

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 30244
)
) **PAUL EDWARD JOHNSON**) **BOARD DECISION**
) (Precedential)
From dismissal from the position)
of Hospital Worker at the Sonoma) **NO. 92-17**
Developmental Center, Department)
of Developmental Services) October 6, 1992
at Sonoma)

Appearances: Melvin Daley, Attorney, California State Employees' Association, representing appellant, Paul Edward Johnson; H. Dean Stiles, Staff Counsel, Department of Developmental Services, representing respondent, Department of Developmental Services.

Before Carpenter, President; Burgener and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in an appeal by Paul E. Johnson (appellant or Johnson) who had been dismissed from his position as a Hospital Worker at Sonoma Developmental Center (SDD), Department of Social Services (Department).

The Department dismissed appellant upon finding that he used improper containment techniques, struck a SDD client and failed to uphold his duty as a hospital worker and report instances of patient abuse.

The ALJ agreed with the Department and found that appellant struck one of the clients. The ALJ also found appellant failed to report instances of abuse which appellant claimed he had witnessed.

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However, the ALJ modified the adverse action by changing the dismissal to a six-month suspension without pay.

The Board determined to decide the case itself, based upon the record and additional arguments submitted both in writing and orally. After a review of the entire record, including the transcripts and briefs submitted by the parties, and after having listened to oral argument, the Board rejects the Proposed Decision of the ALJ and affirms the Department's dismissal of appellant for the reasons set forth in this decision.

FACTUAL

SUMMARY

Appellant began work for the State of California on March 26, 1984 as a Janitor for the SDD. He remained in that position through January 1989 when the position was eliminated because of a decision to hire outside contractors to do the cleaning. Thereafter, appellant was hired as a bus escort, and then a hospital worker for SDD, where he remained until his dismissal on August 15, 1991. In addition to his State service, the record reveals that appellant had over 10 years experience in working with developmentally disabled persons through his work in a residential care facility owned by him and his wife.

On July 9, 1991, the appellant was on duty in the Family Two area of Bemis Cottage at the SDD. His responsibility at that time was to supervise the activities of patients in the Family Two area.

At about 11:00 a.m., David K., one of SDD's clients, appeared to be

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upset and about to approach another client and start a physical confrontation. David K. is a large man with a well-known reputation of being difficult to control. The appellant approached David K. and attempted to control his actions by pushing David K. against the wall in the corner of the room, a technique known as "wall" or "corner" containment.

According to a psychiatric student, Dwain Tremayne, the only witness to the incident, appellant was repeatedly yelling at David K. to "get going, get out of here." The witness testified that the appellant was leaning into David K. with his hands raised and fists clenched, and that David K. appeared to be frightened. Mr. Tremayne further related that David K. managed to run from the appellant towards the door. As David K. ran by the appellant, the appellant struck David K. with his right fist in the middle section in the side of his body. There were no bruises or other marks found on David K. during an examination the following day.

Mr. Tremaine reported the incident to his supervisor the following day, July 10, 1991. The matter was investigated as are all matters involving patient abuse and this adverse action followed.

At the hearing, the appellant repeatedly denied hitting David K. or any other patient at SDD. The appellant testified that he pushed David K. against the wall as he was in fear of the safety of the other clients in the room, but that nothing else occurred.

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He further testified that David K. calmed down after being pushed against the corner and that everyone in the room resumed watching television.

Evidence was introduced at the hearing that appellant stated during an interview with SDD investigators that he had witnessed patient abuse inflicted by others during his time at SDD. However, when pressed for names and dates of those instances, the appellant did not provide further information.

The evidence at the hearing established conclusively that striking or hitting patients is, under all circumstances, prohibited.

ISSUES

This case raises the following issues for our determination:

- (1) Was there sufficient evidence to support the adverse action?
- (2) If so, was the penalty imposed by the ALJ appropriate under the circumstances?

The Charges

Appellant was charged with inefficiency, inexcusable neglect of duty, discourteous treatment, and other failure of good behavior during duty hours which is of such nature that it causes discredit to the appointing authority or the person's employment. [Government Code sections 19572, subdivisions (c), (d), (m), and (t).] The charges were based on allegations that appellant used

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improper containment techniques on a client, struck the client, and failed to report instances of patient abuse by others. At the hearing, the Department sought to prove the allegations of patient abuse based upon the testimony of a single witness to the incident, that of Dwain Tremayne, a student who had been an intern at the SDD for approximately three weeks. Mr. Tremayne's account of the matter is disputed by the appellant. Thus, the credibility of the witnesses is determinative of the question of whether the charge of patient abuse is supported by the evidence.

Appellant argues there is insufficient evidence to support an adverse action as there was only one witness to the alleged incident, and that witness was an inexperienced student, unfamiliar and uncomfortable with containment techniques. Moreover, appellant contends that Mr. Tremayne's account of the incident is suspect as there are inconsistencies in his testimony and because he failed to report the matter immediately to his supervisor on the day it occurred.

While recognizing that the uncorroborated testimony of one witness may, in some cases, constitute substantial evidence to support the allegations contained in an adverse action, the Board has stated that credibility determinations must be viewed in light of all of the surrounding circumstances. In The Matter Of The Appeal by Karen Johnson (1991) SPB Dec. No. 92-02 at page 8.

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In this case Mr. Tremayne's testimony is credible. He had no known motive to fabricate what he claims he witnessed. The fact that he was relatively new to the SDD (three weeks) does not discredit his testimony. Mr. Tremayne was testifying as to what he observed from personal knowledge and not as to his opinion about what was transpiring. It is readily accepted that a competent witness may testify as to what they see and hear and that one need not be qualified as an "expert" witness in order to give factual testimony. Even assuming some familiarity with containment techniques was desirable to describe what was transpiring, the evidence revealed that Mr. Tremayne had taken a semester of psychiatric nursing courses, including a five-week clinical rotation, and that he had seen containment techniques applied.¹

The appellant further argues that Mr. Tremayne's testimony is suspect as he changed stories as to where David K. was struck. We do not find Mr. Tremayne's previous statement that David K. was punched "in the midsection" and later statement at the hearing that he was punched "in the side" of the body to be contradictory.

¹Appellant's brief states "...it appears Mr. Tremayne thought corner containment was inappropriate." However, there was no such testimony at the hearing by Mr. Tremayne. On the contrary, Mr. Tremayne testified that he had seen wall containment performed and knew it to be a proper course of treatment. Similarly, appellant states in his brief that Mr. Tremayne viewed "leaning into" as inappropriate. Mr. Tremayne's testimony was just the opposite.

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Mr. Tremayne testified that the punch was in the midsection area on the side of David K.'s body.

Appellant further contends that Mr. Tremayne's testimony is suspect as he failed to report the incident on the same day that it occurred. This argument is not persuasive either. The evidence showed that Mr. Tremayne was required to report cases of patient abuse to his direct supervisor, who he did not see until the following day. This delay was justifiable under the circumstances.

In summary, we find no persuasive evidence to call into question the credibility of the testimony of Mr. Tremayne that he saw the appellant strike David K. and heard the "thud" of the blow.

On the other hand, the only testimony from the appellant concerning the incident was that he (appellant) "shoved him" (David K.) and "pushed him" against the wall. While some physical confrontation may be necessary as circumstances warrant, there was no evidence presented by the appellant to show that the circumstances warranted appellant's actions. Rather, the act of wall containment was established by SDD staff at the hearing to be "using one's body to move in and press the other person against the wall," not "pushing" or "shoving" against the wall. The admissions by the appellant, without factual foundation to support the necessity of his actions, casts doubt upon the appellant's judgment.

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Whereas in the case of Karen Johnson there were two plausible explanations for basically the same set of facts, the Board is presented in this case with two entirely different stories as to what transpired. Given the facts and circumstances established at the hearing, we find the testimony of Mr. Tremayne to be credible and sufficient to support the adverse action against the appellant.

Appellant also contends that the ALJ was wrong in finding appellant to have violated Government Code section 19572(d) (inexcusable neglect of duty) for failure to report other instances of client abuse. Appellant bases this argument on the grounds that the adverse action failed to allege the actual instances of patient abuse which the appellant allegedly failed to report. We need not decide whether the Department met its burden of proof on this charge as the striking incident alone is sufficient to sustain the dismissal.² However, appellant's admission that he had previously witnessed other incidents of patient abuse, but did not report them at the time, serves to further weaken his credibility and cast doubt upon his judgment.

The Penalty

Although the judge found appellant to have violated Department rules by striking David K., the ALJ modified the adverse action

²Similarly, we need not reach a conclusion as to whether appellant applied improper containment techniques as charged in the adverse action as the hitting alone serves to affirm appellant's dismissal.

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from a dismissal to a six-month suspension without pay. We find this modification to be in error and reinstate the original action of dismissal.

The ALJ modified the penalty after finding that the blow was not very hard and the client, David K., was not actually hurt. While the evidence did not show David K. to have sustained injuries from the incident, we believe that the severity of the blow is irrelevant in evaluating the degree of public harm. We believe the fact that the appellant struck a client while the client was attempting to run away, by itself, demonstrates a serious enough threat to the public service to support appellant's dismissal.

In addition, the ALJ found that the penalty should be mitigated by the fact that the appellant had only recently become a hospital worker and was probably not yet accustomed to his new role. However, the record reveals that appellant had over 10 years experience in working with developmentally disabled persons through his work in a residential care facility owned by appellant and his wife. Even assuming that appellant was relatively new to working with developmentally disabled patients, short tenure would not excuse appellant's actions. No hospital worker should need special training or experience to know that striking a patient is unacceptable behavior.

In reviewing disciplinary actions, the Board is charged with rendering a decision which, in its judgment, is "just and proper."

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(Government Code section 19582). One aspect of rendering a "just and proper" decision involves a determination of whether the discipline imposed is appropriate under all the circumstances. Among the factors the Board considers are those specifically identified by the California Supreme Court in the case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194.

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. Skelly v. State Personnel Board at p. 218.

Working at a center for developmentally disabled adults poses stressful challenges everyday to hospital workers, particularly those who must deal with sometimes hostile, uncooperative clients. The likelihood of such physical confrontations reoccurring is, unfortunately, high given these working conditions. While the appellant may normally be a very caring person as the ALJ found, the State cannot afford to gamble with the care and safety of those who cannot care for themselves. The harm to the public service from physical abuse is sufficiently grave to merit the imposition of the ultimate penalty of dismissal.

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CONCLUSION

The Board agrees with the ALJ's findings that appellant struck a client with his fist. However, it disagrees with the assessment of the ALJ as to the proper penalty.

The Board finds that, in this case, the striking of a client alone is serious enough to warrant the penalty of dismissal.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced adverse action of a dismissal is sustained;

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Clair Burgener, Member
Lorrie Ward, Member

*Vice-President Alice Stoner and Member Richard Chavez did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 6, 1992.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board