

cerebral palsy. His left arm and hand are atrophied and are of limited use. He is dyslexic and has difficulty reading and writing.

W.E. is one of the residents at the group home where the petitioner worked. He is a forty-one-year-old man who is mentally retarded and severely physically disabled as a result of cerebral palsy. W.E. cannot walk and must use a wheelchair to get around. He also cannot speak. He is able only to make simple sounds (basically yes or no), but he uses a "phonetic ear", a computer equipped with a synthesized voice that responds to keyboard-operated symbols, words, and letters, to communicate.

A major concern regarding W.E.'s care and supervision is his propensity to engage in self-injurious behavior (S.I.B.) when he becomes overly-frustrated or angry. At these times W.E. strikes his head with his fists or sometimes, if he is sitting, attempts to hit his head on his knees. Because he is capable of severely injuring himself, the staff at W.E.'s home is instructed to intervene whenever this behavior starts or appears imminent.

The incident in question in this case occurred on August 6, 1989. The petitioner had started his vacation a few days prior to this date, and was camping with his family in New Hampshire. However, because he could not find a relief worker (a requirement of the job) for the entire weekend, he had to return to Burlington on August 5, 1989, a Saturday, to work at W.E.'s group home.

The night of August 5-6 the petitioner got only four hours of sleep. Early Sunday morning, August 6, 1989, another worker who was scheduled to report to work that morning called to say he could not make it in. The petitioner then had to make several phone calls before he found another worker willing to come in to take the absent worker's place.

The petitioner's own relief worker, D.S., came in as scheduled at about 7:00 a.m., but the petitioner could not leave until the other substitute arrived. Upon arriving, D.S. started to clean up and prepare breakfast in the kitchen of the facility. The petitioner was in the living room watching a videotape. A short time later the petitioner brought W.E. into the living room to get dressed. W.E. wanted coffee, but the petitioner told him to get himself dressed first. W.E. was upset that he could not have his coffee first.

While D.S. was in the dining room (that adjoined both the kitchen and the living room) she heard (but could not see) a "slapping sound" and the petitioner shouting at W.E. to "stop it" and "cut it out". Curious, D.S. went into the living room and sat in a chair across from the petitioner and W.E. W.E. was seated, naked, on the floor in front and to one side of the petitioner, who was seated on the couch that was directly behind W.E. W.E. was trying to put on his underpants. D.S. picked up a newspaper, but continued to observe the petitioner and W.E.

What happened next is the subject of considerable dispute. D.S. testified that she saw and heard the petitioner shout at W.E. to "hurry up" and "stop trying to show-off", and that she saw the petitioner push W.E. on the shoulder. She described both the petitioner and W.E. as "agitated", and stated that W.E. appeared to be having difficulty putting on his underwear. D.S. testified that the petitioner then grabbed W.E. by the neck in a "hasty move" and pulled W.E.'s upper body back toward the couch. The petitioner, she said, had his right arm under W.E.'s head and was grasping his right wrist with his left (atrophied) hand when he pulled W.E. back. She stated that W.E. seemed "shocked" by this, but continued trying to put on his underwear. D.S. stated that after a few minutes of W.E. continuing to struggle and the petitioner continuing to prod him verbally, the petitioner again grabbed W.E. by the neck and jerked him back as before. D.S. said that the force was sufficient to lift W.E.'s body slightly off the floor. She stated that while he was on the floor W.E. was "moaning" and flailing his arms, and was having difficulty putting on his clothes, but that he was not engaged in S.I.B. D.S. stated that about thirty minutes after she had gone into the living room, the other replacement arrived and the petitioner abruptly left the home.

The petitioner testified that W.E. was being particularly difficult that morning, and that W.E. was engaging in S.I.B. because he was upset that the petitioner

was insisting he get dressed before having his coffee, and because he was otherwise not feeling well.

The petitioner stated that W.E. had begun to abuse himself while on the floor and that he (the petitioner) was trying to prevent him from hurting himself. The petitioner stated (actually, both the petitioner and D.S. demonstrated what they said happened) that he reached over W.E.'s right shoulder with his right arm, placed his left arm under W.E.'s left armpit, grasped his left wrist with his right hand, and pulled W.E. upright with a sudden motion. The petitioner admits that W.E. was "shocked" by this "show of force", but that after the second time, it was effective in getting W.E. to stop attempting to hit himself and to get dressed. The petitioner admitted, however, that his right arm may have "slipped" up around W.E.'s neck area if and when he lost the grip on this left arm (which was under W.E.'s armpit). The petitioner also admitted he was angry with W.E.'s behavior that morning.

The hearing officer finds D.S.'s version of the events more credible than that of the petitioner. It is found that the petitioner grabbed W.E. around the neck and, suddenly and forcefully, pulled W.E. backwards. It is found that the petitioner's left arm was not placed under W.E.'s armpit, but rather was used by the petitioner to assist his right arm in grasping W.E. around the neck. It is also found that the petitioner was angry with W.E. that morning, and that he continually shouted at W.E. in a threatening and

intimidating manner.

Further, it is found that W.E. was not engaged in S.I.B. that morning. Again, D.S.'s testimony in this regard is deemed more credible than that of the petitioner. D.S. stated that W.E.'s arm movements were related to his trying to get himself dressed while in an agitated state. D.S. was not familiar with W.E. at that time, but it is found that she had sufficient experience to recognize S.I.B. if and when she saw it. D.S.'s memory of that morning appeared good and her testimony was consistent. The petitioner's testimony that he believed W.E. was engaging or was about to engage in S.I.B. was not credible. Based on D.S.'s testimony, it is found that the petitioner's motivation in grabbing W.E. by the neck was not to prevent W.E. from engaging in S.I.B., but was to coerce and intimidate W.E. into getting dressed more promptly.

After the petitioner left the home that morning, D.S. reported what she had seen to the other replacement, who had arrived as the petitioner was leaving. This worker called her supervisor, who came to the facility a short time later.

While she was calling her supervisor, the worker observed that W.E. was crying and shaking, and that he quickly returned to his room without eating his breakfast.

The supervisor arrived a short time later and spoke with W.E. in W.E.'s room. The supervisor directed another worker to take W.E. to a doctor. Later that morning, a doctor examined W.E. and found no physical injury caused by

that morning's incident.

Several employees of HMH testified that caring for W.E. in the group home requires that the staff of the home assist and monitor W.E. in virtually all aspects of his activities of daily life. W.E. is also sensitive, and mutual trust and understanding are essential to his security and well-being.

Physical intimidation and rough manhandling of W.E. is entirely inappropriate, especially when it is not related to preventing W.E. from injuring himself or others--and then, only the minimum amount of force necessary to stop S.I.B. is appropriate. Although there was conflicting testimony regarding the petitioner's knowledge of and training in specific S.I.B. restraint techniques, it is found that the petitioner knew that rough physical force was inappropriate with W.E. as a general matter of behavior modification. Inasmuch as it is found that W.E. was not engaging in S.I.B. that morning, there was no necessity or justification for the petitioner to have used any physical force with him. W.E. was shocked and upset by the petitioner's actions, and his overall welfare was clearly jeopardized.

Following its own investigation of the incident, the petitioner's employer suspended, and then terminated, the petitioner's employment. The employer then reported the incident to SRS. After an investigation that included interviews with staff and W.E., himself, the Department "founded" the report as "abuse" of W.E. by the petitioner.

W.E., through his guardian, refused to testify at the

hearing. Neither party attempted to subpoena him. The hearing officer excluded as hearsay all testimony regarding W.E.'s statements as reported by other witnesses.

ORDER

The Department's decision is affirmed. The petitioner's request to expunge the report in question is denied.

REASONS

The Department is required by statute to investigate reports of abuse of elderly and disabled adults and to maintain a "registry" containing the details of each investigation in which abuse is "founded". 18 V.S.A. §§ 1154 and 1155. Individuals have the right to appeal to the Human Services Board for an order expunging from the registry a record concerning him or her on the grounds that it is unfounded. 18 V.S.A. § 1155(d). At hearing "the burden shall be on the commissioner to establish that the record shall not be expunged". id. The Board has repeatedly held that the hearing by the Board is de novo, and that the Department must establish by a preponderance of evidence that "abuse"--as defined by statute--has occurred. Fair Hearing Nos. 9247, 9112, 8816, 8646, 8574, and 8110.¹

18 V.S.A. § 1151(1) defines "abuse" as follows:

"Abuse" means mental or physical injury or injuries inflicted by other than accidental means, or any other treatment which places life, health or welfare in jeopardy or which is likely to result in impairment of health.

It is not necessary under the above section to establish that actual physical or mental injury was inflicted. Treatment that jeopardizes health or welfare is also considered "abuse". Based on the above findings it must be concluded that the petitioner's unnecessary manhandling of W.E. on the morning in question endangered W.E.'s welfare in the group home by breaching the trust and security W.E. had and required that he not be subject to physical intimidation by his caregivers.

The above findings and conclusions rest, by necessity, on the relative credibility of the actual witnesses to the incident in question. The hearing officer deemed D.S. credible--the petitioner not so. Also, the hearing officer weighed heavily the essentially uncontroverted testimony of the Department's witnesses as to the crucial elements of trust and security in W.E.'s care. Whether the petitioner's actions did or were likely to cause actual "injury" to W.E.'s "health" is problematic. It is clear, however, that they "jeopardized" W.E.'s overall "welfare". Severely disabled individuals in group homes should be secure in the knowledge that they will not be subject to unnecessary and inappropriate physical force and intimidation. It is clear that it is within the intent of the statute to protect this security. See 18 V.S.A. § 1150.

For the above reasons, the Department's decision founding the report in question as abuse of a disabled adult is affirmed.² The petitioner's request to expunge the

report from the Department's registry is denied.

FOOTNOTES

¹The cited cases (except No. 8574) involved the alleged abuse of children--not elderly or disabled adults. See V.S.A. § 681 et. seq. The hearing provisions of the two statutes, however, are virtually identical (see id. § 686(e)), and the same burdens of proof that apply to child abuse cases are clearly applicable in these matters as well.

²This decision is limited solely to the issue of the "founding" of this particular incident. It is not within the scope of this proceeding to consider the petitioner's present or future employment. To the extent, however, that the petitioner may later be aggrieved by a decision by the Department vis-a-vis licensing issues, the Board may well have jurisdiction to consider these issues. See 3 V.S.A. § 3091(a).

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Comments (pursuant to Fair Hearing Rule No. 17) regarding proposed findings of fact and conclusion of law that were submitted by the parties to the hearing officer.

I. THE PETITIONER

FINDINGS OF FACT

1. Paragraphs 1 through 24 of the petitioner's proposed findings are supported by the evidence and, to the extent deemed relevant, are incorporated into the findings of the hearing officer.

2. The evidence regarding the petitioner's training in S.I.B. response (petitioner's finding No. 25) is conflicting. It is found that the petitioner's training, though not intensive, was more than "cursory". However, inasmuch as it has been found that W.E. was not engaged in

S.I.B. on the morning in question, this paragraph is largely irrelevant.

3. Petitioner's findings 26 and 27: See paragraph 2, above.

4. Petitioner's findings 28 through 56 are supported by the evidence and, to the extent relevant, are incorporated herein.

5. Petitioner's finding 57 is accurate although it cannot be found that W.E. lifting his arms necessarily means he is or is about to engage in S.I.B.

6. Petitioner's findings 58 through 61: Same as paragraph 4, above.

7. Petitioner's findings 62 and 63: D.S. testified that both W.E. and the petitioner were "agitated". It is not found that W.E. was less (or only "a bit") agitated.

8. Petitioner's findings 64 and 65: Same as paragraph 4, above.

9. Petitioner's finding 66 is accurate but the hearing officer does not make the inference that D.S. thought W.E. was engaged in S.I.B. D.S.'s testimony on this question (S.I.B.) was specific and credible.

10. Petitioner's findings 67-80: See paragraph 4, above.

11. Petitioner's findings 81-83 are essentially accurate except that it is found that petitioner did "push" W.E. prior to grabbing him by the neck.

12. Petitioner's findings 84-87: See paragraph 4,

above.

13. Petitioner's finding 88 is only partially correct. Regarding W.E.'s engaging in S.I.B., the testimony of the petitioner conflicts with that of D.S.

14. Petitioner's findings 89-93: It is found D.S.'s memory was good, except, perhaps, for her recollection of which hand of the petitioner grabbed which wrist. This "lapse" is deemed minor and in no way diminishes her overall credibility.

15. Petitioner's findings 94-96: D.S. testified that W.E. was not engaged in S.I.B. She did not say or infer that W.E. lifting his arms was, in fact, a prelude to S.I.B.--only that it could be.

16. Petitioner's finding 97: D.S., though she did not intervene, promptly reported the incident. Her failure to intervene is not viewed as diminishing her credibility in describing what she saw.

17. Petitioner's findings 98-99: See paragraph 4, above.

18. Petitioner's findings 100-102 are generally not relevant (see paragraph 2, above). D.D. was not an eyewitness to the incident, and what she reported to her supervisor is irrelevant. There is no credible basis to infer that D.D. was motivated by anything other than her concern for W.E. There is also no basis to find that D.S. was influenced by D.D. in her recollection of the events she saw.

19. Petitioner's finding 103: See paragraph 4, above.

20. Petitioner's finding 104: W.E. did not tell his version of the events at the hearing.

21. Petitioner's finding 105: See paragraph 4, above.

22. Petitioner's finding 106: Several witnesses described W.E. as "withdrawn" for weeks after the incident.

As noted in the recommendation, it is "problematic" whether this was symptomatic of an "injury" to W.E.'s mental health.

23. Petitioner's finding 107 is not supported by the evidence--W.E.'s welfare was placed in jeopardy.

24. Petitioner's finding 108: The evidence on this question is inconclusive.

25. Petitioner's findings 109-111: See paragraph 4, above.

26. Petitioner's finding 112: The petitioner's grasp of W.E. is described in detail in the recommendation, supra.

27. Petitioner's finding 113: This is accurate for the weeks and months following the incident but not for the hours immediately following it.

28. Petitioner's findings 114-118: Accurate but largely irrelevant (see paragraph 2, above).

29. Petitioner's finding 119: It was stated that W.E. smiled when he saw D.K. This was because he was relieved that the person he trusted most had arrived, not because he was not upset over the incident.

30. Petitioner's findings 120-124: See paragraph 4, above.

31. Petitioner's finding 125: It is found D.D. meant that she had not seen the bruise previously.

32. Petitioner's findings 126-135: See paragraph 4, above; except that the hearing officer infers no bias against the petitioner from any of these "facts".

PETITIONER'S CONCLUSIONS

1. Petitioner's conclusions 136 to 143 are accurate.

2. Petitioner's conclusion 144: "Other treatment" as described in 18 V.S.A. § 1151(1) is not limited to "unintentional" acts.

3. Petitioner's conclusion 145: Is accurate except as noted in paragraph 2, above.

4. Petitioner's conclusions 146-153: Appear based on the incorrect premise that "other treatment" refers only to "unintentional" acts. As noted in the recommendation, the statute includes as "abuse" treatment that "jeopardizes" . . . "welfare". Actual injury, physical or mental, need not be found. Likewise, "welfare" is distinguished (i.e., disjunctive) from "health" and from "likely to result in impairment of health."

5. Petitioner's conclusions 154 and 155 are not supported by the findings.

II THE DEPARTMENT

FINDINGS OF FACT

1. Department's findings 1-5 are supported by the evidence and, to the extent deemed relevant, are

incorporated herein.

2. Department's finding 6: The hearing officer has described the events in question in his own words.

3. Department's finding 7 is supported by the evidence.

4. Department's findings 8-9 are deemed irrelevant.

5. Department's finding 10 is not supported by the evidence.

6. Department's finding 11 is irrelevant.

7. Department's findings 12-15 are supported by the evidence.

8. Department's finding 16 is not supported by the evidence.

9. Department's finding 17, to the extent relevant, is essentially supported by the evidence. However, the hearing officer would not characterize D.K.'s training of the petitioner as "complete".

10. Department's finding 18 is irrelevant.

The Department's conclusions or "reasons" are not specific, and do not require comment beyond the actual "reasons" set forth by the hearing officer in his recommendation, supra.

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