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January 24, 2024

Via regular mail and email

Deborah Robinson, Director
N.J. Dept. of Human Services
Office of Program Integrity and Accountability
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Re: D.L. v. Department of Human Services
OAL Docket No.: HSL-04079-2019S & CSV 04380-19
Agency Reference No.: 2019-2468

Respondent DHS' Reply to Petitioner's Exceptions to the Initial Decision

Dear Director Robinson:

This office represents Respondent, New Jersey Department of Human Services (DHS), in the case against Petitioner D.L. regarding his placement on the Central Registry for caregivers who have abused or neglected individuals with developmental disabilities. Please accept this submission as DHS' Reply to Petitioner's Exceptions to the Initial Decision issued on January 4, 2024 by the Honorable Edward J. Delaney, Jr., A.L.J.

For the reasons set forth below, DHS should affirm the conclusions in the Initial Decision, which ultimately found that Petitioner committed physical abuse against a developmentally disabled individual and, consequently, recommended his placement on the Central Registry of Offenders Against Individuals with Developmental Disabilities (Central Registry), and removal from his employment.



I. STANDARD

The deciding agency may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. N.J.S.A. 52:14B-10(c).

In his Initial Decision, Judge Delanoy explains how a case that turns on the credibility of witnesses is to be evaluated:

"Given that the witnesses have different versions of the events surrounding the incident herein, it is my obligation and responsibility to weigh the credibility of the witness in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514."

II. INTRODUCTION

Petitioner D.L. was employed as a Senior Medical Security Officer (MSO) at Ann Klein Forensic Center (AKFC). On February 21, 2018, he physically abused developmentally disabled patient M.F. when he punched M.F. in the face while M.F. was receiving treatment at Helene Fuld Medical Center, a Capital Health facility

(Capital Health). During the hearing, the Court heard testimony about Petitioner striking the patient, watched video footage showing the incident in question and saw photographic evidence of visible marks on the patient's face. An investigation was conducted by DOH's Office of Investigations, and the allegations of abuse were substantiated. Notably, the investigation found Petitioner's "actions demonstrate recklessness and careless disregard for the health, safety and well-being of the individual served and your [D.L.'s] actions placed him [M.F.] at further risk of serious harm." Initial Decision page 2.

Petitioner was placed on the Central Registry for caregivers who have abused or neglected individuals with developmental disabilities. He was also disciplined and removed by DOH for his conduct. Petitioner was issued a Preliminary Notice of Disciplinary Action (PNDA) on July 20, 2018 charging him with conduct unbecoming an employee under N.J.A.C. 4A:2-2.3(a) (6), physical or mental abuse of a patient, client or resident under DOH's Administrative Order 4:08 C3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee under DOH's Administrative Order 4:08 C5. (R-2). Petitioner did not request a departmental hearing and thus, on March 1, 2019, he was issued a Final Notice of Disciplinary Action (FNDA) that sustained all charges and removed him from his position as an MSO. (R-2).

With respect to Petitioner's placement on the Central Registry, there were two issues before the court: whether respondents have proven the charges by a preponderance of the credible evidence, and if proven, whether the penalty of removal was justified and reasonable, and whether Petitioner's name should be placed on the Central Registry.

III. CREDIBLE TESTIMONY AND EVIDENCE

The Initial Decision is supported by a preponderance of the credible evidence. Judge Delanoy analyzed "how the statements and the testimony of the two critical witnesses, D.L. and [Alex] Gerasimowicz [Medical Security Officer at Capital Health] hold together when viewed in total" and found that Gerasimowicz' testimony was consistent with what he told the investigators during the DOH internal investigation. Initial Decision page 13. Gerasimowicz maintained that M.F. spit at D.L. and that D.L. used his left hand to push M.F.'s face away, and then punched M.F. with

his right hand. Id. The evidence did not show any prior issues or "bad blood" between D.L. and Gerasimowicz. Moore, a witness in the room at the time of the incident, said that M.F.'s behavior caused D.L. to "go off" and he heard Gerasimowicz yell out that D.L. hit M.F. Moore also said that although he did not see D.L. punch M.F., he heard a thwack sound. Finally, photograph evidence shows the existence of scratches on M.F.'s face and video footage substantiates Gerasimowicz's version of events. Id. The video footage shows the two men arguing and Gerasimowicz throwing his radio which contradicts D.L.'s testimony that he and Gerasimowicz were discussing which of them oversaw the handling of patient M.F. Id. at 14.

On the contrary, D.L.'s statements to the investigators and his testimony at the hearing were inconsistent. Id. D.L. denied placing his hands on M.F. in his initial written statement, but during his interview with the investigator he said he used both hands to cover M.F.'s face. Finally during the hearing, D.L. testified that he used the back part of his right hand to move M.F.'s face away. Judge Delaney correctly found that these three separate versions of what happened between D.L. and patient M.F. raises doubts as to the veracity of the facts as provided by D.L. Id. In addition the video evidence also fails to support D.L.'s version of events. Judge Delaney found that the video evidence clearly shows that D.L. was acting in a "highly agitated state" towards Gerasimowicz although D.L. testified that he was talking to no one in particular and D.L. had no explanation as to why he continued to speak to Gerasimowicz after the incident was over. Id. Witness Dossous' testimony that M.F. kicked Gerasimowicz is questionable since Dossous did not state this version of events to the investigators. Id. Additionally, since Dossous and D.L. had worked together approximately fifteen to twenty times they were familiar with each other, Judge Delaney found that Dossous may have had an interest in testifying in D.L.'s favor. Id. `

In sum, Judge Delaney found Gerasimowicz to be credible, finding no evidence as to why he may have been untruthful and no evidence of animosity between D.L. and Gerasimowicz other than the altercation between them during and following the abuse. Gerasimowicz failure to immediately report the incident is explained in his testimony and has no bearing on his credibility. Id. at 15. Judge Delaney found the explanation credible. On the other hand, Judge Delaney evaluated D.L.'s testimony in light of what he has at stake. Id. Significantly, D.L. stands to lose his job which may affect his retirement benefits. Because Judge

Delanoy had the opportunity to assess the credibility and veracity of the witnesses at the hearing, DHS should defer to his opinions concerning these matters. Judge Delanoy's factual findings are supported by substantial credible evidence in the record and should not be disturbed. Futterman v. Bd. of Review, Dep't of Labor, 421 N.J. Super. 281, 287, (App. Div. 2011) (quoting Messick v. Bd. of Rev., 420 N.J. Super. 321, 325, (App. Div. 2011)).

V. CONCLUSION

The Initial Decision properly assessed the evidence in the record. Judge Delanoy thoroughly evaluated the evidence and testimony. He determined the "facts of this case from the testimony of one credible witness, Gerasimowicz, as well as the statement of Moore and the video evidence." Id at 16. The Initial Decision finding that D.L. committed an act of abuse against M.F. and recommending his placement on the Central Registry and removal from employment should be affirmed.

Respectfully submitted,

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