BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal	)	SPB Case No. 32468
	)	
ALEJANDRO NEVAREZ	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position of	)	
Psychiatric Technician at the	)	**NO. 94-04**
Stockton Developmental Center,	)	
Departmental of Developmental	)	
Services at Stockton	)	January 6, 1994

Appearances: Ken Murch, Consultant, California Association of Psychiatric Technicians, representing appellant, Alejandro Nevarez; Thomas P. Thompson, Personnel Officer, Department of Developmental Services, representing respondent, Department of Developmental Services.

Before Carpenter, President; Stoner, Vice President; Ward and Villalobos, 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 the appeal of Alejandro Nevarez (appellant) from dismissal from the position of Psychiatric Technician at the Stockton Developmental Center (SDC), Department of Developmental Services (Department or respondent). Appellant was dismissed from his position for dragging a recalcitrant patient by his ankles across the floor when the patient refused to move from the doorway. The ALJ concluded that the appellant's behavior, while discourteous, did not warrant dismissal and modified the dismissal to a suspension without pay until the date of the Board decision.

The Board rejected the Proposed Decision deciding to hear the case itself. After a review of the entire record, including the transcript, exhibits, and the written arguments of the parties, the Board modifies appellant's dismissal to a 90-day suspension.

FACTS

Appellant began his career as a Psychiatric Technician with the Department in 1989. He has one prior adverse action, a one-step reduction in salary for 6 months in 1992 for allegedly poking a pen into a patient's breasts.[1]

Appellant's duties as a Psychiatric Technician included caring for developmentally disabled adults. Some of the patients under appellant's care are hostile and abusive. To assist appellant in dealing with such patients, SDC provides a course on active treatment/crisis management. This course is designed to teach SDC employees how to handle situations with hostile patients and specifically emphasizes how to avoid physical confrontations. Department policy forbids all forms of physical abuse upon patients.

On the morning of October 28, 1992, appellant was on duty at SDC and was providing orientation to a group of student trainees while simultaneously caring for patients. At approximately 7:30 a.m., appellant was attempting to bring patients into a group room

[1] Appellant stipulated to the reduction in salary as part of a settlement entered into with the Department.

off the hallway as is normal practice at that time of the morning. One of the patients present at the time was Russell, a man known by SDC employees to be hostile towards other people. Appellant attempted to lead Russell into the group room by holding his hand and guiding him gently into the room. This technique is one recommended by the Department to deal with hostile patients. However, as soon as the appellant let go of Russell, Russell left the room and returned to the hallway.

Again, appellant applied the same technique to Russell and led Russell back into the group room. Once again, Russell wandered back out into the hallway. On the third attempt to redirect Russell back into the group room, Russell dropped to the floor in or about the doorway and began shouting and thrashing his legs about. Wanting to remove Russell from the doorway, appellant grabbed the underside of Russell's left ankle and the pant leg of his right leg and dragged him into the center of the room, placing him in front of the television set. Appellant claims that he dragged Russell for no more than a couple of feet at most. Russell sustained no injuries as a result of appellant's actions.

Appellant testified that he used this method of moving Russell as he was worried that Russell might injure himself by thrashing about in the doorway, particularly since he was aware that Russell had wounds on his feet which were being medically treated. He further claimed that he saw this as the only way to move Russell at

the time, as Russell was blocking the doorway and he could not get around Russell to pick him up by the arms. He asserted that at sometime he was taught to use this procedure when patients need to be moved in emergency situations.

The only person who testified to witnessing the incident, other than appellant, was a student intern, David Emory Ross (Ross). Ross testified that he was inside the group room at the time of the incident and saw appellant drag Russell into the room by his ankles for approximately 10 to 12 feet. When first questioned about the incident, Ross reported to a Department investigator that he saw appellant dragging Russell by just one ankle. When questioned later at the hearing, however, Ross recalled that the appellant had dragged Russell by both ankles. At the hearing, Ross took the position that he must have made a mistake previously when he reported that appellant had only used one ankle to pull Russell.[2]

Ross further testified that after the appellant deposited Russell in front of the television set, he turned to the student interns in his charge and said, in a light-hearted manner, "You didn't see that." Appellant denies saying that, but does admit

[2] The ALJ's Proposed Decision finds that Ross' version of the events is not credible because of his marked change in testimony. We do not believe it is necessary to make a credibility finding as to Ross' testimony concerning whether appellant dragged Russell by one ankle or two or for exactly how long, as appellant admits that he dragged Russell across the floor by his legs and that is the behavior that the Department is seeking to punish.

that he quipped, "Now, don't try this at home boys and girls, I am a trained professional."[3] Appellant claims he made this remark because the student interns who were observing him were tense and he did not want it to make it appear as if anything was wrong.

At the hearing, it was revealed that the Department's only percipient witness, Ross, believed that he was the target of animosity by appellant's associates as a result of his reporting the incident to supervisors. He claimed that someone put sand in his gas tank and harassed his family since the incident occurred. He admitted, however, that he had no proof that appellant had anything to do with these occurrences.

The Department dismissed appellant on the grounds that his actions violated Government Code section 19572, subdivisions (d) inexcusable neglect of duty (m) discourteous treatment of the public or other employees (o) willful disobedience and (q) Violation of this part or board rule, specifically that portion of Rule 172 which relates to dependability and good judgment.[4]

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[3] The ALJ credited appellant's account of the incident in this respect. We find nothing in the record to lead us to believe that the ALJ was incorrect in doing so, and therefore, we too credit appellant's version.

[4] The charge of violation of Board Rule 172 is dismissed pursuant to Board precedent. D[redacted] [redacted]. M[redacted] (1993) SPB Dec. No. 93-06.

ISSUES

1. Is there sufficient evidence to conclude that appellant's actions violated the department's policy regarding the handling of clients?

2. What is the appropriate penalty under the circumstances?

DISCUSSION

Sufficiency of the Evidence

We find ample evidence in the record to conclude that appellant's handling of Russell violated Department policy on the handling of patients. Ms. Sheila Arnold, a SDC unit supervisor, testified at the hearing that she teaches the course "Active Treatment/Crisis Management" at SDC and that appellant has taken this course. In this course, Ms. Arnold testified that she taught SDC employees how to physically intervene with assaultive patients that need to be escorted to different areas for their safety or for others' safety. At no time did she teach the employees that dragging a patient by his or her ankles was an acceptable method to use. On the contrary, she testified that she advises that SDC employees do not attempt to physically remove noncompliant assaultive patients.

Upon further examination, Ms. Arnold stated that the only instance when appellant might have been justified in moving Russell in the manner that he did was if it had been an emergency such that Russell must be moved immediately. She went on to state that she

certainly did not view the instant case as an emergency situation requiring that appellant's method be used. What would have been an acceptable procedure would have been for appellant to have sought assistance from others nearby to help Russell get back on his feet. Mr. Tom Noel, the Program Director for SDC, testified that he agreed with Ms. Arnold that appellant's actions revealed poor judgment on his part. This testimony was not impeached or rebutted by appellant.

Appellant attempted to defend his actions by claiming that he learned this as an emergency procedure to remove noncompliant patients and that he used it in this instance because he believed there was imminent harm to Russell. However, he admitted at the hearing that there was no reason he could not have left Russell there for a minute and that his actions now might be "reconsidered".

We find sufficient evidence in the record to show that appellant's actions violated Department policy concerning the handling of clients under such situations. While we understand appellant's desire to remove Russell from the doorway, we believe that the bulk of the evidence reveals that Departmental policy required either leaving Russell where he was until he regained composure or seeking assistance from others nearby to assist Russell to his feet. Moreover, general rules of politeness and decorum require that persons not drag others by their ankles to

move them, absent exigent circumstances. We find that the situation was not so urgent as to require that Russell be dragged along the floor out of the doorway. Accordingly, we find appellant's actions violated Section 19572 subdivision (d) inexcusable neglect of duty and (m) discourteous treatment of the public.[5]

Penalty

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], 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 involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> 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

[5] We find no evidence in the record that appellant's actions constitute willful disobedience. As noted in the Board's Precedential Decision Ruth M. Houseman (1993) SPB Dec. No. 93-33, willful disobedience connotes "that one knowingly and intentionally violate a direct command or prohibition." The Department failed to produce evidence to show that appellant knew his treatment of Russell violated Department policy.

> to exercise legal discretion, which is, in the circumstances judicial discretion. (Citations) 15 Cal.3d 194, 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper", the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

> ...[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. (Id.)

In his Proposed Decision, the ALJ modified the dismissal to a long-term suspension on the grounds that, while appellant's handling of the client was discourteous, the harsh penalty of dismissal was unwarranted as appellant was attempting to prevent Russell from hurting himself.

We agree with the ALJ's Proposed Decision that dismissal is not warranted under the circumstances. We do not view the public harm caused by appellant's actions as similar to that caused by physical patient abuse, such as occurred in Paul Edward Johnson (1992) SPB Dec. No. 92-17 when a psychiatric technician struck a patient in the stomach. Certainly intentional, blatant patient abuse is intolerable and warrants an employee's dismissal from state service in the first instance.

In this case, however, we view appellant's actions as an error in judgement in dealing with a hostile patient's errant behavior rather than conduct intending to cause physical or emotional harm to a patient. While we do believe that appellant could have and should have handled the situation differently as described by Ms. Adams, we do not believe that appellant's conduct rises to such a level as would justify his dismissal.

Although we find the record in this case insufficient to justify appellant's dismissal from state service, we believe that a harsh penalty is nevertheless deserving under these circumstances. This is appellant's second adverse action in a short period of time, the first adverse action also stemming from alleged inappropriate physical conduct in attempting to redirect a patient. While we recognize that appellant's job presents difficult challenges on a daily basis, appellant must always keep in mind that his utmost concern must be for the welfare of patients in his charge. We believe that a lengthy suspension is necessary to emphasize to appellant that he must always treat patients with the same dignity and courtesy that he himself would expect. Accordingly, we find a ninety (90) days suspension to be a "just and proper" penalty to impose upon appellant with a warning that further incidents of the exercise of questionable judgment on his part might well warrant dismissal.

ORDER

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

l. The above-referenced action of the Department of Developmental Services in dismissing appellant is modified to a ninety days suspension;

2. The Department of Developmental Services shall reinstate Alejandro Nevarez to the position of Psychiatric Technician and pay to him all back pay and benefits that wold have accrued to him had he been suspended for ninety days' rather than dismissed.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

STATE PERSONNEL BOARD

Richard Carpenter, President

Alice Stoner, Vice President
Lorrie Ward, Member
Alfred R. Villalobos, Member

* Member Floss Bos did not participate in this decision

(Nevarez continued - Page 12)

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 6, 1994.

GLORIA HARMON

Gloria Harmon, Executive Officer

State Personnel Board