

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-05/17-236
)
Appeal of)
)

INTRODUCTION

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL), Adult Protective Services Division (APS) substantiating a report that the petitioner exploited a vulnerable adult. As noted below, the facts are not in dispute. The issue is whether the petitioner's actions constituted exploitation under the pertinent statute.

In lieu of an oral hearing the parties submitted the matter based on stipulated facts and written legal arguments (i.e., cross motions for summary judgment).

FINDINGS OF FACT

1. On March 30, 2015, Petitioner was working as a Registered Nurse at Brookside, a nursing home, in White River Junction, Vermont.

2. One of the patients at Brookside on March 30, 2015 was JB (DOB: 10/5/24).

3. At all relevant times, JB was a "vulnerable adult," as that term is defined under 33 V.S.A. § 6902(14)(A).

4. In doing the evening round of medications for patients on March 30, 2015, Petitioner checked out a 5 mg. oxycodone pill to administer to JB. JB was scheduled for an evening oxycodone pill, but the instructions were to hold if JB was sleeping. Upon arrival at JB's room, Petitioner found that JB was sleeping, and so Petitioner did not administer the pill to JB. Under Brookside's protocols, Petitioner was then required to "waste" the pill, (i.e., have another nurse observe the proper disposal of the pill). Petitioner did not follow this protocol. Instead, he put the pill in his pocket, took it home and ingested it.

5. On the same day that Petitioner took the pill, he falsely wrote on Brookside's narcotics administration records that he had signed out and administered a 5 mg. oxycodone to JB on that date at 6 p.m.

6. There was no negative impact or harm to JB as a result of Petitioner's actions. There were no adverse health consequences. There were no adverse financial consequences for JB, because the medication is charged to JB's pharmacy bill and paid by Medicare, whether the medication is taken or wasted.

7. Petitioner reported that this was the only time that he had diverted medication from the patient, and investigators' review of Brookside's medication records contained no evidence of additional medication diversions.

8. On April 3, 2015, Petitioner self-reported his taking of the pill to the OPR (Office of Professional Licensing) and to Brookside.

9. Petitioner was suspended from his duties as a nurse at Brookside pending the outcome of the internal Brookside investigations.

10. Petitioner was charged criminally with prescription fraud in violation of 18 V.S.A. § 4223(a)(1), and his case was referred to Adult Court Diversion, which he successfully completed.

11. Petitioner was the subject of a proceeding before the OPR, Board of Nursing, in which he was charged with unprofessional conduct. In Re (name), Docket No. 2015-136. In December 2015, Petitioner and OPR agreed to (a) stipulation and Consent Order imposing substantial conditions on his nursing license. On or about April 12, 2017, Petitioner filed a petition with the (licensing) Board for relief from the conditions on his nursing license. His petition was denied because petitioner did not demonstrate

full compliance with the conditions. His license, therefore, remains conditioned beyond the specified 1-year term.

ORDER

The Department's decision is affirmed.

REASONS

By statute, the Commissioner of DAIL is required to investigate allegations of abuse, neglect, and exploitation of vulnerable adults, and to keep the cases that are substantiated in a registry under the name of the person who committed the neglect. 33 V.S.A. §§ 6906 and 6911(b). The law's purpose is to "protect vulnerable adults whose health and welfare may be adversely affected through abuse, neglect or exploitation". 33 V.S.A. § 6901.¹

Once DAIL substantiates abuse, neglect, or exploitation of a vulnerable adult, the person who has been substantiated may apply to the Human Services Board for relief. 33 V.S.A. § 6906(d). The hearing before the Board is *de novo*. DAIL bears the burden of proof to show by a preponderance of evidence that the petitioner's behavior in this case meets the criteria for exploitation.

¹ 33 V.S.A. § 6902(14)(D)(i) defines "vulnerable adult" to include a person over 18 who is "impaired due to . . . mental condition, or a physical, psychiatric or developmental disability".

Under 33 V.S.A. §§ 6902(6), the definition of "exploitation" includes:

(A) Willfully using, withholding, transferring or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another;

(B) Acquiring possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, duress or fraud. . .

The petitioner argues that if he had not taken the pill home and ingested it, it would have been destroyed pursuant to medical protocols, even though JB had paid for it. Therefore, he maintains that exploitation should not be held to have occurred because, in the end, JB suffered no actual harm or loss of property.

However, the above definitions of exploitation focus almost entirely on an ill-gotten *gain* to the perpetrator. Nothing in the plain language of these provisions requires the Department to necessarily show a lasting and measurable detriment to the victim.²

There is no dispute in this case that the pill was JB's property, to be either used by him or destroyed according to medical protocol. The petitioner, JB's caregiver, admits he

² Although not raised by the Department, it is certainly not beyond contemplation that the health and wellbeing of nursing home residents *could be* adversely affected by intentionally-inaccurate entries by their caregivers in their medication charts.

wrongfully took JB's pill home, used it, and then fraudulently tried to cover his tracks. Simply because he was clever (and perhaps lucky) enough not to have "harmed" JB, it cannot reasonably be concluded that these actions were outside the meaning and/or intent of exploitation as defined in the above provisions.

Accordingly, the Department's decision must be affirmed.
3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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