

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MALANG NJIE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0147

Case Type: PA

DECISION NO. 40383

Appearances:

Aaron J. Bibb, Attorney, Hawks Quindel S.C., 409 East Main Street, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Malang Njie.

David G. Makovec, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Health Services.

DECISION AND ORDER

On March 6, 2024, Malang Njie (Njie) filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Health Services (DHS). The matter was assigned to Commission Examiner Anfin Jaw.

An in-person hearing was held on May 6, 2024, and a continued Zoom hearing on May 13, 2024, by Examiner Jaw. The parties submitted written closing arguments on May 30, 2024.

On June 19, 2024, Njie filed objections to the Proposed Decision and Order and requested oral argument. On June 24, 2024, the DHS filed a response to Njie's objections. On June 25, 2024, Njie filed a reply to the DHS response to the objections. The request for oral argument was denied.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

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FINDINGS OF FACT

1. Malang Njie (Njie) is employed by the State of Wisconsin Department of Health Services (DHS) as a Psychiatric Care Technician-Advanced (PCT-A) at Mendota Mental Health Institute (MMHI), and he had permanent status in class at the time of his suspension.

2. MMHI is a psychiatric hospital located in Madison, Wisconsin, operated by DHS, a state agency of the State of Wisconsin.

3. On September 24, 2023, Njie failed to comply with MMHI's Intervention Options Continuum (IOC) Policy when he chose to approach an agitated patient by reaching forward with his left hand toward the patient's face, escalating the situation.

4. Njie did not violate State of Wisconsin work rule #1.

5. Njie did not violate State of Wisconsin work rule #13.

6. Njie did not violate State of Wisconsin work rule #14.

7. DHS suspended Njie for five days for violation of State of Wisconsin work rules #1, #2, #13, and #14.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Health Services did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Malang Njie for five days but did have just cause to suspend him for one day.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

The five-day suspension of Malang Njie by the State of Wisconsin Department of Health Services shall be modified to a one-day suspension, and he shall be made whole for the difference with interest.¹

Issued at Madison, Wisconsin, this 2nd day of July 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ See Wis. Admin. Code ERC 94.07.

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states in pertinent part:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Njie had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Njie was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

On September 24, 2023, Njie and his coworker, Lamin Sanneh (Sanneh), escorted an agitated patient to a “chill out” room after the patient became disruptive and profane around other patients and staff members. After walking down the hall, the patient enters his room and closes the door behind him, but then cracks the door open a few inches to reach out and flip on his light switch, located just outside his door. Sanneh places his hand onto the outside handle of the door and holds on for safety reasons and instructs the patient that his room time would be extended each time he opens the door. As Sanneh and the patient are talking, the door slowly inches closer to being closed, with only the patient’s arm slicking out, and one hand on the light switch. The patient then fully retracts his arm and hand, as he is now completely inside the room.

Throughout this interaction between Sanneh and the patient, Njie is standing about eight feet away from them, observing. The moment the patient is completely inside his room, with the door cracked open an inch or two, Njie approaches the door within a foot, while Sanneh swings the door wide open. Njie reaches forward with an upward motion with his left hand toward the patient’s face. The patient reacts by leaning back as Njie reaches for him, then appears stunned for a second. Njie steps back a foot. At this point, both Sanneh and Njie are about two feet away from the patient. The patient appears to say something as Sanneh moves towards him within a foot. As Sanneh gets closer, the patient makes a fist with his right hand and swings straight at Sanneh. The patient misses Sanneh, but then moves forward towards Njie and takes a few swings at Njie. Sanneh immediately wraps his right arm around the patient’s neck and decentralizes the patient to the ground. Sanneh and Njie restrain the patient, joined by other staff. A spit mask was then placed on the patient.

Njie and Sanneh completed incident reports immediately after the incident. Both report that the patient was spitting at them during the interaction at the patient's door.

About a week or so later, Sanneh files a worker's compensation claim for an injury he suffered to his knee during the September 24 incident. DHS then initiated an investigation, including reviewing video of the incident. It is important to note that the video footage of the incident does not contain audio. Additionally, the video can be viewed frame by frame within a few hundredths of a second. The investigation concluded that both Sanneh and Njie had violated multiple work rules, including State of Wisconsin work rules:

- #1: Falsification of records, knowingly giving false information or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required.
- #2: Failure to comply with written agency policies or procedures. Specifically:
 - MMHI Caregiver Policy #1D.17: Mendota Mental Health Institute is committed to provide a safe, humane, and therapeutic environment for every individual receiving services. Employees and all other persons with whom patients come into contact shall treat them with courtesy, respect, recognition or their dignity and individuality and shall provide them considerate care and treatment. The abuse or neglect of a patient or the misappropriation of his/her property is incompatible with these goals and is expressly prohibited.
 - MMHI Intervention Options Continuum (IOC) Policy #2D.09: Safety is promoted by using the least amount of force necessary to maintain a safe environment. The emphasis is on verbal interventions, encouraging patients to make positive choices...Every staff member is accountable for his/her actions. Holds and techniques shall be consistent with MMHI training, policies and procedures. Staff shall use only the amount of force necessary to safely contain a situation...All MMHI staff trained in IOC are expected to employ verbal techniques to diffuse potentially dangerous situations.
- #13: Threatening or attempting to inflict or inflicting bodily harm or mental anguish to another person.
- #14: Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying; or using profane or abusive language in dealing with others.

In its investigation, DHS concluded that the patient was not spitting at either Sanneh or Njie. Consequently, DHS argues that Njie provided false information to excuse his behavior by stating that the patient was spitting at him and his coworker, Sanneh. A meticulous review of the video footage does not confirm that the patient was not spitting. Along with Njie's credible testimony and documented incident report that the patient was spitting, and the undisputed fact

that a spit mask was placed on the patient, the Commission concludes that the patient was spitting during the September 24 incident. Therefore, we find that Njie did not violate State of Wisconsin work rule #1.

DHS next contends that Njie moved his arm aggressively toward the patient's face with a closed or semi-closed fist and attempted to intimidate or inflict bodily harm. Njie asserts that when the patient was in his room, he spit at Sanneh and Njie twice. The third time the patient began to spit, Njie raised his open, non-dominant hand, to block the patient's saliva from hitting Sanneh or himself. Building on the premise that the patient was actively spitting during the encounter, it is reasonable that Njie was raising his hand to block spit. Reviewing the video footage, it is just about impossible to conclude if Njie's hand formed a closed fist, a semi-closed fist, or he simply had his hand open to block spit. Thus, the record failed to establish that Njie violated State of Wisconsin work rule #13 and #14.

Credible testimony and evidence from DHS established that the expectation for both Njie and Sanneh was to attempt to deescalate the situation. Once the patient was completely in his room, the situation was under control. At that point, Sanneh or Njie could have shut the patient's door and secured it from opening. The video evidence shows that that peaceful option was available to both Sanneh and Njie to safely contain the situation. Njie's conduct, by approaching the patient's door and reaching forward toward the patient's face with his left hand, escalated the situation. Sanneh swinging open the door along with Njie's movement forward, were the catalyst that turned the verbal interaction into a physical takedown. Instead of diffusing the situation, Njie and Sanneh exacerbated it. Thus, the Commission is persuaded that Njie violated State of Wisconsin work rule #2, specifically MMHI's IOC Policy, when he failed to verbally diffuse a potentially dangerous situation with an agitated patient, and instead chose to reach forward toward the patient's face, unnecessarily escalating and provoking the patient. Accordingly, misconduct has been established.

Turning now to a just cause consideration of the level of discipline Njie received, the record reflects that the five-day suspension was imposed as a skip in the normal disciplinary progression based on DHS's conclusion that Njie engaged in egregious misconduct in violation of State of Wisconsin work rules #1, #2, #13 and #14. Having rejected the alleged misconduct except for that referenced in Finding of Fact 3, the Commission concludes that there is no just cause basis for a skip in progression. However, the misconduct referenced in Finding of Fact 3 does provide just cause for imposition of the standard disciplinary progression applicable to Njie. Therefore, the five-day suspension shall be modified to a one-day suspension and Njie shall be made whole for the difference with interest.

Issued at Madison, Wisconsin, this 2nd day of July 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman