



State of New Jersey

PHILIP D. MURPHY
GOVERNOR

DEPARTMENT OF HUMAN SERVICES
OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY
PO Box 700
TRENTON, NJ 08625-0700

CAROLE JOHNSON
ACTING COMMISSIONER

SHEILA Y. OLIVER
LT. GOVERNOR

FINAL AGENCY DECISION
OAL DKT. NO. HSL 00420-17
AGENCY DKT. NO. 17-001

M.P.,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

M.P. appealed the finding of the Department of Human Services (DHS), that she committed an act of sexual abuse, as defined in N.J.S.A. 30:6D-74, against a service recipient of the Division of Developmental Disabilities (Division), and the decision to place her name on the Central Registry of Offenders against Individuals with Developmental Disabilities (Central Registry). N.J.S.A. 30:6D-77.

PROCEDURAL HISTORY:

The Office of Program Integrity and Accountability's Office of Investigations, investigated an unusual incident between M.P. and R.B., an individual who receives services from the Division. By letter dated November 10, 2015, M.P. was notified that the investigation had substantiated abuse against her and that a decision whether to place her name on the Central Registry was pending. Petitioner filed a request for an appeal of the abuse charge and the Department transmitted that matter on April 11, 2016, to the Office of Administrative Law (OAL), which filed it for determination as a contested case (OAL Docket No. HSL 05411-2016S). On October 19, 2016, the Honorable Joseph A. Ascione, ALJ, issued a prehearing order setting December 30, 2016, as the discovery end-date. On December 22, 2016,

respondent served petitioner with the State's First Demand for Answers to Interrogatories and Production of Documents and the First Request for Admissions. Petitioner failed to respond.

On January 6, 2017, the Department issued an amended letter to notify M.P. that her actions warranted placement of her name on the Central Registry, but that there was no need to request a second fair hearing as the matter under OAL Docket No. HSL 05411-16 was still pending. The Department transmitted the placement matter to the OAL on January 9, 2017, where it was consolidated with the original filing under the present docket number.

Following telephone prehearing conferences with the parties, Judge Ascione issued three separate deadlines for submission of discovery requests to which M.P. did not respond.

On August 9, 2017, the matter was reassigned to Tricia M. Caligure, ALJ. On August 25, 2017, a telephone prehearing conference discussed discovery matters. On August 30, 2017, the new ALJ entered an Amended Prehearing Order, requiring discovery to be completed by September 1, 2017. The parties submitted Joint Stipulations of Facts and Joint Exhibits on October 13, 2017 and the Department filed a motion for summary decision in its favor - as there were no genuine issues of material fact and all statements in M.P.'s first and second requests for admission were deemed admitted by petitioner pursuant to N.J.A.C. 1:1-10.4(c). Specifically, the Department sought approval of the provisional finding that M.P. committed acts of sexual abuse against R.B. and of the decision of the Department to place M.P. on the Central Registry.

M.P. failed to timely file a responding affidavit setting forth facts as to which there is a genuine dispute, pursuant to N.J.A.C. 1:1-12.5(b). On November 30, 2017, with the Department's consent, M.P. requested until December 4, 2017, to file a response to the Department's motion. This request was granted. On December 4, 2017, M.P. filed a letter brief in opposition to summary disposition in favor of the Department and as cross-motion for summary disposition in favor of M.P. In so doing, M.P. adopted the procedural history and facts set forth in the Department's brief. On December 12, 2017, the Department filed a reply letter to M.P.'s opposition to its motion for summary disposition and opposition to M.P.'s cross-motion for summary disposition. The record was then closed.

Based on the documents submitted, the ALJ issued an Initial Decision/Summary Decision.

EXCEPTIONS:

No exceptions were received.

INITIAL DECISION:

Based on the Joint Stipulation of Facts and Joint Exhibits, the ALJ found:

1. M.P. was a Senior Therapy Program Assistant at the New Lisbon Developmental Center.
2. R.B. is an individual receiving services from the Division. He was admitted to New Lisbon in 2005 and lived there during the time period in question.
3. R.B. has a developmental disability as defined in N.J.S.A. 30:6D-25(b).
4. M.P. supervised R.B. during her employment at New Lisbon.
5. On or about July 19, 2015, R.B. sent M.P. a photograph of his penis via text message.
6. On or about July 19, 2015, M.P. responded to the photograph of R.B.'s penis by sending R.B. a text message that stated: "Omg now I really Need u. . HELLO."
7. On or about July 19, 2015, M.P. sent R.B. a text message that stated: "Wtf he doing outside I wanted too [sic] kiss u."
8. Sometime between July 19, 2015, and August 1, 2015, R.B. sent M.P. a text message that stated in part: "Yeah can you do me a favor stop by to make love to me."
9. Sometime between July 19, 2015, and August 1, 2015, M.P. responded to R.B.'s text message by sending R.B. a text message that stated in part: "I wish I could. That's [sic] sounds real nice."
10. On or about August 10, 2015, M.P. sent to R.B. a photograph of her vaginal area in a red-lace undergarment via text message.
11. On or about August 11, 2015, M.P. sent to R.B. a photograph of her breast area and cleavage in a red-lace undergarment via text message.
12. Petitioner and R.B. are not married, and are not engaged in a domestic partnership or a civil union.

The ALJ correctly stated the applicable laws governing the matter; finding, the New Jersey Legislature created the Central Registry to protect the legal rights and safety of individuals with developmental disabilities by identifying those caregivers who have wrongfully caused them injury, and then preventing such caregivers from again working with individuals with developmental disabilities. N.J.S.A. 30:6D-73; N.J.A.C. 10:44D-1.3. An individual will be listed on the Central Registry if he or she has committed an act of abuse. N.J.S.A. 30:6D-77(b). "Abuse" includes "wrongfully inflicting or allowing to be inflicted . . . sexual abuse . . . by a caregiver upon an individual with a developmental disability. N.J.S.A. 30:6D-74; N.J.A.C. 10:44D-1.2. "Sexual abuse" is defined for purpose of the Central Registry as:

"An act or attempted act of lewdness, sexual contact, or sexual penetration between a caregiver and an individual with a development disability. Any form of sexual contact or activity between a caregiver and an individual with a developmental disability, absent marriage, domestic partnership, or civil union, is sexual abuse, regardless of whether the individual with a developmental disability gives consent or the caregiver is on or off duty." [N.J.S.A. 30:6D-74; N.J.A.C. 10:44D-1.2.]

A substantiation of abuse shall be based upon the preponderance of the evidence found during the investigation. N.J.A.C. 10:44D-3.2. The Department asserted that M.P. committed acts of sexual abuse when she exchanged text messages of a sexual nature with R.B. M.P. argued that despite the inappropriate nature of the text messages, they do not constitute physical contact and that the prohibition found in the statute is of intimate physical relations, not virtual communications. The Department countered that any form of sexual activity between a caregiver and a service recipient constitutes sexual abuse, “regardless of physical contact.” Further, the Department notes that “lewdness” also constitutes sexual abuse and the statutory definition of lewdness does not require contact. “Lewdness” is defined in N.J.S.A. 30:6D-74, as:

[T]he exposing of the genitals for the purpose of arousing or gratifying the sexual desire of a caregiver or an individual with a developmental disability, or any flagrantly lewd and offensive act which the caregiver knows or reasonably expects is likely to be observed by an individual with a developmental disability.

While it is true that the photos sent by M.P. of her genitals show her breasts and vaginal area partially covered by lace underclothing, she admitted that she sent them and thought R.B. would enjoy them. The argument that partial exposure of the genitals for the purpose of R.B.’s enjoyment does not qualify as “exposure for the purpose of arousing or gratifying the sexual desire” of R.B. is not persuasive. Further, sending sexual images is clearly an “offensive act which the caregiver knows or reasonably expects is likely to be observed by an individual with a developmental disability.” N.J.S.A. 30:6D-74 (emphasis added). The statute does not include any language prohibiting only those lewd acts which are performed in-person.

R.B. is a resident and service recipient at New Lisbon; he is an individual with a developmental disability. M.P. worked at New Lisbon in a capacity in which she exercised supervisory authority over R.B.; she was a caregiver with respect to R.B.

The facts to which M.P. stipulated make clear that she and R.B. engaged in a form of contact—text messaging and the sharing of photographs—that was sexual in nature. Not only did they exchange photos of their sex organs, but they discussed via text engaging in sexual activities.

The ALJ concluded, by a preponderance of the undisputed, credible evidence that M.P. committed acts of sexual abuse against R.B., an individual with developmental disabilities, and her placement on the Central Registry was appropriate. The ALJ ordered that respondent’s application for summary disposition be granted and filed her decision with the Director of the Office of Program Integrity and Accountability for consideration.

FINAL AGENCY DECISION

Pursuant to N.J.A.C. 1:1-18.1(f) and based upon a review of the ALJ's Initial Decision and the entirety of the OAL file, I concur with the Administrative Law Judge's findings and conclusions. **I CONCLUDE and AFFIRM** that the Department has met its burden of proving sufficiently that M.P. committed acts of sexual abuse against R.B., an individual with developmental disabilities, and that her placement on the Central Registry was appropriate. The ALJ correctly found that there were no material facts in dispute; therefore, the matter was correctly decided by way of summary decision, because there were no relevant facts in dispute that would necessitate a hearing, as a matter of law. The ALJ correctly interpreted the law in this matter of sexual abuse to hold that physical contact is NOT always a necessary element in the Central Registry of Offenders against Individuals with Developmental Disabilities' definition of sexual abuse – sexual abuse can consist of any flagrantly lewd and offensive act which the caregiver knows or reasonably expects is likely to be observed by an individual with a developmental disability.

Therefore, pursuant to N.J.A.C 1:1-18.6(d), it is the Final Decision of the Department of Human Services that **I ORDER** the placement of M.P. on the Central Registry of Offenders against Individuals with Developmental Disabilities.

Date: March 12, 2018



Lauri Woodward, Director
Office of Program Integrity and Accountability