

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,716

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities (DAD) substantiating a report of abuse by the petitioner against a disabled adult.

FINDINGS OF FACT

The petitioner and the alleged victim (who hereinafter will be referred to as L) were both volunteers at their town rescue squad. At the time in question the petitioner was the assistant chief of the squad.

On the morning of March 21, 1995, the petitioner, L, and two other members of the rescue squad were scheduled to make a presentation to a local kindergarten class. The rescue squad headquarters was being renovated, and L had been led to believe that they could not hold the class in that building. Because of this, L had made prior arrangements with the squad chief and the kindergarten teacher to bring a rescue squad vehicle and equipment to the school and have the presentation there.

Apparently, the petitioner was not aware that these arrangements had been made. On the morning of the presentation the petitioner arrived early at the rescue squad headquarters and began to clean up to get ready for the arrival of the class. The other two squad volunteers who were to participate in the presentation arrived some time later and began to help the petitioner when the petitioner told them the class was coming there.

When L arrived the other volunteers told her that the petitioner had told them that the class was to be held at the headquarters. L told the petitioner that she had arranged to hold the class at the school. What happened next is the subject of dispute. L and the two other volunteers testified that the petitioner became angry and began shouting at L, and refused to acknowledge that the presentation site had been moved. L and the witnesses stated that L remained calm during the confrontation. The petitioner testified that she was the one who was calm, and that L was yelling at her.

In the midst of the confrontation the phone rang and the petitioner answered it. Apparently, it was the teacher asking when the presentation was going to come to the class. The petitioner came out and

informed L and the other volunteers that they should go to the class for the presentation, but that she was not going to go with them. L and the other volunteers began to pack the rescue vehicle with the equipment and materials they would need.

L and one of the volunteers then returned to the room the petitioner was in to get some supplies. L went to a desk that was in the room and began looking in the drawers for what she needed. The petitioner's jacket was lying on top of the desk. L and the other volunteer testified that while L was bending over to look in the drawers the petitioner snatched her jacket up off the desk and intentionally swung it around hard, striking L in the side of the head. A zipper or a snap that was on the jacket struck L just below her eye, causing her to yell out in pain. The petitioner testified that she merely picked the jacket up to put it on, and that if the jacket hit L it was an accident.

At any rate, on the way to the presentation the other two volunteers noticed that L had a scratch and a red mark under her eye. L testified that it hurt, but that she was able to do the presentations without difficulty. By the time L returned to headquarters after the presentations, however, the wound had become swollen and discolored. L decided to call the police and press charges against the petitioner.

The police investigated, took pictures of L's wound, and interviewed the witnesses present. After its investigation the police processed the complaint as an assault. Because L is disabled, the matter was referred to DAD for investigation as a report of abuse.

The DAD investigation included examining the police report, including the photographs, and interviewing L and the witnesses. DAD gave the petitioner an opportunity to respond to the charges but (apparently on the advice of her attorney) the petitioner declined to speak with the DAD investigator. Upon its investigation DAD concluded that the report was substantiated as one of abuse by the petitioner against L. It does not appear that L suffered any serious injury or permanent disfigurement.

L is a woman with degenerative disk disease who is a recipient of SSI disability benefits. In his Recommendation the hearing officer found that it was the petitioner who provoked the incident and that she intentionally and recklessly swung her jacket at L's face. While the evidence supports this finding, the Board concludes that the evidence does not support a finding--crucial in the Board's opinion--that the petitioner was aware of L's status as a disabled adult.

The petitioner and L had worked together on the rescue squad for many years. There is no evidence that L's disability is readily apparent to others. There is also no evidence that the petitioner, or anyone else on the rescue squad, knew that L has a disability, or considered L to be disabled. It does not appear that L's duties at the rescue squad were compromised by her disability, or that she ever requested or received any accommodation based on her impairment.

ORDER

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

REASONS

33 V.S.A. § 6902 includes the following:

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 a elderly or disabled adult;

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(5)"Disabled adult" means a person eighteen years of age or older, who has a diagnosed physical or mental impairment.

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(12) "Substantiated report" means that the commissioner or the commissioner's designee has determined after the investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the elderly or disabled adult has been abused, neglected or exploited.

The Board concludes that implicit in the above definitions of "abuse" is the element that an alleged perpetrator knew, or should have known, that his or her "victim" was, in fact, a "disabled adult". It appears that by defining "abuse" and "disabled adult" in such broad and unspecific terms the legislature intended to offer a low threshold for and a wide range of services and protection to those individuals. However, because many "disabilities" covered by the statutory definition can be marginal, unseen, or undetectable to others, it is highly doubtful that the legislature also intended to permanently identify and stigmatize all individuals who are involved in any "abusive" physical or verbal conduct, however isolated or minor, with any person who, unbeknownst to the individual engaging in such conduct, has any "diagnosed physical or mental impairment".

In the Board's view, such an interpretation of the statutes produces an absurd and irrational result. Although the contents of the DAD registry are confidential, all persons placed in the registry are effectively prohibited from obtaining or continuing jobs in the health care industry. See 33 V.S.A. § 6911. It strikes the Board as an unreasonable stretch of legislative intent to conclude that a person like the petitioner, on the basis of one incident like the one that occurred in this case, should be forever precluded from working in any "hospital, nursing home, residential care home, certified home health agency, intermediate care facility for adults with mental retardation, therapeutic community residence, (or) group home (or) development home." See *id.* § 6911(b)(3).

As noted above, it cannot be found that the petitioner in this case intended to harm or was reckless toward a person she knew, or should have known, was a disabled adult. The evidence establishes only that during a dispute between the petitioner and L, the petitioner swung her jacket at L, striking L in the face. Whatever the petitioner's intent or recklessness toward L as a person, without evidence of the petitioner's knowledge of L's status as a "disabled adult", it cannot be concluded that the petitioner "abused" L within the meaning of the above statute. Therefore, the Department's decision substantiating the report as the petitioner's abuse of a disabled adult is reversed.

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