

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-361

APRIL TERM, 2005

Denise Thibeault	}	APPEALED FROM:
	}	
v.	}	Human Services Board
	}	
Department of Aging and Disablittes	}	DOCKET NO. FH 18,471

In the above-entitled cause, the Clerk will enter:

Petitioner appeals from a Human Services Board decision upholding a determination by the Department of Aging and Disabilities (DAD) that she abused an elderly person. We reverse.

Petitioner, a licensed nurse=s aid, worked at a long-term care facility from 1999 until January 2004. In November 2002, C.H., one of petitioner=s co-workers, reported that she suspected petitioner may have abused elderly residents under her care. A DAD registered nurse investigator looked into the matter, interviewing petitioner, C.H., the affected residents, and certain supervisors. The allegations were substantiated, and a finding was entered accordingly. Petitioner appealed the decision to the Human Services Board.

A Board hearing officer conducted a hearing on the matter in April 2004. C.H. testified, and the Board found, that petitioner mistreated three residents. The first incident involved a ninety-two-year-old woman. As C.H. passed by the woman=s room, she heard an unusual scream. She observed petitioner forcefully pushing the woman to the other side of the bed, saying Aknock it off@ and Apush over.@ When C.H. stopped to help petitioner move the woman, the woman stopped screaming. Over the next few days, C.H. noticed that the woman would begin screaming each time petitioner entered her room.

The second incident occurred a few days later. Only C.H. and petitioner were working on the floor at the time. C.H. heard petitioner screaming to an eighty-two-year-old woman to Astop yelling@ and to Ashut up.@

The third example of mistreatment concerned an elderly man who was unsteady on his feet while recovering from a shoulder injury. The man, who required assistance to use the bathroom, would ring the nurse=s station frequently for help. He called three times one evening, and petitioner did not answer the calls. C.H. spoke to petitioner about it, explaining that it was dangerous to ignore the man=s calls because he might try to go to the bathroom alone.

Petitioner provided the Board with letters attesting to her good work ethic and character, although none of the letter-writers had knowledge of the incidents C.H. witnessed and reported. The Board found that C.H.=s testimony was credible and that petitioner=s story was inconsistent, muddled, and lacked credibility. Ultimately, it sustained DAD=s determination that petitioner=s treatment amounted to abuse because she acted with reckless disregard for the health of the residents. This appeal followed.

On appeal, petitioner raises two arguments: (1) the Board applied the wrong legal standard to the facts presented, and (2) she is entitled to a new hearing because her witnesses were not subpoenaed to testify. We do not address the second issue because we reverse on the first.

The Board concluded that petitioner=s conduct met the definition of Aabuse@ under ' 6902(1) of Title 33:

- (A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;
- (B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

33 V.S.A. ' 6902(1)(A), (B). Petitioner argues that the Board erred by failing to apply the proper standard: that her conduct was Alikely@ to put the vulnerable person=s life, health, or welfare in jeopardy or cause the vulnerable adult unnecessary pain, suffering, or harm. We will affirm the decision on appeal if the Board applied the proper legal standard and based its fact findings on the record evidence. Highgate Assocs. v. Merryfield, 157 Vt. 313, 316 (1991); In re Tinker, 165 Vt. 621, 622 (1996) (mem.).

We agree with petitioner that the Board did not use the statutory standard in upholding the finding of abuse against

petitioner. Rather than finding it Aikely@ that petitioner=s conduct amounted to abuse under ' 6902(1), the Board concluded that petitioner=s conduct could Aundoubtedly lead to serious emotional and physical consequences@ for the elderly individuals committed to her care. That standard is not theAikely@ standard that our Legislature established. Accordingly, the Board=s decision must be reversed.

Reversed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice