

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,183

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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 a disabled adult under his care in a community mental health program. The petitioner seeks to have the report destroyed and not entered on the Department's "registry".

FINDINGS OF FACT

At the time in question in this matter the petitioner was employed as a "Community Integration Specialist" by a county mental health agency. His job was to assist mentally retarded adults with transportation and other services necessary for them to live independently in the community.

On July 7, 1994, the petitioner and a coworker were with C.M., a mentally retarded twenty-six-year-old man, at a "satellite office" of the agency. The coworker testified that he observed the petitioner and C.M. "fooling around", and that the petitioner poked C.M. in the ribs at least three times. According to the coworker the following events then occurred: C.M. angrily told the petitioner to stop, and sat down in a chair to get away from the petitioner; while sitting in the chair C.M. raised his foot to ward off the petitioner, but accidentally kicked the petitioner in the groin; the petitioner then clenched his fist and swung at C.M.'s head, but released his fist before striking C.M., ending up slapping C.M. hard in the face with an open hand.

The coworker admitted that even though hitting a client is strictly against agency policy, he thought that the petitioner was hurt by C.M.'s kick and showed "some restraint" in opening his hand before striking C.M. The coworker also stated that because he considered the petitioner to be his friend he felt "awkward" after the incident, and thought it over for 24 hours before he decided to report it to his supervisor.

C.M. also testified at the hearing. Although his version of the incident was consistent with the testimony

of the petitioner's coworker, C.M.'s verbal and comprehension abilities appeared to be limited, and the hearing officer deemed his responses not spontaneous enough to merit much consideration.⁽¹⁾

From the outset the petitioner has vehemently denied that he struck C.M. At the hearing he testified that on the day in question C.M. was "clinging" to the coworker and that he (the petitioner) asked C.M. to "stand back". The petitioner stated that when C.M. ignored this request he "gently" tapped C.M. on the shoulder and told him to sit down, which C.M. did. The petitioner testified that when he then walked in front of C.M.'s chair, C.M. intentionally kicked him in the groin. The petitioner stated that he then "brought his hand around" at C.M., but only "placed" it on C.M.'s cheek.

The petitioner alleges that the entire report and investigation of the incident in question was part of a conspiracy against him because he is Jewish. At the petitioner's insistence the hearing officer admitted and considered several documents and letters the petitioner has written to various federal and state agencies, legal organizations, and anti-defamation groups protesting his treatment by the agency that employed him and by the Department in its investigation of the incident.⁽²⁾ Based on the testimony at the hearing and the documents submitted by the petitioner, however, it cannot be found that there is any evidence whatsoever of any preconceived bias against the petitioner by any individual or agency that was involved in the reporting and investigation of the incident in question.

The findings in this case turn mainly and straightforwardly on the relative credibility of the petitioner and the coworker who witnessed the incident. Unfortunately for the petitioner, based on the demeanor of these individuals at the hearing the hearing officer deems the testimony of the coworker to be credible and the petitioner's not so. It is found that on the day in question the petitioner intentionally and forcefully slapped C.M. in the face with his open hand after C.M. accidentally kicked him. It is further found that physically striking clients of the agency, even in retaliation, is strictly against agency policy and inappropriate and contrary to their best interests.

ORDER

The Department's decision "substantiating" the report of abuse by the petitioner is affirmed.

REASONS

The Commissioner of the Department of Aging and Disabilities is required by statute to investigate reports regarding the abuse of elderly and disabled persons and to keep those reports that are "substantiated" in a "registry" under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911. Within 30 days of notification that a report of abuse has been substantiated against them individuals can apply to the human services board for a fair hearing on the grounds the report is unsubstantiated. Id § 6906(d). Reports that are found to be unsubstantiated must be destroyed pursuant to 33 V.S.A. § 6906(e) and not entered in the Department's registry.

The statute which protects elderly and disabled 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

As found above, the petitioner's conduct in this case was intentional and likely to have caused unnecessary pain to the client in question. See paragraph (B), supra. Moreover, the Board has held that clients of mental health facilities have "an expectation of trust and security from their caregivers which must be maintained as an integral part of their welfare". Fair Hearing Nos. 12,580, 12,187, and 9716. Thus, it must also be concluded that the petitioner's actions also placed the "welfare" of this client "in jeopardy" within the meaning of paragraph (A), supra.

As also noted above, there is no evidence whatsoever that any individual or agency connected with the reporting and investigation of this incident was biased against the petitioner in any way. Based on the above findings and conclusions, the Department's decision in this matter is affirmed.

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1. This is not to say that C.M. was deemed not to be a credible witness.

2. Neither the agency nor the Department dispute that the petitioner came to the job highly recommended by past associates, that before the incident in question the petitioner's work at the agency had been satisfactory, and that on at least one occasion he had been singled out as an exemplary employee.