BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 34024
	)	
LYLE Q. GUIDRY	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position	)	
of Psychiatric Technician at the	)	**NO. 95-09**
Lanterman Developmental Center	)	
Department of Developmental	)	
Services at Pomona	)	April 4, 1995

Appearances: Loren E. McMaster, Attorney representing appellant, Lyle Q. Guidry; Nancy A. Irving, Labor Relations Specialist, Department of Developmental Services representing respondent, Department of Developmental Services.

Before Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, 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 Lyle Q. Guidry (appellant) from dismissal from the position of Psychiatric Technician at the Lanterman Developmental Hospital, Department of Developmental Services (Department). The appellant was dismissed for allegedly striking a developmentally disabled client in the chest/abdomen region while the client was being tied down to a restraining chair.

The ALJ who heard the case found that appellant did strike the client, but modified the dismissal to a five month suspension, based solely on his conclusion that the appellant was prejudiced as a result of a witness' five month delay in reporting the alleged

abuse. The Board rejected the ALJ's Proposed Decision and asked the parties to brief the issue of whether the Department proved by a preponderance of evidence that the appellant struck the client and, if so, whether the delay in bringing the charges against the appellant should result in mitigation of the appellant's penalty.

After a review of the record in this matter, including the transcript, exhibits, and the oral and written arguments of the parties, the Board finds that the Department has not met its burden of proving by a preponderance of evidence that appellant struck the client as alleged, and therefore, as a matter of law, we revoke appellant's adverse action.

FACTUAL SUMMARY

Appellant has worked as a Pre-Licensed Psychiatric Technician and Psychiatric Technician at Lanterman hospital since February 1, 1988. He has received one prior adverse action, a one step reduction in salary for six months, for tardiness and inexcusable absence without leave.

Sometime during the month of April[1] around 3 p.m., Rehabilitation Therapist Wendy Anson walked onto unit 15 of Lanterman Developmental Center. Anson had worked at Lanterman for many years, and was familiar with all of the employees who worked on this unit. When she arrived on the unit, she heard crying coming from down the hallway. She investigated the source of the crying and, while standing at the doorway to a client's room, she

[1] The Department believes that it was in April as Anson recalls the incident took place a few weeks after the Department's Multi-Cultural Fair, which took place on March 24, 1993.

observed four or five people attempting to restrain a client to a restraint chair by tying the client's limbs to the chair with soft ties. During the investigation of the incident, and again later at the hearing in this matter, Anson could not positively identify the client in the restraint chair, other than to state he was an African American male.

Of the four or five employees attempting to restrain the client during the time she observed this incident, Anson could identify only one, the appellant. While Anson stood in the doorway, approximately 20 feet away from where the client was being restrained, she saw what she claims was the appellant take his closed fist and, with a firm blow, strike the client somewhere in the chest, abdomen or shoulder region. Anson testified that since the client was in the process of being restrained, he did not struggle, block the punch or fight back. She further stated that she stayed in the doorway of the client's room for about 15 seconds before she left because she "did not want to observe more [abuse]." Anson did not initially say anything to anyone about what she saw or report the abuse, as she liked the appellant and claims she did not want to get him in trouble. Anson further testified that she attempted to raise the subject with appellant a week or two later, but was unable to bring herself to do so.

Approximately five months after this incident, Anson was asked to meet with an investigator who was at Lanterman to determine

whether there was any client abuse occurring at the center. The investigator asked Anson if she had seen any abuse recently, and Anson responded "no." The next day, after giving the matter some thought, Anson went back to the investigator and told him about observing appellant hit a client on unit 15 sometime in or around April 1993 around three o'clock in the afternoon. She told the investigator that she could not recall the identity of the client (except that he was African American), the exact date the incident occurred during April, or the identities of the other employees who were present at the time attempting to restrain the client.

The identity of the client, the date of the alleged incident and the identities of the other employees allegedly present during the incident were ascertained through an examination of the hospital's records during the investigation of the alleged incident. After appellant relayed what she witnessed, the hospital's program administrator, Penny Muff, reviewed the hospital's records to determine what clients, if any, had been placed in restraints during the month of April. The hospital records revealed that the only client that had been restrained during the month of April was "Calvin".

Calvin is an African American male client who often needs to be placed in restraints, who can be very obstreperous about being placed in the restraints, and is known to cry when being restrained. While Calvin was restrained on a few different

occasions during the month of April, the only time Calvin was restrained at approximately three o'clock in the afternoon was on April 14, 1993. The hospital's records revealed that Calvin had been placed in restraints on that date at 2:55 p.m. When presented with this information, Anson agreed that Calvin was likely the client she had seen being hit by appellant because the identity of Calvin as the abused client corresponded with the fact that she recalled the client to be an African American male who was crying at the time she witnessed the incident.

The hospital records further revealed that Laurie Miller, a fellow psychiatric technician, was involved with restraining Calvin on the date and time in question, as she was the employee who recorded Calvin's restraint in the hospital records. Miller, however, did not recall seeing the alleged abuse reported by Anson. Department investigators subsequently spoke to the other employees who were on duty on April 14 in Unit 15 during the afternoon shift, but none of these employees claimed to have witnessed such an incident.

The appellant was served on September 20, 1993 with a Notice of Adverse Action of Dismissal effective September 30, 1993. The notice charged appellant with violating Government Code section 19572, subdivisions (m) discourteous treatment of the public or

other employees; (o) willful disobedience; and (t) other failure of good behavior. The notice specifically alleged that:

> On April 14, 1993, at approximately 2:55 to 5:30 p.m.... you struck client Calvin ...on or about his shoulder, chest or abdomen with the clenched fist of your right hand. Calvin was sitting in a chair in restraints at the time and was unable to defend himself.

At the hearing on the adverse action, appellant testified that he never struck Calvin on that, or any other, day. Laurie Miller, as well as two other employees who worked on Unit 15 on the day in question, also testified that they have never seen appellant strike Calvin or any other client, nor have they seen him commit any other harmful act toward any Department clients. While Anson testified that she clearly saw the appellant strike a male client in or about his right shoulder, chest or abdomen, she admitted that she could not identify any of the other employees who were present at the time, whether the client struck was definitely Calvin, or on what day this incident occurred.

ISSUE

1) Are the hospital's records (which were used by the Department to establish the date of the incident and identification of the client) admissible evidence which can be used to support a finding?

2) Has the Department proven the allegations in the adverse action by a preponderance of evidence?

Use of the Hospital's Records To Support A Finding

Appellant alleges that the Board cannot use the hospital's records to establish that appellant hit Calvin on April 14 as the matters contained in the records are hearsay and as such are inadmissible evidence which cannot be used to support a finding that appellant struck Calvin on April 14. We disagree.

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Evidence Code section 1200. As to administrative hearings, Government Code section 11513(c) provides that:

> ...Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Assuming the Department's records do not meet an exception to the hearsay rule (such as the exception for public records under Evidence Code section 1280), then the records alone could not be used to support a finding by the Board.[2] Government Code section 11513(c), however, explicitly states that such hearsay evidence can be used to supplement other evidence. The American Heritage Dictionary (2d College ed. 1982) defines "supplement" as "something

[2] The documents were admitted into evidence without objection from the appellant. Despite the lack of objection by the appellant, the Board is still prohibited from basing any finding on otherwise inadmissible hearsay evidence. Martin v. State Personnel Board (1972) 26 Cal.App.3d 573.

added to complete a thing, make up for a deficiency, or extend or strengthen the whole."

In this case, there was direct evidence in the form of testimony by Anson that she saw appellant hit an African American client who was being placed in restraints at approximately 3:00 p.m. during the month of April. The hospital's records are being used only to complete the picture, and make up for the deficiency of the missing details, such as the exact date of the incident and the precise identity of the client. The record here is thus distinguishable from the situation in Martin v. State Personnel Board (1972) 26 Cal.App.3d 573. In Martin, the Court of Appeal held that a finding could not be made that Martin was guilty of receiving a written communication from an inmate as the only evidence of such communication was inadmissible hearsay; no direct evidence was ever offered of the alleged act itself.

In this case, we find that the ALJ properly allowed into evidence the hospital's records and that such records, even assuming they do not meet an exception to the hearsay rule, are admissible hearsay evidence which may be used to supplement Anson's direct testimony that she saw appellant strike a client.

The Department's Failure To Meet Its Burden Of Proof

Disciplinary charges must be proven by a preponderance of evidence. Evidence Code section 115. A preponderance of evidence means "evidence that has more convincing force than that opposed to

it." Glage v. Hawes Firearms Co. (1990) 226 Cal.App.3d 314. As the court instructed the jury in Glage:

> If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of providing it. Id. at 324, fn. 7, citing Book of Approved Jury Instructions (BAJI), BAJI 2.60.

In this case, the ALJ found that Anson was credible when she testified that she saw appellant strike a client in the upper body region when the client was being restrained to a chair. Generally, the Board will accept the credibility determinations made by its administrative law judges absent evidence in the record that the credibility determinations are unsupportable. Linda Mayberry (1994) SPB Dec. No. 94-25, p. 7.

In judging the credibility of Anson, the law instructs the Board to consider, among other things, the extent of her capacity to perceive, to recollect or to communicate any matter about which she testifies and the extent of her opportunity to perceive any matter about which she testifies. Evidence Code section 780, subdivisions (c) and (d). Given Anson's lack of ability to perceive and recall the most basic facts surrounding the incident, we find insufficient evidence to support the Department's requisite burden of proof.

Our main concern with Anson's testimony is her inability to have observed any of the most obvious details stemming from the incident. She claims that while she definitely saw appellant swing

a punch and stood there watching for a full 15 seconds, she could not identify Calvin as the client who was hit, despite the fact that she knew Calvin and had previously worked with him. It further troubles us that Anson cannot recall the other employees who were assisting appellant at the time, even though the record reveals that she was familiar with all of the employees who were working on Unit 15 on that day, and further testified that she could identify the employees working that day without even having to see their faces. Although we do not necessarily doubt that Anson believes she saw something[3], we do question whether Anson actually saw what she believes she saw given her inability to recall any of the most obvious circumstances surrounding what could have been a serious incident.

While the uncorroborated testimony of one witness may, in some cases, be sufficient evidence to support the allegations contained in an adverse action (Karen Johnson (1991) SPB Dec. No. 91-02; Paul E. Johnson (1992) SPB Dec. No. 92-17), in this case, we have grave reservations about basing such serious charges upon the uncorroborated testimony of one witness who has such difficulty

[3] We are concerned, however, with the fact that Anson was under a duty to report instances of client abuse and failed to do so for several months. Anson also failed initially to affirmatively respond to the investigator's questions as to whether she had observed any client abuse. It was not until the next day that Anson came forward. Had it not been for the investigator's unsolicited questioning, it appears Anson would have kept the alleged incidents to herself, in direct violation of the Department's rules.

relating the basic details of what transpired during the incident. In this case, Anson's inability to recount the basic details concerning the incident leads us to reject the use of her uncorroborated testimony as sufficient evidence that, more likely than not, appellant committed physical abuse on a client.

An additional factor leads us to question whether we can rely solely upon Anson's uncorroborated testimony to sustain the dismissal. No other employees who were working on April 14 came forward to testify that they saw such an incident and, moreover, Laurie Miller, who definitely participated in the April 14 restraint of Calvin, testified that she never saw such an incident. While the other employees assisting appellant may very well have been engrossed in the task of tying restraint ties on Calvin, and therefore may not have been looking in Calvin's direction, the lack of any corroborating testimony is a factor which can be considered in determining whether the Department has met its requisite burden of proof.[4]

[4] Although the Board finds that the Department failed to prove its allegations by a preponderance of evidence, we nevertheless note our disapproval of the administrative law judge's conclusion that the Department's delay should be considered as a mitigating factor in this case. The adverse action was served well within the statute of limitations and the timing of the Department's adverse action should not be a consideration in assessing the appropriate penalty to impose.

CONCLUSION

We find the Department failed to prove by a preponderance of evidence that appellant struck Calvin on April 14, 1993. Accordingly, appellant's adverse action is revoked and appellant shall be reinstated to the position of Psychiatric Technician in accordance with the order below.

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 Lyle Q. Guidry is hereby revoked.

2. Lyle Q. Guidry shall be reinstated to the position of Psychiatric Technician and the Department of Developmental Services shall pay to Lyle Q. Guidry all back pay and benefits that would have accrued to him had he not been dismissed.

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

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

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 4, 1995.

WALTER VAUGHN
Walter Vaughn, Acting Executive Officer
State Personnel Board