

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-03/18-168
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Appeal of)
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INTRODUCTION

Petitioner appeals a substantiation determination by the Department of Disabilities, Aging and Independent Living (DAAIL or Department). The substantiation is based on the Department's determination that petitioner physically abused a vulnerable adult in one incident on October 21, 2017. After multiple status conferences and continuances of scheduled hearing dates a hearing was held on November 30, 2018. The following findings are based on the evidence submitted at hearing.

PROCEDURAL BACKGROUND AND EVIDENTIARY RULING

This case was originally set for hearing in June 2018. The case was continued at the Department's request in order to provide additional time to locate the complaining witness, "TD" (hereafter TD). The hearing was then reset for July. Prior to the July hearing date, the Department filed a motion to have TD appear by phone. The motion reported that TD now

lived in northern Vermont, does not drive and would need to obtain a ride to the hearing, and also had an obligation on the date of the hearing that would prohibit her from attending in person. In order to advance the case, the hearing officer offered the option of having TD testify using the video terminal at a State office building that was closer to the witness's home. Further continuances of July and October hearing dates were subsequently granted for reasons unrelated to the facts of the case.

Further status conferences were held and the Department advised that TD no longer wished to testify but that the Department would proceed with the matter. The case was rescheduled for hearing on November 30th. On November 28th, the Department advised that TD would testify. The hearing officer advised the Department that the video equipment was not available for the hearing and that TD would therefore need to appear in person. At hearing on November 30th, TD did not appear in person but the Department stated that TD would be available to testify by phone. The petitioner did not oppose the request for telephone testimony.

As this case involves an allegation of physical assault, and hearings are held in conference rooms without means to separate the parties or provide security, the motion to allow

telephone testimony was permitted. However, the hearing officer noted that presentation of TD's testimony by phone would make it much more difficult to assess the credibility of the witness. The Department acknowledged that limitation and TD was permitted to testify via telephone.

FINDINGS OF FACT

1. Respondent and TD are both adults (in their forties or fifties) who had been involved in a romantic relationship in 2017. The allegation at issue is TD's report that the petitioner hit her in the face on October 21, 2017.

2. The Adult Protective Services Investigator testified at hearing that the petitioner agreed to speak to him about the incident and that he interviewed petitioner on November 15, 2017. The petitioner acknowledged a verbal disagreement with TD on the date in question but denied hitting TD; petitioner reported that TD was intoxicated and he witnessed her hit her head on the doorframe as she was getting out of her car.

3. TD provided the following account via telephone: She said she was living in a group home in Burlington when she was in a romantic relationship with petitioner. She said she receives social security income and has disabilities to

include bi-polar disorder, post-traumatic stress disorder, and depression. She stated that she and petitioner were "boyfriend and girlfriend" in 2016 or 2014. When asked by the Department, she did not recall the date (including the year) of the incident at issue in the case. She said she did recall being at a motel in Colchester with the petitioner at some point in the past. She said she was not really sure about what happened but she guessed that they were in an argument and petitioner then hit her in the eye. She then said that she thought they were at petitioner's house when the incident occurred.

4. There was no dispute at hearing that TD received services due to her mental health conditions; petitioner agreed that TD received mental health services and assistance with housing. Therefore, there is no dispute that TD meets the definition of "vulnerable adult" provided in the Adult Protective Services law.

5. When asked on cross examination whether she remembered being at a motel in Colchester with petitioner, TD said she did not remember the events of that evening. When prompted about certain events of that evening, TD said she remembered being in the car with petitioner in front of a motel. When asked by the petitioner how he had hit her, TD

said she thinks he punched her in the eye when they were back at his mother's house. When asked whether she had been drinking alcohol on the date of the incident, TD initially agreed that she had been drinking beer, but then denied drinking before the incident happened.

6. While it was not possible to see petitioner's demeanor at hearing, petitioner's voice and language sounded unsure, confused or, alternatively, defensive during her testimony.

7. The petitioner testified he and TD met in 2017 when he was homeless and she was living at a group home. He subsequently obtained housing. He said they had a romantic relationship for a period of time but had ended it two or three days prior to the date of the alleged incident on October 21st. Petitioner said that a few days before October 21st, he was giving TD a ride and TD had asked him to stop at a store and buy her beer because she didn't have any money. Petitioner subsequently learned that TD did have money and he and TD became involved in a verbal argument which resulted in the police being called. The event ended with the police instructing TD to obtain her things from petitioner's car and for the pair to leave the area separately.

8. Petitioner said that TD called him a few days later, on October 21st, for a ride to a motel; a motel room had been reserved due to a problem at her residence. Petitioner said that he gave her the ride because he felt sorry for her and that "it was a constant thing with us" that one would feel sorry for the other person. Petitioner said that TD had been drinking before he picked her up on October 21st. When they arrived at the motel in Colchester, TD was unable to check in as she had not brought an ID. Petitioner said they had a verbal argument at this time because they looked through all of TD's belongings to find the ID and he was telling her that it wasn't there and she wasn't listening to him. Petitioner then drove TD back to her residence to get her ID. Petitioner testified that TD was drinking in the car while they were driving and that they stopped on the way back to the motel to buy more beer. He said he didn't know exactly how many beers TD drank that day but he believes that she drank about five to seven 24-ounce beers. He stated that he did not drink any beer or other alcohol that day.

9. After returning to the motel, petitioner stated that TD got out of the passenger seat of the car and he heard a thump and that TD had hit her face on the doorframe and hit her glasses into her face underneath her right eye. He said

that she was then holding her head and said it hurt but didn't then make a big deal of it. He said that they then went into the motel and waited for 10 minutes in the lobby. He said that after she got a room he stayed with her in the room for about 10 minutes and then left. After leaving, he realized her phone was in the car, so he returned to the motel with the phone and gave her the phone and then left again. Petitioner denied hitting TD at any time.

10. Petitioner was straightforward in demeanor, he was able to testify in detail about the events at issue and his testimony at hearing in November 2018 was consistent with his report to the APS investigator in November 2017. His testimony was credible.

11. In contrast, TD acknowledged that she had confused memories of the events on the date in question. She testified that the incident of being hit in the face occurred at three different locations. She admitted that she was drinking alcohol prior to the event, though she later denied this. Coupled with petitioner's unrebutted testimony that petitioner had been drinking beer prior to the time he picked her up at her residence and while en route to the motel, TD's testimony was not reliable and it is not adopted in any

respect here. TD's testimony was the only evidence presented of petitioner's alleged actions.

ORDER

The Department's substantiation decision is be reversed.

REASONS

The Department investigates allegations of abuse, neglect and exploitation concerning vulnerable adults. See 33 V.S.A. §§ 6901, *et. seq.* Names of individuals substantiated for abuse, neglect or exploitation are placed on a registry maintained by the Department which may be disclosed to potential employers or volunteer organizations serving vulnerable adults. 33 V.S.A. § 6911(b). Appeals from a substantiation finding are reviewed by the Board de novo and the Department has the burden of establishing the substantiation by a preponderance of the evidence. 3 V.S.A. §3091; Fair Hearing Rule 1000.3(O)(4).

TD is over the age of 18 and receives services as a result of mental health conditions; there was no dispute that TD was a vulnerable adult at the time of the alleged incident as defined by 33 V.S.A. § 6902(14).

The sole issue in this appeal is whether petitioner was responsible for committing an incident of abuse as provided

by the statute. "Abuse" is applied to the facts of this case, is defined, in pertinent part, as:

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 vulnerable adult.

33 V.S.A. § 6902(1)(B).

While TD did testify at hearing that petitioner struck her in the face on October 21st, her recollection of the totality of the event casts doubt on that testimony. She initially did not remember the event at the hotel, but then after prompting said that she remembered being there; she said that she thought the incident when she was hit happened at two other locations, however there was no evidence that she had been with petitioner at those locations on the date in question. She initially admitted drinking alcohol prior to the event, but then denied having anything to drink prior to the incident. In contrast, petitioner provided a consistent account of the incident which included testimony that the petitioner was intoxicated when she hit her face on the doorframe while getting out of his car.

Therefore, the Department did not meet its burden of proof that petitioner committed "abuse" as defined in the

statute by a preponderance of the evidence. See Fair Hearing No. M-08/16-813.

As the Department's substantiation determination was not supported by sufficient evidence at hearing the determination is inconsistent with the applicable rules and statutes and must be reversed by the Board. See 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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