

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31209
)
LINDA MAYBERRY) **BOARD DECISION**
) (Precedential)
)
From dismissal from the position)
of Psychiatric Technician at the) **NO. 94-25**
Department of Developmental)
Services at Pomona) August 9, 1994

Appearances: Loren E. McMaster, Attorney representing Appellant, Linda Mayberry; Nancy A. Irving, Personnel Officer, Lanterman Developmental Center representing respondent, Department of Developmental Services.

Before: Carpenter, President; Ward, Vice President, Stoner, Bos and Villalobos, Members.

DECISION

President Carpenter, Members Ward and Villalobos:

This case is before the State Personnel Board (Board) after the Board granted a Petition for Rehearing filed by appellant Linda Mayberry (appellant). Appellant filed her Petition For Rehearing after the Board adopted the Proposed Decision of the Administrative Law Judge (ALJ) which sustained appellant's dismissal from the position of Psychiatric Technician at the Lanterman Developmental Center, Department of Developmental Services (Department). Appellant had been dismissed from her position for allegedly slapping a client on the hand, leaving her clients unattended on one occasion, and threatening to slash her supervisor's tires. While the ALJ found insufficient evidence that appellant had left her clients unattended as alleged, he did find sufficient evidence

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to support the abuse and threat charges.

In her Petition for Rehearing, the appellant contends that there was insufficient evidence in the record to conclude that she committed the alleged acts and that, in any event, dismissal is too harsh a penalty for these charges.

After a review of the record in this matter, including the transcript, exhibits, and the oral and written arguments of the parties, the Board sustains appellant's dismissal for the reasons stated below.

FACTUAL SUMMARY

The appellant was appointed as a Psychiatric Technician Trainee in 1964 with Fairview Developmental Center. She promoted to a Psychiatric Technician the following year and separated from Fairview on January 31, 1966. After a break in state service, she was reinstated as a Psychiatric Technician in 1969. She promoted to a Developmental Specialist in 1974. She had another brief separation from state service in 1981 and later took a voluntary demotion back to Psychiatric Technician. She transferred to Lanterman Hospital in 1990 as a Senior Psychiatric Technician, but again voluntarily demoted to Psychiatric Technician in 1991. Appellant has no previous adverse actions.¹

¹ These facts are taken from the Proposed Decision of the Administrative Law Judge.

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Slapping Incident

On January 16, 1992, appellant was assigned to care for clients in the "green" group. One of the clients in this group was Paula, an extremely developmentally disabled woman who had the mental capacity of an eight month old baby. One of the behaviors Paula exhibited was that she would eat almost anything she found, particularly plastic disposable diapers and any feces she found in the diapers. Because of this behavior and the serious health hazard it clearly posed, Paula needed to be watched at all times.

In the afternoon of January 16, 1992, appellant was in the green group's living area supervising her assigned clients. At approximately 3:30 or so, appellant's supervisor Audrey Vuelvas (Vuelvas) stepped into the room with two new students, Mario Chavez and Joshua Mensah, to introduce them to appellant. Vuelvas and the students then left, only to return several minutes later at approximately 4 o'clock while appellant was attempting to tie Paula's shoes. Appellant was seated on a settee, with Paula's foot on her lap, trying to tie Paula's laces. Paula, however, kept grabbing at appellant's hand, which prevented appellant from being able to tie the shoes.

The Department alleges that while appellant was attempting to tie Paula's shoes, Vuelvas and the two students came back into the room without appellant noticing. At that point, Vuelvas heard appellant loudly shout "no" at Paula and saw appellant take her

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left hand and slap Paula hard on her right hand. Vuelvas testified that appellant appeared to be angry at Paula when she did this and then appeared surprised when she looked up and saw Vuelvas standing there. Vuelvas did not say anything to appellant, but immediately left the room and asked the two students if they had seen the slap.

The students told her that they did not see appellant slap Paula. Vuelvas then called her supervisor, Carolyn Randall, who later spoke with the appellant and initiated an investigation into the alleged abuse. Vuelvas then went back into the green group area to check on Paula and claims to have seen a red mark on her hand. No one else, however, claims to have seen any red mark on Paula, including a doctor who examined Paula's hand several hours after the incident.

The appellant denies shouting at Paula and denies slapping her hand. According to appellant, she merely was pushing Paula's hand away in order to tie the shoes and nothing more. Appellant alleges that her supervisor, Vuelvas, is fabricating the story to get her dismissed because she wanted to bring in new employees and because appellant had been circulating a petition to have Vuelvas removed from her supervisory position.

Threat Incident

It was alleged that, in November 1991, appellant told fellow psychiatric technician, Gloria Marin (Marin), that if Vuelvas, took any action to jeopardize her (appellant's) job, she would slash

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Vuelvas' tires. Marin took this threat seriously and told Vuelvas about it, although she did not report the incident to anyone else.

Marin testified at the hearing that she recalled the appellant making this statement to her in approximately November of 1991 and told Vuelvas about it shortly thereafter. Vuelvas recalled, however, learning about the incident sometime in January of 1992.

Appellant testified that she never made any such statement and that Marin and Vuelvas are friendly with each other and are simply trying to get her (appellant) fired.

Leaving Clients Unattended

The final allegation is that immediately after the slapping incident occurred, appellant left her clients in the green group room unattended for up to ten minutes to take a cigarette break outside, while not telling any other employees where she was going or that they needed to cover for her. While psychiatric technicians may take occasional breaks, they always need to make sure another worker is watching their group for them, especially when they have patients, such as Paula, who need constant supervision.

Vuelvas testified that after the slapping incident, she escorted the two students to another living area and returned to find the door closed. When she opened it, the green group clients were there, but appellant was not. Vuelvas was informed that

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appellant left for a cigarette break, but no one was watching her group.

The appellant testified that she did go on a cigarette break and that before she went on break she told Marin where she was going and asked her to watch her group. Appellant further claims that Marin appeared to acknowledge her request and appellant took her acknowledgment to be an acceptance of the responsibility to watch her group.

ISSUES

- 1) Was there a preponderance of evidence sufficient to support the charges against appellant?
- 2) What is the appropriate penalty under the circumstances?

DISCUSSION

In his proposed decision, the ALJ found sufficient evidence to establish the charges concerning the slapping incident and the threat incident, but not the allegation concerning leaving clients unattended. We find no fault with these determinations.

The allegations concerning the slapping incident and the threat incident boil down to whether one believes Vuelvas' and Marin's testimony or that of the appellant. The Administrative Law Judge who heard the case acted as the finder of fact and made credibility determinations that Vuelvas' and Marin's testimony was credible and persuasive over that of the appellant's testimony.

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While such credibility determinations are not binding on the Board, the Board does give weight to an ALJ's credibility determinations absent evidence in the record that the credibility determinations are unsupportable. As set forth in Wilson v. State Personnel Board (1978) 59 Cal.App.3d 865:

On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted - but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability. Wilson v. State Personnel Board 59 Cal.App.3d at 877.

We find insufficient evidence in the record to question the ALJ's credibility determinations that Marin and Vuelvas is to be believed over appellant, and thus follow his determinations.

As stated in the Board's Precedential Decisions Karen Johnson (1992) SPB Dec. No. 91-02 and Paul Johnson (1992) SPB Dec. No. 92-17, the uncorroborated testimony of just one witness may, in some cases, constitute substantial evidence to support the allegations contained in an adverse action. Since we find that Marin and Vuelvas were telling the truth, we can conclude from the record that appellant angrily slapped Paula's hand and also made a threat to Marin about slashing Vuelvas's tires.

Appellant argues that Vuelvas's testimony as to the slapping incident should not be believed as there were three other staff members present in the room at the time of the incident and none of

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them saw or heard the alleged slapping.² We do not believe that the fact that two students standing next to Vuelvas did not see the slapping incident, despite having an unobstructed line of vision, proves that the incident did not occur. The record reflects that there were approximately six clients in the green group room at the time of the alleged incident, and that it was both students first day at the hospital. It is quite possible (although the record does not state whether or not this was the case) that the students' attention was diverted elsewhere in the room when the incident occurred. As to Anita Bowersock, the other potential witness to the incident, the record reflects that she was busy dispensing medication at the time and her back was to appellant and Paula. Bowersock's testimony that she did not see or hear a slap is of little probative value considering that her back was turned to appellant and she was concentrating on her dispensing duties.

Finally, as to the last charge of leaving clients unsupervised, we agree with the findings of the ALJ that this charge was not established by a preponderance of the evidence. The record of the hearing reveals that on that date and time in question, Marin recalls watching appellant's group for appellant while appellant took a cigarette break. For this reason, we find insufficient evidence to support the charge that appellant's group

² Student Mensah did not testify at the hearing, although Vuelvas admitted that after the incident, Mensah told her he did not see anything.

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was left unsupervised.

Appropriateness of Penalty

The Administrative Law Judge recommended that, based upon the findings that appellant slapped Paula and made a threat against her supervisor, the dismissal should be sustained. We agree with this conclusion and sustain appellant's dismissal.

As noted in the California Supreme Court case of Skelly v. State Personnel Board (1973) 15 Cal.3d 194:

While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (Citations.)
Skelly, 15 Cal.3d at 217-218.

In exercising its judicial discretion, the Board is charged with rendering a decision which, in its judgment, is "just and proper." Government Code section 19582. One aspect of rendering a "just and proper decision" is assuring that the penalty is "just and proper."

The Skelly court set forth several factors for the Board to consider in assessing the propriety of the imposed discipline. Among the factors to be considered are the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence.

In this instance, the appellant committed physical abuse against a helpless client who had the brain functioning of an

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eight-month old baby. Although we can understand that appellant may have become impatient in attempting to tie Paula's shoes when Paula kept interfering with what she was doing, she had absolutely no right to slap Paula. As set forth in Paul Edward Johnson (1992) SPB Dec. No. 92-17 at page 10:

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...the State cannot afford to gamble with the care and safety of those who cannot care for themselves.

The fact that appellant only slapped Paula, rather than hit her, and did not cause her any noticeable injury (beyond a temporary red mark) does not mitigate against the imposition of dismissal. As further stated by the Board in Paul Edward Johnson, "the severity of the blow is irrelevant in evaluating the degree of public harm." (Paul Edward Johnson at page 9.) A department should not be required to wait until actual harm is inflicted upon a client before removing the source of potential abuse. Just as one would not wish to leave an eight month old baby with a caretaker who would slap the baby's hand for making the dressing process difficult, so should the state not entrust those under its care to abusive behavior.

Finally, the appellant argues that her long unblemished record of state service mitigates against the imposition of the ultimate

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penalty of dismissal. We disagree. An employee's length of state service and good work history are certainly factors which the Board has taken into consideration in assessing a just and proper penalty and in determining the probability of recurrence. (See Leona A. Patteson (1993) SPB Dec. No. 93-15 at page 7.) This does not mean, however, that a department may not rightfully dismiss an employee, despite a clean 25-year work record. As previously discussed above, the safety of patients hospitalized under the care of the State is too important a public concern to take a risk and allow appellant a second chance.

CONCLUSION

The Board finds cause to discipline appellant under Government Code section 19572, subdivisions (m) and (t) (discourteous treatment of the public and other failure of good behavior) as there is a preponderance of evidence that appellant slapped a client's hand and threatened to damage a coworker's property. The Board finds, however, that the charge of leaving clients unattended (inexcusable neglect of duty) was not established by a preponderance of evidence. Because of the seriousness of the two charges which were sustained, particularly the charge of patient abuse, dismissal is found to be an appropriate remedy.

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ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582, it is hereby ORDERED that:

1. The adverse action of dismissal taken against Linda Mayberry is hereby 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
Lorrie Ward, Vice President
Alfred R. Villalobos, Member

*Members Stoner and Bos dissented from this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 9, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board