

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,580

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities substantiating a report of abuse against the petitioner involving two elderly residents of a nursing home where the petitioner was employed. The petitioner seeks to have the report expunged from the Department's "registry".

FINDINGS OF FACT

On August 5, 1993, the Department received a report from a nursing home that one of its employees had been accused of abusing two of its residents. Upon its investigation over the next several days the Department learned that a coworker of the petitioner had alleged that she had observed the petitioner forcibly place a pillow over the head of one patient and slap another patient. The Department's investigation culminated with a Commissioner's Review Hearing held on December 29, 1993, after which the Department determined that the report of abuse in both instances was "substantiated". This appeal followed.

At the hearing, held on April 12, 1994, the coworker in question testified that in late July, 1993, she had been working the evening shift at the nursing home with the petitioner (both she and the petitioner were employed as "nursing assistants") and that they were making their "rounds" of patient care. She and the petitioner were changing the bedding of an elderly bedridden male resident who had severe dementia. The patient was a large man who regularly yelled at the staff and loudly protested whenever they attended to him, and he was being loud and resistant that night as well.

The coworker testified that while they were attending to the patient the petitioner lost her temper and placed both her hands over the patient's mouth and told him to "shut up"; and that when the patient continued his protests the petitioner placed a pillow over his face, held it there with her hands for several seconds, and told the patient to "shut the fuck up". She stated that when the pillow was removed the patient looked shocked and out of breath. She testified that the petitioner then told her that she needed a vacation because the job was "getting to her".

The coworker also testified that a few nights later she was again working the evening shift with the

petitioner when they were attending to a disabled elderly woman, who was also loud, abusive, and physically agitated. She stated that while she and the petitioner were picking this woman up to change her the woman poked the petitioner in the stomach. She stated that the petitioner then sat the woman down in a chair, swore at her, and slapped her across the face. At this, the woman yelled "she hit me" and began crying.

The coworker testified that she completed her rounds with the petitioner that night and later confided in another employee about both incidents. The other employee advised the coworker to report the incidents. Two nights later the coworker took her allegations to the nursing home's director of nursing, who reported it to the home's administrator, who notified the Department.

The petitioner's coworker was deemed by the hearing officer to be a credible witness. The employee in whom she first confided the allegations, the director of nursing, and the administrator all testified that the coworker's allegations have been consistent, from her initial report through the subsequent investigations and hearings.

The petitioner denies the allegations. The director of nursing and the administrator admitted that the petitioner had been a good employee in the six months she had been employed at the home before the allegations were made. However, the employee in whom the petitioner had first confided the allegations testified (credibly) that she had once observed the petitioner slap the same male resident, but had not reported it. Also, the home's administrator and the Department's investigator both testified that during the course of their inquiries after the alleged incidents the petitioner gave conflicting statements to them regarding the presence of other witnesses. The petitioner also did not deny or rebut an allegation by the Department at the hearing that she had had a previous incident of elderly abuse founded against her when she was employed at another nursing home.

There is no credible evidence that any of the witnesses who testified at the hearing for the Department had any bias against the petitioner or any reason to fabricate or prejudge the allegations against her. The investigations on the part of the nursing home and the Department appear to have been thorough and open minded.

All the witnesses agreed that both patients in question were incompetent to assist meaningfully in the investigation and to testify at any hearing. Based on the testimony and the demeanor of all the witnesses who did testify, however, it is found that the allegations of the petitioner's coworker are credible, and the petitioner's denials not so. A preponderance of the evidence establishes that the petitioner did intentionally commit the acts against both patients as reported by the coworker who was working with her on both occasions.

ORDER

The Department's decision is affirmed.

REASONS

The Commissioner of the Department of Aging and Disabilities is required by statute to investigate reports regarding the abuse of elderly persons and to keep those reports which are substantiated in a registry under the name of the person who committed the abuse. 33 V.S.A. § 6906, 6911(b). Persons who are found to have committed abuse may apply to the Department for expungement of his or her name from the registry. 33 V.S.A. § 6911(d). A denial of this application is appealable to the Human Services Board pursuant to 3 V.S.A. § 3091(a).

Credible evidence in this case establishes that the petitioner, while engaged in her work as an aide at a nursing home, forcibly and intentionally placed her hands and then a pillow over the mouth of an elderly disabled patient in order to keep him quiet; and that she also slapped another elderly disabled patient in retaliation for that patient having poked her.

The statute which protects elderly adults, 33 V.S.A. § 6902, defines "abuse" as follows:

As used in this chapter:

(1) "Abuse" means:

(A) Any treatment of an elderly or disabled adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to an elderly or disabled adult;

(C) Unnecessary confinement or unnecessary restraint of an elderly or disabled adult;

(D) Any sexual activity with an elderly or disabled adult by a caregiver; either, while providing a service for which he or she receives financial compensation, or at a caregiving facility or program;

(E) Any pattern of malicious behavior which results in impaired emotional well-being of an elderly or disabled adult.

As found above, the petitioner's conduct in this case was intentional, and was clearly "likely to cause unnecessary harm, unnecessary pain, or unnecessary suffering" to the patients in question, as defined in paragraph (B), above. Moreover, the Board has held that residents in nursing homes have "an expectation of trust and security from their caregivers which must be maintained as an integral part of their welfare". Fair Hearing No. 12,187; see also, Fair Hearing No. 9716. Thus, it must be concluded that the petitioner's actions also placed the "welfare" of these patients "in jeopardy", within the meaning of paragraph (A), *supra*.

Based on the above findings and conclusions, the Department's decision in this matter is affirmed.

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