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FINAL AGENCY DECISION

OAL DKT. NO. HSL 03760-18
AGENCY DKT. NO. DRA#18-004

D.C.,
Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

D.C. appealed the finding of the Department of Human Services (Department, DHS) that he committed an act of physical abuse, as defined in N.J.S.A. 30:6D-73 et seq., against a service recipient of the Division of Developmental Disabilities (Division), and the decision of respondent to place his name on the Central Registry of Offenders Against Individuals with Developmental Disabilities (Central Registry). N.J.S.A. 30:6D-77.

PROCEDURAL HISTORY:

The Department's Office of Program Integrity and Accountability investigated a report of an unusual incident involving D.C. and an individual who receives services from the Division. On January 17, 2018, the Department notified D.C. that the investigation had substantiated an allegation of abuse against him and that his name would be placed on the Central Registry. On March 12, 2018, D.C., the petitioner, filed an appeal and the Department transmitted the matter to the Office of Administrative Law (OAL) for a hearing.

Prior to the hearing, there were several prehearing telephone conferences with the parties. The first two were adjourned at the request of the parties. On June 6, 2018, counsel for the Department stated that the underlying incident was the subject of an ongoing criminal investigation by the Harrison Township, New Jersey Police Department. On July 9, 2018, the Department requested that the matter be kept active and a prehearing telephone conference was scheduled for August 9, 2018. D.C. failed to appear for this conference and failed to appear for the next scheduled telephone prehearing conference on September 24, 2018. Both parties appeared for a peremptory telephone conference on October 10, 2018, after which a prehearing order and a notice of hearing date were issued.

On April 2, 2018, the Administrative Law Judge (ALJ) entered an Order to Seal. On November 15, 2018, at the request of the respondent, the ALJ entered a Confidentiality and Protective Order. The hearing was held on January 16, 2019, and the record remained open for the parties to submit post-hearing briefs and responses. Respondent filed a post-hearing brief on February 5, 2019; petitioner did not file a brief or response within the ten-day deadline and the record closed on February 15, 2019.

EXCEPTIONS:

The Deputy Attorney General (DAG) representing the Department filed a procedural exception that the record of the proceedings should not be held under seal. The Order to Seal had been entered by the ALJ on April 2, 2018. The DAG correctly maintains that initial decisions and final agency decisions involving the Central Registry Act, N.J.S.A. 30:6D-77 to -82, were never intended to be sealed from the public. In Initial and Final Agency Decisions, initials are used in place of full names, a practice which adequately safeguards the identities of victims and petitioners.

Having decisions available in Central Registry cases stimulates transparency in the adjudicatory process and educates the public and members of the bar on this developing area of the law. The availability of these decisions provides an invaluable precedential resource for use in the Office of Administrative Law. There are cases falling outside the context of the Central Registry, particularly ones that involve child abuse that fully warrant the entry of an order to seal. In this case, however, such an order serves no tenable purpose.

No reply to the exception by the DAG was received from the petitioner.

The Department contends that the order to seal was entered improvidently in this case. Further, as a general rule, such orders should not be used in Central Registry cases. Therefore, the order to seal is vacated, and the petitioner and any victims will be identified by initials in the decisions concerning this matter and any subsequent release of documents, such as transcripts or evidence (such releases shall comply with all state and federal laws concerning confidentiality, such as HIPAA and the Central Registry).

INITIAL DECISION:

Testimony and Evidence

The factual issues in this case are whether D.C. repeatedly punched K.S., an individual with developmental disabilities, with a closed fist and kicked him, causing injury; whether D.C.'s alleged actions demonstrated recklessness and careless disregard for the health, safety and well-being of K.S.; and whether D.C.'s alleged actions placed K.S. at risk of harm. Respondent presented two witnesses; D.C. testified on his own behalf.

Katie Licciardello testified for respondent. She has been employed by Bellwether/AdvoServ for three years. Licciardello knows K.S. She described K.S.'s Behavior Support Plan (BSP) and his Individual Health Plan (IHP). The BSP describes K.S.'s program level and provides a step-by-step plan to address aggression and agitation. To treat aggression or agitation, the BSP directs to redirect K.S.

to another behavior or to “self-initiate relaxation techniques.” If K.S. continues to aggress, staff are directed to take three additional, progressive steps, which do not involve restraints. Finally, if K.S. becomes an immediate threat to himself or others, staff is to place mechanical restraints on his wrists and/or ankles and release him when he is no longer an immediate threat to himself or others. If K.S. continues to be an immediate threat to himself or others, staff will apply the protective “wrap mat,” a large blanket with hooks for wrist and ankle bands. K.S. will be released when he is no longer an immediate threat to himself or others.

On January 8, 2017, K.S. was watching television with Hurdle, an employee of Bellwether/AdvoServ, in the small living room. Licciardello was at the kitchen island, facing the living room, and could see both men. A dispute over the remote control ensued. Licciardello convinced K.S. to go upstairs. K.S. did so, called his mother and, a few minutes later, agreed to apologize to Hurdle. Hurdle was still yelling, though to no one in particular, and when K.S. attempted to apologize, Hurdle yelled at him, saying, “We can take this outside.” Licciardello saw Hurdle try to direct K.S. toward the outside door. She did not observe K.S. showing aggression, though he raised his voice when he tried to apologize. Further, she did not observe Hurdle using the interventions for treating aggression found in K.S.’s BSP.

Licciardello testified that, D.C. “stormed” through the kitchen door with such force that the door banged into the wall, threw off his jacket and gold chain, and hit K.S. in the back or side of his torso. K.S. had had his back to the kitchen door; he appeared unaware of what had happened and dropped to the floor in a fetal position. D.C. continued to hit K.S. and Hurdle stomped on him. Licciardello did not recall the number of times D.C. hit K.S.; she did recall that D.C. hit K.S. on his torso and that K.S.’s nose was bleeding. She, and two other female direct support personnel (DSP), tried to pull the men off K.S. Once freed, K.S. ran outside in bare feet into the street. Licciardello did not observe K.S. exhibiting aggression toward D.C. She did not observe D.C. using the interventions for treating aggression found in K.S.’s BSP.

Licciardello was able to get K.S. into another Bellwether/AdvoServ employee’s car. They drove to another group home and eventually took K.S. back to his own group home, by which time both Hurdle and D.C. were gone. The police were called; Licciardello gave the police a statement.

Deborah Ann Tomlin (Tomlin) testified for respondent. She is employed by DHS as a Quality Assurance Specialist in the Office of Program Integrity and Accountability, Office of Investigations. Her investigation began with receipt of the Unusual Incident Report. She contacted the police to obtain clearance to begin her investigation.

Tomlin identified the reports of her interviews on April 4, 2017 with Licciardello and two other Bellwether/AdvoServ employees who were present during the incident. The account of each woman was consistent with that of the other two.

Tomlin identified the report of her interview with K.S. on April 4, 2017. She described K.S. as high functioning, with very good recollection of the incident. In any investigation, Tomlin typically interviews the alleged perpetrators and tried to contact D.C. Tomlin sent a letter to D.C. via certified mail requesting an interview, but due to a mistake of Tomlin’s secretary, this letter was not sent to D.C. until August 8, 2017. Petitioner did not pick up the certified letter. Tomlin reviewed proof that D.C. was trained by Bellwether/ AdvoServ in “abuse, neglect and exploitation of individuals;” in “prohibited

acts and practices,” which includes hitting and may result in disciplinary or legal action; and as a Self-Care Specialist.

Tomlin identified the patient registration form prepared on K.S. at Memorial Hospital of Salem (New Jersey), where he was taken after the incident, the records prepared by the emergency department nurse and doctor after each examined K.S., and the imaging report on the CT scan of K.S.’s head ordered by the ED doctor. The injury to K.S.’s head is noted. The nurse’s record differs from the other accounts of the incident in that K.S. told the ED nurse that he was assaulted in the group home and also kicked and punched in the head when he “was outside in the snow.” K.S. gave similar information to the ED doctor, stating that he was tackled when outside. Tomlin reviewed all of these forms in the course of her investigation.

Tomlin was directed by her supervisor to follow the criminal proceedings initiated after the incident. She identified the Harrison Township Police Department incident report, the court documents showing charges against Hurdle of simple assault, and against D.C. of assault. By November, 2017, there was an outstanding warrant for D.C.’s arrest. Tomlin did not know of the final disposition of the criminal proceeding involving D.C. when she completed her report.

Bellwether/AdvoServ completed the report of its investigation on February 16, 2017. Tomlin identified this report and stated that Bellwether/AdvoServ’s findings were consistent with those of DHS. Tomlin identified the letter sent to D.C. by DHS, notifying D.C. of the Department’s findings, substantiated by its investigation, and of the decision to place his name on the Central Registry. She confirmed that the statements in the DHS letter are consistent with the conclusions she reached in her investigation--that K.S. was punched and kicked by D.C. and Hurdle, he ran out of the house and was picked up by another Bellwether/AdvoServ employee, and was taken to the hospital where he was diagnosed with having sustained injuries to his head and face.

D.C. testified on his own behalf. He criticized the investigators because neither took a statement from him or Hurdle. He stated that all the other witnesses were present during the incident but only he and Hurdle were placed on leave.

D.C. cited the following differences in his account and that testified to by Licciardello and Tomlin:

1. During the course of his employment with Bellwether/AdvoServ, D.C. was called to the only group home where more difficult clients live once or twice a week to assist with disruptive residents.
2. Hurdle was the lead staff person on the day of the incident.
3. K.S. is dangerous; D.C. witnessed K.S. destroy cars and throw rocks. When K.S. misbehaves, the police must be called.
4. The three male staff working in the two group homes on the day of the incident bore the bulk of the responsibility for dangerous clients.
5. D.C. has been on Workers’ Compensation leave twice due to injuries inflicted by K.S.
6. D.C. and Hurdle both have good rapport with K.S. The reason K.S.’s behavior had improved (as testified to by Licciardello) is that Hurdle had been working with him on a daily basis.
7. The wrap mat was abolished for most other clients, but still allowed for use with K.S. When D.C. arrived at K.S.’s group home the night of the incident, the wrap mat was out. (Licciardello testified that it was still stored under the couch in the den.)

On the day of the incident, D.C. was working at a different group home. According to D.C., Hurdle called him by telephone to say that “K.S. is going off,” and to request help. When D.C. walked in, he saw K.S. holding Hurdle’s dreadlocks and D.C. tried to pull K.S. off. All three fell to the floor and K.S. then ran out of the house. “No one else was even close by.”

While D.C. criticized Tomlin for not taking his statement, he conceded that he did not accept the certified letter she sent to him as he was homeless for about six months. On or about the same time, a warrant was issued by Harrison Township Municipal Court for D.C.’s arrest. He eventually went to court and the charge was dismissed without prejudice. D.C. stressed that he does not have a criminal record, has suffered during this hard time, and truly cares for the group home residents.

ALJ’s Evidence Determinations

After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, the ALJ considered the testimony of Licciardello to be credible. Licciardello’s testimony was deemed clear, concise, and largely consistent with the statement she gave shortly after the incident, almost two years ago. Further, she had no reason to fabricate or exaggerate. Licciardello’s testimony regarding the action she took to defuse the situation was consistent with the statements given by others. Her testimony regarding the actions taken by Hurdle and D.C. was consistent with the statements given by others.

The ALJ considered the testimony of Tomlin to be credible as to the work she did and the steps she took to thoroughly investigate the incident of January 8, 2017. She did not appear to have any bias toward or against petitioner, and the ALJ could see no motive on her part for untruthful testimony. Petitioner attempted to show that Tomlin did not act diligently in her attempts to interview him. The ALJ stated that D.C. also bears responsibility in this regard, as he failed to respond to Tomlin’s calls.

The ALJ stated that D.C. appeared contrite. The ALJ believed D.C. when he said he had enjoyed working with, and cared for, the group home residents. D.C.’s testimony regarding K.S.’s behavioral problems and history of violent incidents (and incarceration) is corroborated by K.S.’s BSP. However, the ALJ stated that K.S.’s history is not at issue in the matter of this hearing.

ALJ’s Findings

After hearing the testimony and reviewing the evidence, the ALJ **FOUND** the following **FACTS** by a preponderance of the credible evidence:

1. On January 8, 2017, D.C. and Hurdle were employed by Bellwether/AdvoServ as DSPs.
2. On January 8, 2017, K.S. was a resident of a group home; he is an individual with a developmental disability. His care and the manner in which caregivers are to respond to aggression and/or agitation, if any is displayed by K.S., is detailed in his BSP, a document with which all DSPs involved in his care are expected to be familiar.

3. As of January 8, 2017, D.C. knew K.S. and had experience working with him. By D.C.'s own testimony, this experience included responding to aggressive behavior displayed by K.S.
4. On January 8, 2017, between the hours of 6:00 p.m. and 7:00 p.m., Hurdle called D.C. to assist with K.S. D.C. responded to this call shortly after receiving it.
5. Upon arriving at the Richwood group home, D.C. did not take time to assess the situation or to ask questions of Hurdle or the other DSPs on staff. He immediately used physical force meant to subdue K.S.
6. D.C. did not use a firm, neutral tone of voice to direct K.S. to sit in a chair away from Hurdle and/or the other group home residents.
7. D.C. did not verbally or physically direct K.S. to a mat for relaxation until K.S. became calm. D.C. did not attempt to use mechanical restraints on K.S.
8. D.C. repeatedly used a closed fist to strike K.S. on his upper torso while K.S. lay on the ground in a fetal position. As a result of this action by D.C., K.S. sustained injuries to his face, head and torso. K.S. ran into the street through the snow without shoes or socks and was taken to the emergency room and treated for his injuries.

The ALJ cited the Central Registry's definition of abuse (N.J.S.A. 30:6D-74) and Department's preponderance of the credible evidence burden of proof. The ALJ determined that petitioner knew K.S. and was familiar with the proper procedures to address aggressive and/or agitated behavior by K.S. Not only did D.C. fail to take the time to consider the best method of dealing with K.S., D.C. did not even take the time to determine whether K.S. was the aggressor. D.C. did not use the techniques as to which he had been trained, but immediately and without provocation struck K.S., knocking him to the ground. D.C. continued to punch K.S. while he lay on the floor, defenseless. At the same time, D.C. did nothing to prevent Hurdle from kicking K.S. repeatedly. If it were not for the other DSPs, all women, who intervened, D.C. and Hurdle may have injured K.S. even more severely. The ALJ **CONCLUDED** that respondent has proved by a preponderance of the undisputed, credible evidence that D.C. committed an act of abuse against K.S., an individual with developmental disabilities.

After allegations of physical abuse are substantiated, in order to place a person on the Central Registry, the Department must also prove that "the caregiver acted intentionally, recklessly or with careless disregard to the well-being of the service recipient resulting in injury to an individual with a developmental disability or by exposing the latter to a potentially dangerous situation." N.J.A.C. 10-44D-4.1(b) In considering this second prong of the statute, the ALJ maintained that D.C.'s determination to use physical force against K.S. was evidenced by the speed with which he came into the group home (throwing the door open "with a bang") and how he immediately began hitting K.S., without any delay or time for consideration. No witness testified as to any discussion with, or statements made to, K.S. by D.C. The purpose of K.S.'s BSP is to improve his quality of life by, among other things, reducing his inappropriate behavior via "systematic application of contingencies for inappropriate behavior." All the DSPs were aware of K.S.'s BSP; all were trained in the application of contingencies. Licciardello clearly applied her training in K.S.'s BSP when she acted quickly to defuse a confrontation that she witnessed. D.C. came to the group home, by his testimony, fully aware of K.S.'s history of aggressive behavior and that this behavior had improved (presumably for a number of reasons, including the application of the BSP). That D.C. acted without taking time to assess the situation or to administer any of the contingencies outlined in K.S.'s BSP was reckless and created a risk of harm to K.S. and the other staff. D.C. acted without regard for that risk.

The ALJ **CONCLUDED** that the DHS sustained its burden of proving, by a preponderance of the credible evidence, that petitioner's actions rose to the level of abuse as defined in

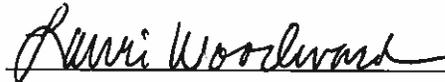
N.J.A.C. 10:44D-2.1(c). Further, she **CONCLUDED** that D.C. acted intentionally, recklessly or with careless disregard to the well-being of K.S., resulting in injury to an individual with a developmental disability, thus justifying that his name shall be entered onto the Central Registry. Consistent with her findings and conclusions, the ALJ **ORDERED** that the determination of abuse by respondent Department of Human Services against petitioner D.C. be **AFFIRMED** and further **ORDERED** that D.C.'s name be placed on the New Jersey Central Registry of Offenders against Individuals with Developmental Disabilities.

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. The ALJ had the opportunity to assess the credibility and veracity of the witnesses; I defer to her opinions concerning these matters, based upon her observations described in the initial decision. **I CONCLUDE and AFFIRM** that the Department has met its burden of proving sufficiently that D.C. committed an act of physical abuse against an individual with developmental disabilities. **I CONCLUDE and AFFIRM** that D.C. acted intentionally, recklessly or with careless disregard to the well-being of that individual, and that D.C.'s placement on the Central Registry is appropriate. **I CONCLUDE** that the order to seal this matter was improvidently issued and should be removed. **I CONCLUDE and AFFIRM** that the Confidentiality and Protective Order shall remain in place concerning all documents pertaining to this case.

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 D.C.'s name on the Central Registry of Offenders against Individuals with Developmental Disabilities.

Date: March 26, 2019



Lauri Woodward, Director
Office of Program Integrity and Accountability