



State of New Jersey

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FINAL AGENCY DECISION

N.S.,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

OAL DKT. NO.: HSL 11813-19

AGENCY DKT. NO.: DRA #19-007

CONSOLIDATED

K.H.,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

OAL DKT. NO.: HSL 11624-19

AGENCY DKT. NO.: DRA#19-006

Jonathan McMeen, Esq., for petitioners N.S. and K.H. (Laddey, Clark & Ryan LLP, attorneys)

Gregory J. Sullivan, Deputy Attorney General, for respondent, (Andrew J. Bruck, Acting Attorney General, State of New Jersey)

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners N.S. and K.H. appeal their placement on the Central Registry of Offenders Against Individuals with Developmental Disabilities (“Central Registry”), pursuant to N.J.S.A. 30:6D-73 *et seq.* Respondent Department of Human Services, Office of Program Integrity and Accountability (“DHS” or “OPIA”), investigated and substantiated that the petitioners had engaged in physical abuse and/or verbal abuse of an individual with developmental disabilities. The incident occurred on November 10, 2018, during the course of their employment at a Hewitt, New Jersey group home providing residential services to individuals with developmental disabilities and operated by Bellwether Behavioral Health. The matters were transmitted to the Office of Administrative Law (“OAL”) on August 23, 2019 and August 30, 2019, for hearings as contested cases. The cases were consolidated under OAL Docket Nos.: HSL 11624-19 and HSL 11813-19 since they arise from the same date and incident.

An Order to Seal and Consent Confidentiality Protective Order, and Consolidation Orders were entered in these matters. The matter was assigned to Danielle Pasquale, Administrative Law Judge (“ALJ”) for a hearing. The hearing was conducted in-person on February 7, 2020 and, after the onset of the COVID-19 Pandemic and Governor Phil Murphy’s Executive Orders related to the COVID-19 emergency, held virtually via Zoom on August 24 and October 30, 2020. The record closed on March 11, 2021. Due to the COVID-19 pandemic, the Governor issued Executive Order No. 103 on March 9, 2020, declaring a Public Health Emergency; the emergency continued until June 4, 2021. The time for the completion of administrative decisions was extended by Executive Order No. 127. The ALJ issued her Initial Decision on April 27, 2021 finding that N.S. committed verbal abuse but that the allegations of physical abuse by both N.S. and K.H. were unsubstantiated. The ALJ recommended placing only N.S. on the Central Registry.

Due to an increased workload caused by an unusually large number of decisions coming due since the end of the Public Health Emergency, two extensions to issue a final agency decision were granted; the first until October 7, 2021 and the second until November 30, 2021.

EXCEPTIONS TO INITIAL DECISION

The Public Health Emergency ceased on June 4, 2021 by Executive Order No. 244. Exceptions to Initial Decisions, issued during the emergency, were therefore due on June 17, 2021.

DHS filed exceptions to the ALJ’s Initial Decision on June 2, 2021. No exceptions were submitted by petitioners. Respondent’s submission argued that DHS should reject the conclusions in the Initial Decision finding that N.S. did not

commit physical abuse and, thus, physical abuse should also be considered as a factual basis to place N.S. on the Central Registry. The exceptions did not address the ALJ's recommendations as to K.H. The exceptions cite N.J.S.A. 52:14B-10(c) that DHS is not required to accept an ALJ's findings of fact or credibility findings when those findings "are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." The agency is further expressly permitted to "reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision."

INITIAL DECISION'S FACTUAL DISCUSSION AND FINDINGS

The first issue in this proceeding is whether N.S. and/or K.H. committed acts of physical and/or verbal abuse for their conduct on November 10, 2018 while performing a safety hold on F.G., an individual with developmental disabilities, by striking him in the face and/or verbally abusing him either during or after the restraining hold. The second issue is whether N.S. and/or K.H. should be placed on the Central Registry.

FACTS

The parties stipulated to the following facts:

1. On November 10, 2018, F.G. was a developmentally disabled individual residing in a group home in Hewitt, New Jersey.
2. On that date, F.G. was a service recipient of the Division of Developmental Disabilities ("DDD").
3. On that date at approximately 7:00 p.m., direct-support professionals N.S., K.H., Christine Davis ("Davis") and Melinda Decker ("Decker") were working in the group home with F.G.
4. On that date, F.G. became aggressive and was throwing furniture. He needed to be restrained.
5. On that date, F.G. was in fact restrained by N.S., K.H., Davis, and Decker at one or another point during this incident of aggression.
6. As the result of her conduct during this incident with F.G., N.S. was terminated and K.H. resigned from their employment as direct-support professionals.
7. As the result of their conduct during this incident with F.G., which was investigated and substantiated by a DHS, Office of Investigations Investigator, N.S. and K.H. were placed on the Central Registry for physical and/or verbal abuse of F.G.

The ALJ found petitioners' testimonies more credible overall, thus supporting the ALJ's conclusion that N.S. verbally abused F.G. but petitioners did not commit physical abuse. Regarding verbal abuse, the ALJ found Decker's testimony

recalling N.S.'s verbal abuse compelling. The ALJ found that after the physical altercation with F.G., N.S. told F.G. to "get the f**k away."

Turning to the allegation of physical abuse, the ALJ found given all of "the testimony along with the documentary evidence, specifically the lack of medical evidence, lack of assault charges, lack of reporting by [co-worker witnesses], mostly consistent recollections of the incident, [and] personality clashes involved with the co-workers," she could not find by a preponderance of the evidence that the alleged hitting occurred. The incident was more likely a pressing of F.G.'s face in an effort to free N.S.'s bitten thumb than physical abuse.

The ALJ concluded that the substantiation of verbal abuse warranted placing N.S. on the Central Registry and because respondent did not meet its burden in establishing that petitioners physically abused F.G., Central Registry placement was not appropriate for K.H.

DECISION AND ANALYSIS

Finding that it is in the public interest for the State to provide for the protection of individuals with developmental disabilities by identifying those caregivers who wrongfully caused them injury, in 2010, the New Jersey Legislature enacted legislation creating the Central Registry. N.J.S.A. 30:6D-73 et seq. The intent of the legislation is to ensure that the lives of individuals with developmental disabilities are safeguarded from further injury and possible death and that the legal rights of such persons are protected. N.J.S.A. 30:6D-73(c).

The legislation sets forth the standards by which individuals are determined to warrant placement on the Central Registry. If a caregiver's name is placed on the Central Registry, that caregiver is barred from working or volunteering for any DHS-funded programs.

The Legislature provided for inclusion on the Central Registry in the case of a substantiated incident of physical abuse. Examples of physical abuse include, but are not limited to, the service recipient being kicked, pinched, punched, slapped, hit, pushed, dragged or struck with an object. N.J.S.A. 30:6D-74. The caretaker must act with intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability. N.J.S.A. 30:6D-77. Verbal abuse means "any verbal or non-verbal act or omission by a caregiver that inflicts one or more of the following: emotional harm; mental distress; or invocation of fear, humiliation, intimidation or degradation to an individual with a developmental disability. Examples include, but are not limited to: bullying; ignoring need; verbal assault; use of racial or ethnic slurs; or intimidating gestures, such as shaking a fist at an individual with a developmental disability." N.J.A.C. 10:44D-1.2. The caretaker must act with intent, recklessness, or careless disregard to cause or

potentially cause injury to an individual with a developmental disability. N.J.S.A. 30:6D-77; N.J.A.C. 10:44D-4.1(b).

In deference to the ALJ's ability to assess the credibility of the witnesses' testimony during the hearings, DHS concurs with the ALJ's findings and conclusions. However, DHS disagrees with the ALJ's determinations regarding the investigation at issue. DHS believes that the investigator's testimony should not have been discounted for his perceived insufficient experience. Rather, the investigator handled four or five similar investigations; had interview training; and observed senior investigators conduct interviews, which was sufficient to handle this investigation and its interviews. Similarly, DHS believes that the interview techniques utilized by the investigator when interrogating F.G. were appropriate under the circumstances. No formal "certification" is required to engage in a dialogue with F.G. and the facts establish that the investigator conducted a proper interrogation that did not taint F.G.'s responses. The ALJ's insistence that OPIA investigators must have certified training or use "certified techniques" is misguided.

With regard to N.S.'s verbal abuse, the ALJ found Decker and Davis's testimony convincing, and concluded that N.S. acted intentionally when she swore at F.G. once the incident was over. In addition, the fact that F.G. had a reputation, when F.G. was in control, to be "sweet" adds to his likely humiliation when N.S. rebuffed his apology and thus was likely to cause him emotional harm. DHS concludes that N.S. acted intentionally to verbally abuse F.G. DHS concludes that N.S.'s verbal abuse of F.G. was an act of abuse, as defined by the regulations. DHS further concludes that neither N.S. nor K.H. physically abused F.G. K.H. did not verbally abuse F.G. As such, K.H.'s name will NOT be listed on the Central Registry; N.S.'s name will be listed on the Central Registry for verbal abuse of F.G.

Petitioners have the right to appeal this Final Order within 45 days to the New Jersey Superior Court, Appellate Division, Richard J. Hughes Justice Complex, PO Box 006, Trenton, New Jersey 08625-0006.

THEREFORE, it is on this 26th day of November, 2021,

ORDERED:

That the Initial Decision of the Administrative Law Judge is hereby **ADOPTED** and N.S. shall be placed on the Central Registry. K.H. shall NOT be placed on the Central Registry.

FURTHER ORDERED:

That any action required by this decision be promptly implemented by the appropriate Department staff.

11/26/2021
Date: _____

Lauri Woodward 

Lauri Woodward, Director
Department of Human Services,
Office of Program Integrity and
Accountability