

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,092
)
Appeal of)
)

INTRODUCTION

The petitioner appeals a finding by the Department of Aging and Disabilities (DAD) that she abused an elderly person and should thus be placed in the Department's registry.

FINDINGS OF FACT

1. The petitioner is a certified and licensed nurse's aide who has worked in her field for twenty-five years. Her last position was a four-year stint as an aide in a geriatric nursing home from which she was discharged in August of 2001, following an incident with a resident, D.R.

2. D.R., the alleged victim of abuse, is an elderly man who uses a wheelchair. He was unable to be present at the hearing or to testify due to failing health.

3. The incident at issue occurred on August 4, 2002 at about 4:50 p.m., just before dinner was served at the nursing home. At that time the petitioner observed that D.R. had pushed his wheelchair into a small kitchen off of a hallway in the wing on which she was working. D.R. lived in a different

wing but the petitioner was familiar with him because she had worked with him in the past. The kitchen was about the size of a closet and the only way to leave in a wheelchair was to back out. The kitchen was off-limits to residents because it contained hot liquids, like coffee, and residents had injured themselves in the past in that area. There was a "Staff Only" sign on the door. In spite of this restriction, D.R. persisted in going in the kitchen and was often told by staff members to leave.

4. When the petitioner came to the door of the kitchen, she saw D.R. reaching into the refrigerator. She was standing behind his wheelchair and could not enter the kitchen because it was completely blocked by the wheelchair. The petitioner testified that she identified herself and told D.R. in a polite but firm manner that he was not supposed to be in the kitchen and that he could ask the staff to get him what he needed from the kitchen. She believes he was startled when she spoke. He said he told her he was getting some ice cream for a friend and that he could "do what he wanted" and she should "mind her own business". The petitioner said that D.R. became agitated and began flailing his arms and rocking the chair. She put her hands on the back of the wheelchair to steady it, concerned for his safety. The petitioner said that

D.R. often becomes angry and combative when he is directed to do anything by female staff members.

5. D.R. exclaimed to other staff members who arrived on the scene that the petitioner had jerked his chair back and hurt his neck.¹ No one but the petitioner and D.R. observed the initial contact in the kitchen but other staff members were nearby and either observed or became involved in the following events.

6. The unit charge nurse was working nearby on the medication cart and was attracted to the kitchen when she heard what she described as loud voices. She went to the kitchen and saw that the petitioner had her right hand on the left handle of the wheelchair and was trying to ease it out of the kitchen. She did not see the petitioner jerk the wheelchair. D.R., she recalls, was holding on to the doorjamb and resisting the attempt. She described D.R. as angry, and said that he "took a swipe" at the two of them. He accused the petitioner of having snapped his neck when she pulled the wheelchair back. The nurse said that the petitioner was speaking to D.R. in a stern and a louder than usual voice and that D.R. was yelling back at her. The charge nurse raised

¹ The underlined portions are hearsay statements which were objected to by the petitioner.

her voice, told them to both stop and told the petitioner he could not have ice cream this close to dinner time. D.R. still refused to leave the kitchen and the charge nurse called someone from his wing to come and get him. When D.R. was given this information, he backed the chair out and went back to his wing on his own.

7. Another licensed aide was also nearby when this incident occurred. She said she came out of the shower room around the corner and saw the petitioner attempting to persuade D.R. to come out of the kitchen. She said the petitioner spoke in a normal voice and she heard her telling D.R. that he could not be in the kitchen. She saw the petitioner's hand on the handle of the wheelchair but did not see the petitioner using any harsh force. She heard D.R. swearing at the petitioner and claiming that he had gotten "whiplash" and that his neck had been hurt. She said the scene did not impress her as extraordinary and she kept going about her business. She said she saw the unit nurse intervene and said that D.R. was so difficult to deal with that she was only able to resolve the matter by calling the charge nurse on D.R.'s unit. She said she was surprised to hear the next day that the petitioner had been fired for this incident and thought it was odd that no one at the nursing home had

questioned the staff to see who might have witnessed the event.

8. Following the incident, the charge nurse on D.R.'s wing spoke with him about his injuries. She said that D.R. told her that the petitioner had "yanked his neck" but he did not complain of pain at that time. He also told the charge nurse that the staff on that wing don't like him and referred to the petitioner as a "bitch". The charge nurse said that D.R. is usually friendly but can be temperamental and moody due to depression. About two hours later, he said his neck hurt and he asked for some medication. He asks for medication almost daily for pain from arthritis mostly in his back and legs.

9. The evening of the incident, the records show that D.R. asked for and received medication for neck pain. He did not ask for such medication the day before nor the day after. The records show that D.R. has asked for pain medication on other occasions. The petitioner testified that when she worked on his ward, he frequently complained of neck and shoulder pain and was medicated for those reasons. The charge nurse testified that the petitioner has chronic back pain, not neck pain.

10. The petitioner was discharged from her employment the next morning after speaking with the administrator and director of nursing before any investigation was conducted. They did not ask her what had happened.

11. The nursing home director of social services went to speak with D.R. within a day or two of the event. The purpose of her meeting with him was not to investigate the incident but to offer him support. She found him alert and oriented. She described the petitioner as still upset about the incident. He told the director that he had been visiting a friend on the wing and had tried to get something out of the refrigerator. At that point, he said a staff member said he did not belong there and had "jerked" him out of the room. He said he thought the petitioner did not like him and that they had had conflicts in the past.

12. The above incident was reported to DAD and an investigator interviewed staff members, the petitioner and D.R. and looked at pertinent records. The investigator concluded that the petitioner should be placed in the registry because she "yanked" the wheelchair of the resident, caused him injury and spoke to him in an "authoritative" tone of voice. That decision was appealed and an administrative

review hearing was held on October 11, 2002 which upheld the substantiation.

13. A preponderance of the evidence in this case does not show that the petitioner caused any bodily injury to D.R. It is not clear from the evidence that the petitioner was actually physically injured in the kitchen as he was never examined by a physician. Hearsay evidence offered that the petitioner said his neck was injured and his request for pain medication on a one time basis is not in itself sufficient to conclude that an injury to the petitioner's neck actually took place. This is particularly so in light of the D.R.'s anger about being asked to leave the kitchen, his pre-existing animosity towards the petitioner and his desire to get the petitioner away from him. The petitioner's testimony that she did not yank the wheelchair appeared sincere and credible. It was not possible to assess the accuracy of D.R.'s statements since he was not available to testify. In addition, if D.R. had been injured in the kitchen, it is not possible to tell from the evidence offered whether he was injured by his own flailing, by some kind of an accident or by an intentional action of the petitioner.

14. A preponderance of the evidence does not show that the petitioner mistreated D.R. with resulting mental anguish.

The testimony of the petitioner was that she did not treat the petitioner roughly or verbally abuse him. While there were no other eye-witnesses during the first few seconds of the incident, those that came upon the scene corroborated the petitioner's testimony. Hearsay evidence offered from D.R. indicates that he accused the petitioner of "yanking" his chair but without an opportunity to hear directly from D.R. the accuracy or meaning of his statement cannot be ascertained. There is no evidence that D.R. accused the petitioner of verbally abusing him, although he was surely unhappy with the message she gave him. The evidence clearly indicates that D.R. was upset by this encounter but without his testimony, it is not possible to tell by his reaction alone if mistreatment occurred. This is particularly so since the evidence also indicated that D.R. could be temperamental and had been resistant at times to authority and rules at the nursing home.

15. The petitioner has been unable to obtain employment in the nursing field based on the substantiation made by DAD. The state licensing board has also started a proceeding to revoke her aide's license based on this substantiation which is pending at this time.

ORDER

The decision of DAD substantiating the abuse is reversed.

REASONS

The Commissioner of the Department of Aging and Disabilities is required by statute to investigate reports regarding the abuse of elderly adults 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, 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 defines "elderly adult" as an "individual who is sixty years of age or older." 33 V.S.A. § 6902(6). Abuse is defined, in pertinent part, as:

- (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;

. . .

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

33 V.S.A. § 6902

The purpose of this hearing is not to determine whether the petitioner's employer had cause to terminate her or whether she should be able to retain her aide's license. The purpose of this hearing is to determine whether the petitioner abused an elderly adult as that term is defined in the above regulation.

The petitioner has argued that none of D.R.'s statements (which are underlined above) should even be allowed into evidence because they are hearsay and D.R. is not available to testify with regard to those statements. She argues that her right to confront the witness and test the truthfulness of those statements is violated by their admission.

DAD has argued that the statements made by D.R. during the incident are admissible because they fall under both the "excited utterance" or contemporaneous expression of pain exceptions to the rules excluding hearsay without regard to whether D.R. is available for cross-examination. See Vermont Rule of Evidence 803. DAD is correct that under the regulation utterances during the event regarding perceived pain and the source of it are admissible, even when the person

who uttered that statement is not available to testify. It appears that statements made by D.R. to his charge nurse after the incident describing his pain are also admissible under this rule as "statements made for purposes of medical diagnosis or treatment." See V.R.E. 803.

DAD argues that all of the hearsay statements regarding D.R.'s assertions made at the hearing should be otherwise admissible under the Board's own fair hearing "relaxed hearsay" rule. That rule allows the admission of hearsay evidence to prove a fact if, in the judgment of the hearing officer, "application of the exclusionary rule would result in unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs." Fair Hearing Rule 12. Whether or not the hearing officer can or should admit statements in abuse cases outside of the parameters of Vermont Rule of Evidence 804a which allows for hearsay to be admitted in cases involving young children and mentally ill adults only when the alleged victim is available to testify, is a question that need not be reached here since admissibility has been

determined on other grounds.² See In re C.M. 168 Vt. 389, 721 A.2d 1176 (1998).

Even though the above evidence was admitted, it is not determinative of the issue. The hearing officer must still weigh the evidence and consider it in light of other evidence admitted at hearing. As was set forth in paragraphs 13 and 14 above, the hearing officer did not find the statements of D.R. when considered in combination with all of the other evidence to completely and accurately reflect the pertinent facts.

As the preponderance of the evidence does not show that any facts occurred which constitute "abuse" under the above statute, the petitioner's request to reverse the substantiation should be granted.

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² The only testimony not covered by the exceptions are those of the social worker who spoke with the petitioner later. As the hearsay statements offered by her are cumulative and consistent with those admitted and as part of that hearsay statement is helpful to the petitioner in that it reveals the D.R.'s biases, there is no harm in admitting those statements as well.