A. Just a reaction, it was.

(T119)

In the Initial Decision, the ALJ concluded that the respondent "did not intend to strike D.K., but rather, attempted to shield himself from what could have been a fatal blow." (Initial Decision at 19) However, the record provides no basis whatsoever for this conclusion; to the contrary, what the record shows instead is that the respondent

struck D.K. from behind *after* having unsuccessfully attempted to shield himself, and that he did so – as he himself stated at the time of the event – because D.K. hit him. Although respondent maintains that his slapping of D.K. was to protect himself, that assessment is belied by his own account of events – wherein he states that D.K. immediately turned to flee after punching him and was heading away from him at the time of the slap; thus, there was no reason for a defensive counter-strike, even assuming such a tactic were allowed under DHS policy (which it is not). The Commissioner also notes that, although the respondent’s arms were still in the air from his attempt at shielding himself while seated, the respondent does not claim that his striking of D.K. was the result of inadvertent bodily contact. Indeed, what the record clearly shows to have transpired is that – all within the space of a few seconds – the respondent was unexpectedly struck in an area of his body susceptible to serious, possibly even life-threatening injury, and, once the shock of the blow had registered, he instantly responded with what has elsewhere been aptly termed a “spontaneous reactive assault.” (*Famakinwa*, supra, at 3)

In the present context, then, regardless of whether it was on the head (as charged by the DHS based on the statement of Ms. Bush) or on the back (as stated by the respondent), the salient fact is that the respondent slapped D.K. under circumstances where the contact was not accidental and D.K. no longer posed a clear and immediate threat so as to enable the respondent’s action to be fairly characterized as self-defense.<sup>4</sup> Therefore, in order to prevail in its charge of unbecoming conduct, the DHS need not show that sufficient time passed between D.K.’s punch and the respondent’s slap in order for the respondent to have made a conscious decision to smack D.K. in retaliation for

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<sup>4</sup> Indeed, even if D.K. *had* posed a threat, DHS policy clearly precluded the respondent from striking him in self-defense.

being struck: However instantaneous or instinctive his action may have been, and however understandable the urge to lash out under circumstances where he had just been attacked in a vital area and feared he might possibly be attacked again, the fact remains that by losing control and slapping D.K. as he did, the respondent violated the DHS's policy unequivocally prohibiting the striking of clients and classifying even the least of such actions as client abuse.

Having thus found that the DHS has proven its charge of unbecoming conduct against the respondent, the Commissioner must now consider whether the respondent's action requires his dismissal from tenured employment. Unfortunately, the Commissioner perceives little room for discretion in this regard, in light of operative DHS policy that is clear on its face and has been applied and upheld elsewhere in the interest of ensuring the safety of vulnerable Division of Developmental Disabilities (DDD) clients.

The DHS, as the agency responsible for and having expertise in institutions serving the developmentally disabled, has stressed that it "must protect its clients because they are extremely vulnerable to physical abuse in light of the fact that they can, at times, be both aggressive and violent and they do not comprehend their actions," and that the "nature of the population served necessitates that [the DHS] strictly abide by its prohibition against abuse and terminate all employees [who] have committed an act of physical abuse" as defined in the applicable policy. (Initial Decision at 16, quoting DHS's Post-hearing Summation at 12) Moreover, in the developmental disability environment – where both parties and all witnesses freely acknowledge that clients are frequently and unpredictably violent – a reaction that is understandable and

even tolerable in other contexts necessarily takes on a different import and raises questions about the employee's ability to function henceforth in the performance of his or her duties with the full faith, trust and confidence of the DHS in accordance with the agency's strict client protection policies – particularly where, as here, similar situations are almost certain to arise in the future. Given, then, that the policy in question in this matter is rooted in a compelling public interest, has been consistently applied, and reflects the reasoned judgment of the agency of expertise as to the heightened standard of employee self-control that must be maintained in institutions serving the developmentally disabled, *In the Matter of Tammy Herrmann*, 192 N.J. 19 (2007), the Commissioner cannot – as the respondent suggests she should, as evidenced by the cases cited in support of his position – judge this matter by norms and precedents arising in the altogether different context of the public school setting.

In so holding, the Commissioner recognizes that termination is an extremely harsh penalty for a single instance of loss of control by a teacher who has provided over 41 years of otherwise satisfactory service, and she sincerely regrets the necessity to impose it here.<sup>5</sup> However – notwithstanding that the Legislature has placed jurisdiction over tenure proceedings against teachers in State institutions with the Commissioner of Education – in deciding such matters, the specific rules and special considerations unique to the setting in which the charged teacher is employed, the views

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<sup>5</sup> Given that termination of employment through tenure charges of unbecoming conduct – in addition to having serious consequences in its own right – raises the possibility of action against a teaching staff member's certificate by the State Board of Examiners and detrimental impact on the member's pension, the Commissioner is somewhat perplexed by the absence (at least on record) of any attempts by the parties to explore alternatives such as retirement or assignment to duties without direct client contact. This is particularly so in light of the respondent's long service with the agency and the existence of a unique physical vulnerability which places him at heightened risk in an environment where staff are frequently and unpredictably struck by violent clients.

of the appointing authority with expertise in such settings, and the prior determinations of the Merit System Board with respect to non-teaching employees in the same setting, cannot be ignored – even where similar conduct in a different context might well have resulted a lesser penalty.

Accordingly, for the reasons set forth above, the Commissioner rejects the Initial Decision of the OAL and directs that the respondent be dismissed from tenured employment. Pursuant to *N.J.A.C. 6A:9-17.6(a)1*, this matter shall be forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.<sup>6</sup>

COMMISSIONER OF EDUCATION

Date of Decision: December 26, 2007

Date of Mailing: December 27, 2007

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<sup>6</sup> This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*