



State of New Jersey

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FINAL DECISION
OAL DKT. NO. HSL 13409-12
AGENCY DKT. NO. DHU 12-010

OFFICE OF DEVELOPMENTAL
DISABILITIES LICENSING,

Petitioner,

v.

HELEN GORDON,

Respondent.

A. INTRODUCTION

On August 1, 2012, respondent, Helen Gordon, was notified that allegations of verbal abuse/psychological mistreatment and exploitation of a developmentally disabled resident had been substantiated against her. Because of these substantiations, her license to operate a community care residence was revoked pursuant to N.J.A.C. 10:44B-2.1(f).

Ms. Gordon requested a fair hearing, and the matter was filed at the Office of Administrative Law (OAL) on September 24, 2012, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on June 7, 2013, and September 11, 2013, and the record was kept open for submission of transcripts and written summations. The Petitioner, the Office of Licensing, was represented by Theodore F. Martens, DAG, and the respondent represented herself, pro se. The record closed on January 20, 2014. The Honorable Ronald W. Reba, ALJ, issued an initial decision on August 22, 2014.

B. THE INITIAL DECISION

The Department revoked Ms. Gordon's license to operate a Community Care Residence (CCR) based upon substantiations of verbal abuse/psychological mistreatment and exploitation of Service Recipient, L.S. During the hearing, the Administrative Law Judge (ALJ) heard testimony

from the Service Recipient, the Service Recipient's cousin, the Chief of Licensing in the Department of Human Services, an investigator with the Department's Special Response Unit, and the Service Recipient's case manager.

Concerning the verbal abuse, the ALJ found by a preponderance of the evidence that Ms. Gordon may have used the word "mental" in counseling discussions, but that other specific incidents of derogatory language had not been established. The ALJ concluded that derogatory remarks, if made, toward the Service Recipient's cousin "do not support a substantiation of verbal abuse of the resident."

Concerning the exploitation, the ALJ found that the Service Recipient unlocked the door for her blind housemate after work as a "practical matter," and not an inappropriate substitution of Ms. Gordon's duty of care. The ALJ found that "on the occasion in question," alternate arrangements were made. The ALJ concluded that the burden of proof had not been met to support the respondent having committed exploitation.

C. EXCEPTIONS

No exceptions were received by the Office of Program Integrity and Accountability.

D. FINAL DECISION

The Initial Decision may be adopted, modified, or rejected by the Office of Program Integrity and Accountability by issuing a Final Decision in this matter. Careful consideration was given to the entirety of the Administrative Law Judge's Initial Decision, as well as the entire record of testimony, and the documents admitted into evidence during the trial.

The ALJ concluded that the Department of Human Services did not meet its burden of proof that Helen Gordon committed verbal abuse or exploitation with regard to L.S., and, therefore, revocation of her Community Care Residence license was not warranted. I agree with the Initial Decision that there was insufficient evidence of verbal abuse against L.S. There was evidence of coarse language, but there was no clear evidence of the context in which it was used or how it was conveyed. Therefore, I adopt the ALJ's findings concerning the verbal abuse, agreeing that there is not a preponderance of evidence to support such a finding.

There is, however, a preponderance of evidence in the record to support a finding of exploitation. Helen Gordon's job as a Community Care Residence provider was to provide support, training, and a safe home to two ladies with developmental disabilities. In order to become a Community Care Residence provider, Ms. Gordon had to apply to the Department of Human Services, be vetted, and have her home inspected for safety. Before any clients were placed in her home, Ms. Gordon received extended training and provided the Division of Developmental Disabilities (DDD) with a description of her availability and capacity to provide for clients. Ms. Gordon had a contract with the Division to provide services to the two Service Recipients with full knowledge of their capabilities and maintaining that she would be available to provide care before and after the two ladies went to their day program. Ms. Gordon was paid based upon the level of services that she was expected to provide and testified that she had negotiated a higher rate for herself based upon one of the ladies level. On September 6, 2011, Ms. Gordon represented that she was employed at Lighthouse Outreach on Tuesdays from 10am to 3pm, Wednesdays from 11am to 3:30pm, and Fridays from 10am to 2:30pm (Petitioner's Exhibit P-13, page 2), with a five minute commute from home.

During questioning by the ALJ, Ms. Gordon testified that she had one of her clients “Open the door for S.” (TR 6/7/13, p.150). Ms. Gordon routinely had L.S. accompany S, her blind housemate, home from their day program and open the door for her because Ms. Gordon was not in the home to let either of them into the house. L.S.’s cousin testified that she tried four times to arrange for L.S. to attend family gatherings after the day program, but L.S. was unable to attend because L.S. had to open the door to Ms. Gordon’s house in order to let her housemate inside after the day program ended. L.S.’s cousin then wrote a letter to the DDD case manager to complain that L.S. was being employed by Ms. Gordon in such a way as to prevent L.S. from participating in family gatherings in the community. L.S.’s cousin testified that when Ms. Gordon called back to allow L.S. to attend her own birthday celebration with family, Ms. Gordon yelled at the cousin for making her rearrange her schedule (TR 6/7/13, p 113).

Ms. Gordon testified that she had been attending a training program with the National Council on Aging for four evening hours each day. She stated that she “took that position in 2010,” as a four year program, that she finished in 2012. (TR 6/7/13, p 192). This program was not included in her availability statement of 9/6/11 (above), because she was never available to allow her clients into the house on weekdays from 4:00 to 4:30pm, when the van brought them home from the day program. During questioning by the ALJ, Ms. Gordon did not give a direct response to the question of whether or not she had informed DDD of her participation in this program – her answers went from job versus training to knowledge of blindness to her not being required to be in the house at all times to who had a door key – without answering the question (TR 6/7/13, pp. 191 to 194). The most compelling evidence that the program she attended, preventing her from being home on weekdays, was unknown to DDD is that it was not noted in her availability statement made during the licensing review of 9/6/11.

The afternoon program that Ms. Gordon attended conflicted with her contractual duties to provide care for the Service Recipients under her care – to admit them into the home as she had represented she was available to do. L.S. was essentially employed by Ms. Gordon to escort her housemate from the day program into the house. L.S. was unable to enjoy the off-the-job time that community-based services are designed to offer her. She could not take a ride with her family after her day program but had to perform Ms. Gordon’s duties. The situation was brought to light by a family member who was unable to arrange for L.S. to attend family functions. A Service Recipient cannot be compelled to perform the functions of the Community Care Residence provider’s contractual duties. L.S. was denied the opportunity to attend three (“a few” as defined by L.S. in TR 6/7/13, p 41) earlier family functions because Ms. Gordon wanted L.S. to admit another Service Recipient into her house so that she, Ms. Gordon, could attend some undefined training program.

The exploitation occurred when Ms. Gordon used L.S. to perform the job for which she was contracted and paid to do by the Division of Developmental Disabilities. L.S. was not compensated for her efforts. L.S. was, in fact, denied the opportunities to attend functions with her family while carrying out duties that DDD was paying Ms. Gordon to perform.

The ALJ stated that he had the impression that the Service Recipient “felt a moral obligation to watch over” her housemate. The evidence elicited by testimony is quite different, however. L.S. is described by Ms. Gordon and the case manager as someone easily influenced by others. The case manager explained that L.S. had not complained about earlier problems with Ms. Gordon. The case manager, under questioning by the ALJ, testified that there had been reports made by other, earlier co-residents of Ms. Gordon’s CCR that L.S. did not verify until after L.S. had been removed from the house. “[T]he main reason she never told us when she lived there was because she was afraid that she would have to go back to live with Helen and things would get worse.”

(TR 9/11/13, p 21) L.S. was intimidated by Ms. Gordon. The most telling exchange of Ms. Gordon's manipulative attitude toward L.S. was revealed in this questioning of Ms. Gordon by the ALJ:

Ms. Gordon (answering the ALJ's question if she had told L.S. to watch over her housemate): I said, "Open the door for S."

ALJ: That's it?

Ms. Gordon: Right. They will be in the house. They knew their food was in the refrigerator. Okay? Because I was on a work program – training, let me put it like that. Work training. I couldn't just break up my thing and just run home every time her cousin called or sent a message home. All right? (TR 6/7/13, p 150)

The ALJ was keenly aware of the tension between the cousin and Ms. Gordon. The family member is not the troublemaker that Ms. Gordon tries to portray but someone who raised legitimate concerns regarding the care Ms. Gordon was or was not providing to the Service Recipients she was being paid to deliver. The family member correctly understood the duties of a CCR provider, as well as the rights to be afforded a Service Recipient such as the freedom of interaction in the community. The cousin was seeking the individual rights due L.S. under Ms. Gordon's contract with DDD.

The Initial Decision correctly cites N.J.A.C. 10: 44B-1.3 as the legal authority in the case of exploitation.

"Exploitation" is defined to mean any willful, unjust, or improper use of an individual or their resources for the benefit, profit, or advantage of another and/or condoning and/or encouraging the exploitation of said individual by another person. Examples of exploitation include, but are not limited to, appropriating, borrowing, or taking without authorization, personal property/funds belonging to the individual or requiring the latter to perform functions or activities that are normally conducted by persons employed by or contracted with the Division or other agencies, or the performance of which are done solely for the convenience of others.

As clearly set forth in the record at trial, Helen Gordon used L.S. to perform functions or activities that were normally to be conducted by Helen Gordon. Helen Gordon, having been contracted with the Division of Developmental Disabilities to care for a blind Service Recipient had used another Service Recipient, L.S., to provide a portion of that care (five days a week) while she attended another function that was not documented as having been known to the Division.

CONCLUSION:

I find that there was not a preponderance of the evidence to substantiate a finding of verbal abuse of L.S. by Helen Gordon and accept the findings of the Initial Decision in the matter of verbal abuse. As explained above, I find that there is a preponderance of evidence to support a finding of exploitation of L.S. by Ms. Gordon. I, therefore, must modify the findings of the Initial Decision to reflect that Helen Gordon did exploit L.S. by requiring her to escort her housemate home from day program every week day and admit her into the Community Care Residence

where Helen Gordon was contracted to provide services. To her detriment, L.S. was denied the opportunity to attend family functions because of this exploitation.

Careful consideration was given to the entirety of the Initial Decision of the Administrative Law Judge, as well as the entire record of testimony and evidential documents. Because the ALJ had the opportunity to listen to the testimony and observe the demeanor of the witnesses, his findings concerning credibility were given proper deference. Because the initial decision did not appear to reasonably apply the relevant definition of exploitation in the law, the entire record was given a greater scrutiny. Upon review, certain determinations were found to lack a showing of support or reliability in the record. Even after factoring in the proper deference for the observation of witnesses, the evidence in the record was compelling that certain determinations may have been arrived at in an arbitrary or capricious manner. The recommended decision of the ALJ is hereby **MODIFIED** by the Office of Program Integrity and Accountability.

Helen Gordon testified at trial and has submitted correspondence (ID, p11) that she does not want her Community Care Residence licensure reinstated. The question of license revocation is, therefore, moot and needs not be addressed in this Final Decision. As a matter of precedence, however, it is important that the Office of Program Integrity and Accountability affirm and maintain that the definition of exploitation does not have a solely monetary connotation. The Office of Program Integrity and Accountability endorses the above definition without determining whether or not in this instance a revocation of licensure would have been appropriate. Therefore, pursuant to N.J.A.C 1:1-18.6(b), it is the Final Decision of the Department of Human Services that Helen Gordon is not substantiated as having verbally abused a Service Recipient, but is substantiated of having exploited a Service Recipient. At her own request, Helen Gordon's Community Care Residence licensure will not be reinstated.

Date: 11/21/14



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