

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 15,190
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities (DAD) substantiating a report of abuse against the petitioner involving an elderly resident of a nursing home where the petitioner was employed.

FINDINGS OF FACT

In May, 1997, the Department received a report from a nursing home that a licensed practical nurse employed by the facility had been accused of abusing one of the residents at the facility. Upon its investigation the Department learned one of the petitioner's coworkers, a nurse's aide, had alleged that she had observed the petitioner kick an elderly resident in the foot and swear at him. The Department's investigation culminated with a Commissioner's Review Hearing held on August 8, 1997, after which the Department determined that the report of abuse was "substantiated". This appeal followed.

At the hearing, held on December 11, 1997, the coworker in question testified that in late May, 1997, she and the petitioner were toileting and changing the soiled clothes of an elderly male resident who had severe dementia. The resident wore a brace on one of his legs,

and his shoe had to be fitted on over the brace. The resident was not capable of assisting with his dressing and it was usually difficult to slip his shoe on over his brace.

The coworker testified that while the petitioner was attempting to put the resident's shoe on she became frustrated, called the resident a "fucking idiot", kicked him on the foot, and then left the room.

The coworker was shaken by this incident and went out into the hall where she heard the petitioner tell another aide that she (the petitioner) had just said something she'd probably regret. After the petitioner had left the area, the aide who had witnessed the incident reported what had happened to the aide with whom the petitioner had been talking. At the other aide's suggestion, she then told her supervisor.

The second aide also testified at the hearing, and she essentially corroborated the first aide's testimony as to what happened in the moments immediately after the incident. She also corroborated that the first aide was visibly upset by the incident.

The incident occurred on the Memorial Day weekend, and there was some delay in the nursing home reporting the incident to DAD. The administrator and the nursing director at the home testified that after the incident was reported to them they placed the petitioner under

suspension pending the outcome of the DAD investigation. Both of them testified that the petitioner is an experienced and highly regarded nurse, and that there had been no prior problems with her.

All the witnesses agreed that there had been no sign of injury to the resident. Although DAD concluded that the petitioner had kicked the resident in the "ankle", the aide who witnessed the incident testified that the kick had been to the resident's foot while his shoe was partially in it.

The petitioner testified that she has no specific recollection of the incident in question and does not remember talking that day with the aides who testified at the hearing. The petitioner vehemently denies, however, that she ever kicked or swore at any resident.

The petitioner presented some vague testimony about "backstabbing" by employees at the nursing home, but she did not allege any particular problems between her and either of the aides who testified at the hearing. The petitioner admitted that the aide who witnessed the incident had only recently been hired, and that she did not know her very well.

The hearing officer deemed the testimony of the two aides to be highly credible. Although there were some minor inconsistencies between the testimony of the aides at the hearing and what the SRS investigator had earlier determined had occurred, these are deemed to be more likely

indicative of inaccuracies in the DAD report rather than a problem with the witnesses themselves.

The hearing officer did not deem the petitioner to be credible either in her lack of recollection of the events of that day or in her denials that the incident occurred as reported by the aides. There is no credible evidence that any of the witnesses who testified at the hearing for the Department had any bias against the petitioner or any reason to fabricate or exaggerate the allegations against her. The investigations on the part of the nursing home and the Department appear to have been thorough and open minded.

The above notwithstanding, it appears that the incident in question was entirely isolated, and that the petitioner is an experienced, competent, and respected LPN.

However, based on the credible testimony of her coworkers it is found that the petitioner did intentionally commit the acts as reported by the aide who was working with her on that occasion.

ORDER

The Department's decision is affirmed.

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 Department for expungement of his or her name from the registry. 33 V.S.A. § 6911(d). A denial of this application is appealable to the Human Services Board pursuant to 3 V.S.A. § 3091(a).

As found above, credible evidence in this case establishes that the petitioner, while engaged in her work as an LPN at a nursing home, swore at a resident and angrily kicked him in the foot.

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, the petitioner's conduct in this case was intentional, but there was no apparent actual injury to the resident in question. Nonetheless, it must be concluded that kicking an elderly and disabled nursing home resident in the foot and swearing at him in frustration was in "reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering" within the meaning of subsection (B) of the above statute. In noting the intent of the elderly abuse of status (see 33 V.S.A. § 6901) the Board has held that "residents in nursing homes have an expectation of trust and security from their caregivers which must be maintained as an integral part of their welfare". Fair Hearings No. 12,580 and 12,187; see also, Fair Hearing No. 9716. Thus, it must be concluded that the petitioner's actions in this case constituted "abuse" of an elderly person within the meaning of the statute.

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