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FINAL AGENCY DECISION

OAL DKT. NO. HSL 07840-18
AGENCY DKT. NO. DRA#18-008

J.B.,
Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

J.B. appealed the finding of the Department of Human Services (Department, DHS) that she 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 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 Department's Office of Program Integrity and Accountability investigated a report of an unusual incident involving J.B. and an individual (A.M.) who receives services from the Division. On May 21, 2018, the Department notified J.B. that the investigation had substantiated an allegation of abuse against her and that her name would be placed on the Central Registry. On May 21, 2018, J.B., the petitioner, filed an appeal and the Department transmitted the matter to the Office of Administrative Law (OAL) for a hearing. The contested case was filed on June 1, 2018 at the OAL.

Two hearings took place on October 17, 2018 and January 29, 2019 before Ernest M. Bongiovanni, Administrative Law Judge (ALJ). The record remained open until February 28, 2019 to allow the parties to submit post-hearing briefs and responses. Respondent filed a submission on February 25, 2019; petitioner filed a submission on February 28, 2019, at which time the record was closed. The ALJ issued an initial decision on April 12, 2019.

EXCEPTIONS: No exceptions were received.

INITIAL DECISION:

Testimony and Evidence

The factual issues in this case are whether J.B. abused A.M., an individual with developmental disabilities, by having A.M. carried or dragged to her bedroom, at the instruction of J.B., causing injury; whether J.B.'s alleged actions demonstrated careless disregard for the health, safety and well-being of A.M.; and whether J.B.'s alleged actions placed A.M. at risk of harm. Respondent presented one witness; J.B. testified on her own behalf.

The facts relating to the background of this matter are essentially not disputed. J.B. was employed as the manager of a group home for the developmentally disabled operated by New Concepts for Living (NCL). A.M. suffers from an intellectual disability, impulse control disorder, pervasive developmental disorder, and epilepsy. Also present at the group home, during the incident, were four subordinate employees, Shana Noffke (Shana), Khadijah Thomas (Khadijah), Ayana Mack (Ayana), and Tiara Toney (Tiara). However, the facts of what happened between the aforesaid employees, J.B., and A.M. are disputed.

The Department reports that A.M. had a behavior episode, which included laying down or throwing herself to the floor in the group home's living room. She was either physically dragged or grabbed and pulled across a part of the floor. One week later, this incident was reported to the Department. The report resulted in an investigation of an allegation of abuse.

The investigation was conducted, and a report was written by Wendy Galasso. She is a Quality Assurance Investigator with the Office of Investigations, within the Department; a position she has held for six years. She has been involved in over 200 investigations.

After reviewing the Unusual Incident Report (UIR) concerning A.M., Ms. Galasso met A.M. and A.M.'s behaviorist. A.M. told Ms. Galasso that on the date in question, May 26, 2017, she was having a behavior incident when the employees began laughing at her, as she tried to get into a medicine cabinet while threatening to take an overdose. While the four employees watched and laughed at her, J.B. pulled her shirt and dragged her from her living room to her bedroom. Ms. Galasso reviewed data assembled about A.M. and her medical condition and other records on file, including A.M.'s Individual Habilitation Plan (IHP). The IHP included an informal behavior plan to "minimize aggressive behaviors, property destruction, suicidal ideation and suicidal attempts." Ms. Galasso reviewed a lengthy list of behavioral incidents starting from 2014.

Ms. Galasso's report stated that an IHP Behavior Modification Plan was implemented on May 1, 2017, to address A.M.'s aggressive behavior. A.M. was given a point system based on rewards for good behavior and subtraction of points for bad behavior. It approved of staff using de-escalation procedures including explaining to A.M. why she can't have certain things, but avoiding using the word "No." If verbal efforts to de-escalate were unsuccessful, staff could use physical redirection as necessary (although "physical redirection" was unclear as to meaning). Finally, if de-escalation does not occur and "there is a threat of harm to herself, to others or to property, crisis management must be used."

Ms. Galasso reviewed a Communications Log for May 26, 2017. On June 7, 2017, "NCL staff" provided Ms. Galasso with "four pictures of A.M.'s injuries, taken on 6/2/17 when staff were informed of the incident." Also on June 7, 2017, Ms. Galasso took her own pictures of A.M.'s injuries¹ plus pictures of the group home.

As part of her investigation, Ms. Galasso also obtained Antecedent Behavioral Consequences, (ABC) sheets from dates May 3, 2017 to May 26, 2017 (The sheets describe typical behaviors by A.M. such as to "throw things around the room," "banging on the window," "kicking staff," as well as several other similar incidents). There were three ABC sheets for May 26, 2017, written by Khadijah (K.T.) and Tiara (T.T.) between 7:45 p.m. and 8:15 p.m. which described the incident in dispute. The first, initialed by T.T. stated that the "antecedent" (the trigger of the behavior) was that A.M. "tried to snatch the house phone from staff when she got angry and upset." The behavior which followed was that A.M. "tried to hit staff, threw a table and fell on the floor." The consequence following was "had to get restraint and talk to staff." The second ABC sheet again, initialed by T.T. and K.T., depicted the same events with nearly identical language. The third and final ABC sheet, initialed only by K.T., stated the antecedent conduct was A.M. "sitting in her room kicking the door trying to attack the staff and crying." The behavior that followed was A.M. "got up and tried to attack staff threatening everyone." The consequences description failed to mention the use of any restraints.

Three of the four employees, eye witnesses to and participants in the incident, were interviewed by Ms. Galasso on June 9, 2019. They all said the incident started because A.M. was having a behavior which included flipping over a coffee table in the living room. A brief summary of what each of them claimed happened thereafter follows.

Tiara Toney:

Ms. Toney claimed J.B. grabbed A.M. by the back of her shirt and pulled her over the metal threshold separating the kitchen from the living room. J.B. pulled A.M. approximately seven feet over the living room rug. A.M. began to cry and crawled back to the kitchen. J.B. re-entered and ordered the others to help carry A.M. to her bedroom. Ms. Toney took A.M.'s left arm; J.B. grabbed her right arm, while Ms. Mack and Ms. Thomas held A.M. under her knees. During that time, A.M.'s body never touched the floor or rug.

Khadijah Thomas:

Ms. Thomas claimed she witnessed J.B. grab A.M.'s shirt collar with both hands in an attempt to get her up from the floor. As instructed by J.B., she and Ms. Mack each grabbed a pants leg, while J.B. and Ms. Toney each grabbed a shirt sleeve and lifted A.M. about one foot to a foot-and-a-half off the ground and into the bedroom. Ms. Thomas said at about the half-way point between the kitchen and the bedroom they put A.M. on the floor to get a better hold but that they "did not drag A.M. at any time."

Shanna Noffke:

Ms. Noffke claimed that after A.M. flipped over the coffee table, she got up and stood in front of A.M., who was sitting on a couch, and "held A.M.'s arms while they were crossed." Ms. Noffke confirmed that she was standing while A.M. was sitting. Ms. Noffke indicated that she held A.M.'s arms for "less than two minutes." She then called for J.B., who had been downstairs. When J.B. came upstairs, she yelled at A.M. to stop. When A.M. attempted to kick

¹ The ALJ noted that these pictures were not produced at the hearing and thus were not in evidence.

J.B., J.B. grabbed A.M.'s leg with one hand and dragged her across the carpet toward the entertainment center three feet away.

Ayana Mack:

While she refused to cooperate with the Ms. Galasso, she gave an initial interview to her employer NCL. She reported seeing J.B. step on A.M.'s hair so she couldn't move. Then each staff member took one of A.M.'s limbs and carried her into her bedroom.

J.B.

Ms. Galasso interviewed J.B. by phone. J.B. said the four employees lifted A.M. from the floor and brought her into her bedroom. Ms. Galasso stated that she did not deem J.B.'s statement to be "credible."

A.M. had an Individual Behavior Plan (IBO), which was implemented on May 1, 2017. J.B. was present at the development and agreed to the plan and signed the attendance sheet. The plan noted A.M.'s "target behaviors," which included throwing objects, kicking others, and displaying self-injurious behavior. The plan also identified "triggers" that set off the targeted behavior such as being told "No," when observing others being disrespectful to staff, when being asked to go to the doctor, workshop, take a shower, take medication, and clean her bedroom. For the behavior plan, a point system was used which allowed A.M. to collect points throughout the day to reward the absence of maladaptive behavior and would lose points if she attempted any targeted behavior.

A de-escalation procedure was to be employed, wherein staff would try methods to deal with the targeted behavior. For example, staff would explain why A.M. could not have something - while avoiding the word "No." Staff members were to talk calmly with A.M. to identify the issue and give her time to process staff requests. Staff were to use redirection, when necessary. Only if A.M. did not de-escalate and there was a threat to harm herself, others and to property, were staff permitted to employ crisis management, which might include the use of restraints.

After Ms. Galasso concluded her investigation, she recommended the finding that A.M. was physically abused by J.B., resulting in a minor injury, was substantiated. She attributed all of the injuries to A.M. to J.B.'s conduct. Specifically, she found that J.B. grabbed A.M. by her shirt collar, dragged her to the floor, and dragged her on the rug and stepped on her hair to prevent her moving.

J.B. testified that on May 26, 2017, she had gone food shopping for the home. A.M. went to the day program, during the 7 a.m. to 3 p.m. shift. J.B. sent Shaina with A.M. because A.M. needs one-on-one supervision. A.M. had a behavior at the day program which included refusing to get on the van when it was time to return. J.B. decided to pick up the other three residents rather than have them wait until they could all leave at once. J.B. then went back to the day program and helped persuade A.M. to return to the home in the van. After accompanying A.M. back to the home, J.B. continued the grocery shopping, this time with Shaina with her. When J.B. got back with the groceries and put them away, she went downstairs to log in the records of the shopping when she heard a "commotion."

J.B. went back upstairs after hearing Tierra Toney asking A.M. what the matter was. She soon realized A.M. was having one of her typical behaviors, saying she wanted to overdose on medication. J.B. thought A.M. was motivated by wanting to go to the hospital. J.B. was concerned that if A.M. got into the kitchen she could get hold of things to hurt herself. At this stage A.M. was being loud and cursing others. The staff “basically surrounded her” and A.M. dropped to the floor. J.B. instructed the other staff with her to each grab a leg or arm put their arms underneath A.M.’s limbs and carry her out to her bedroom. Soon after, J.B. described what had happened to the nurse and got her to prescribe a PRN medication.

J.B. explained that A.M. has a condition – “SIB,” and takes medications Depakote and Serquil, which she believed cause A.M. to bruise easily. Also, at the day program earlier, A.M. had been restrained. A body check of A.M., which was done between 11 p.m. and 7 a.m., did not mention bruises or cuts and there were no bruises or cuts on A.M., only red marks which a nurse confirmed as “rug burns.” J.B. also discussed how difficult a client A.M. was. In her opinion, A.M. never wanted to be in the group home. J.B. believed from thirty years’ experience in this field that A.M. was not appropriately placed at the group home; A.M. was not yet ready. In her opinion, the behavior department wasn’t much help, and A.M. became overmedicated.

As to the other eyewitness accounts, J.B. said Tierra Toney’s story that she (J.B.) grabbed A.M. by the back of the shirt and pulled her over the metal threshold separating the living room and the kitchen, was untrue, and further that Tierra was lying. She was motivated to lie because J.B. had written up Tierra only a little while before this event on Mother’s Day for being a “no show, no call.” Regarding Kadeshia Thomas’s statement that she saw J.B. grab A.M.’s shirt collar with both hands to get her up from the floor, J.B. said she too lied because of fear of not being able to get a job again by the threat of being on the Central Registry.

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 that Tierra Toney, Khadijah Thomas, Ayana Mack, and J.B. all agreed on one point: that all four of them carried A.M. out of the living room, through the kitchen, and then to A.M.’s bedroom, with each holding a limb. The ALJ determined that to be credible because despite their having different versions of J.B.’s precise role in the conduct, J.B. admitted to the conduct. While J.B.’s subordinates focused more on J.B.’s conduct and responsibility than their own, their statements concerning their own participation constituted admissions against their own interest and thus were credible. All of their statements and J.B.’s are not inconsistent with what A.M. was able to say about it when she told Ms. Galasso she was “dragged” to her bedroom. It is quite possible that A.M. used the term “dragged” without being asked to distinguish this conduct from pushing, forcing, or carrying.

ALJ’s Findings

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

1. A.M. is an individual with developmental disabilities.

2. A.M. (then aged twenty-nine), began living at NCL in December 2016, and lived there, in between frequent day visits to hospitals up to and beyond May 26, 2017.
3. A.M. has several problems among them an intellectual disability, impulse control disorder, pervasive developmental disorder, and epilepsy which, among other things, make it difficult for her to communicate effectively, and causes her to frequently engage in maladaptive disruptive behavior. She frequently acted out to try to get to the hospital
4. J.B. was a highly experienced employee for NCL and, at that time, manager of their group home. She had four staffers working under her.
5. J.B. was generally frustrated with A.M. and her behavior and did not believe she was ready to live in a group home, but rather belonged in a State mental hospital.
6. On May 26, 2017, A.M. caused a delay while at the day program, which J.B. resented as causing an inconvenience to other residents while creating more work for J.B. That evening around 7 pm, A.M. was in the living room sitting on a couch with other staff, also sitting on couches, when she had a behavior that included crying and saying she didn't want to live anymore. She kicked a table resulting in it being flipped over.
7. Staff called J.B., as the manager, to ask what they should do. Upon observing the scene, J.B. immediately decided A.M. should be forced to go to her bedroom to calm down. She directed that three of the staff help lift her by holding all four limbs. They did so, carrying her through the living room and kitchen through a corridor and into A.M.'s bedroom.
8. As a direct result of being carried to her bedroom, A.M. received rug burns and a bruised shoulder and bicep.
9. The ALJ specifically did not find that J.B. had singlehandedly dragged A.M. across the floor; consequently A.M. was not dragged over a metal strip separating the kitchen and living room floors.

The ALJ cited the Central Registry's definition of abuse (N.J.S.A. 30:6D-74) and the standard of acting "with intent, recklessness or careless disregard to cause or potentially cause injury" as the standard for placement on the Central Registry. The ALJ correctly acknowledged the Department's preponderance of the credible evidence burden of proof standard. The ALJ determined that J.B., the petitioner, knew A.M. and was familiar with the proper procedures to address aggressive and/or agitated behavior by A.M. The ALJ found that, during the incident, it was not credible to believe that A.M. was endangering herself or anyone else by being loud and crying, after flipping over a table. Led by J.B., and none of the staff members led her, followed A.M.'s IHP Behavior Modification Plan. They did not employ the proper de-escalation techniques. No one attempted to redirect her, no one tried to use the point system of incentives or disincentives. No one spoke to her calmly; J.B. immediately said "No" to A.M. to get her to stop. Noffke had already restrained A.M. on the couch by standing up and placing her hands against shoulders. The ALJ found that rather than attempting to avoid force, J.B. and her staff chose to use unnecessary force, most likely because they were frustrated by A.M.'s somewhat typical behaviors. The ALJ stated that it was unnecessary to decide whether there was dragging at any point during the carrying – stating it quite possibly it did happen when A.M. was placed down on the floor half-way to the bedroom as described by Thomas, and as admitted to by J.B.

The ALJ **FOUND** that grabbing and carrying this developmentally disabled woman from the group home living room through the kitchen, the hallway, and into her bedroom caused her "pain, injury, anguish, or suffering" by an act of force and violence what was unnecessary to

prevent harm to her or anyone else, nor damage to property. A.M. had been crawling and was prostrate and weeping when J.B. entered the scene. J.B., while not exclusively to blame, bears the heaviest share of it; she was the supervisor and should have known better than the others what ought to have been done and what ought not to have been done. It was also clear from her own testimony that J.B. was disdainful of A.M.'s IHP Behavior Modification Plan, and she acted in careless disregard of it, by imprudently directing unnecessary force against this individual.

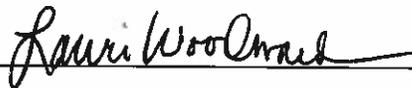
The ALJ **CONCLUDED** that the Department had sustained its burden of proving, by a preponderance of the credible evidence, that J.B.'s actions constituted physical abuse by acting "with careless disregard to cause or potentially cause injury" to A.M. Therefore, the ALJ **CONCLUDED**, that the Department's placement of J.B.'s name on the Central Registry of Offenders for physical abuse was within the parameters of the statute. The ALJ **ORDERED** that a finding of physical abuse of a resident by J.B. shall be entered on the New Jersey Central Registry.

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 his opinions concerning these matters, based upon his observations described in the initial decision. **I CONCLUDE and AFFIRM** that the Department has met its burden of proving sufficiently that J.B. committed an act of physical abuse against an individual with developmental disabilities. **I CONCLUDE and AFFIRM** that J.B. acted intentionally, recklessly or with careless disregard to the well-being of that individual, and that J.B.'s placement on the Central Registry is appropriate.

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 J.B.'s name on the Central Registry of Offenders against Individuals with Developmental Disabilities.

Date: May 24, 2019



Lauri Woodward, Director
Office of Program Integrity and Accountability