

2. At the hearing, held on January 4, 2002, the coworkers in question testified that on February 17, 2001, they and the petitioner were attempting to put to bed an elderly male resident who had severe dementia. The resident was fighting this effort and was flailing his arms at them. The resident was often uncooperative with staff and it was usually difficult to assist him in attending to his personal needs.

3. The coworkers testified that while the petitioner was attempting to restrain the resident's arm she angrily yelled his name and "hit" him forcefully on his hand. One of them, who remained in the room with the petitioner after the resident was in bed testified that the petitioner then pulled the sheet up over the petitioner's face and held it down tightly in a "vindictive" manner.

4. The coworkers stated that they were upset by this incident and together determined to report it to their supervisor.

5. The nursing director at the facility testified that after the incident was reported to her she notified DAD and placed the petitioner under suspension pending the outcome of the DAD investigation.

6. Although the coworkers were not asked at the hearing to elaborate on how the petitioner "hit" the resident, the Department's investigator testified that the coworkers had

reported to her that the petitioner had "slapped" the resident on the hand.

7. The petitioner had worked at the facility for seven years and there does not appear to have been any prior problem with her interactions with residents. Both of the coworkers who were with her on the night in question had worked there only a few months.

8. All the witnesses agreed that there had been no sign of injury to the resident. The petitioner testified that she remembers raising her hand to block the resident from grabbing her arm. She admitted she has trouble modulating her voice and may have spoken the resident's name in a loud manner to get his attention. She also admits putting the sheet over his head, but stated that she was playing "peek-a-boo" with the resident. The petitioner vehemently denies that she ever hit the resident or "smothered" him with the sheet.

9. The petitioner maintains that the coworkers who reported the incident were inexperienced and misinterpreted her actions toward the resident as abuse. She stated that she had learned over the years that this particular resident would frequently try to grab her arm in a painful manner, and that she was using reasonable force to try to block his attempt to do so on the night in question.

10. The hearing officer deemed the testimony of the two coworkers to be credible. They were both licensed and had undergone specific training in handling residents. There is

no evidence or allegation that either of them had any bias against the petitioner or any reason to fabricate or exaggerate the allegations against her. Although they were not as experienced as the petitioner, they were both familiar with the behavior of the resident in question. There is no basis to find that they would "misinterpret" abusive treatment of this or any other resident. The investigations on the part of the nursing home and the Department appear to have been thorough and open-minded.

11. The hearing officer did not deem the petitioner's version of the events on the night in question to be entirely credible.

12. The above notwithstanding, it appears that the incident in question was entirely isolated, and that the petitioner is an experienced and competent aide. However, based on the credible testimony of her coworkers it is found that the petitioner, most likely out of frustration with an admittedly difficult resident, did commit the acts as reported by the coworkers on the night in question.

ORDER

The Department's decision is reversed.

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 Human Services Board pursuant to 33 V.S.A. § 6906(d) for relief on the grounds that the report in question is "unsubstantiated".

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, credible evidence in this case establishes that the petitioner, while engaged in her work as an aide at a nursing home, yelled at and slapped a resident on his hand, and forcibly held a sheet over his face. However,

as also found above, the petitioner's conduct in this case was isolated, and there was no apparent actual injury to the resident in question. The Board concludes that the petitioner's actions in this case, though inappropriate and unprofessional, did not rise to the level of "intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering" within the meaning of subsection (B), or any other part, of the above statute. See K.G. v. Dept. of Social and Rehabilitation Services, 171 Vt. 529 (2000). Thus, it must be concluded that the petitioner's actions in this case did not constitute "abuse" of an elderly person within the meaning of the above statute. The Department's decision must, therefore, be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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