

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-283

MAY TERM, 2008

In re Crystal Hudson	}	APPEALED FROM:
	}	
	}	
	}	Human Services Board
	}	
	}	
	}	FAIR HEARING NO. 19,972

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

Petitioner Crystal Hudson, who at all relevant times owned and operated a residential care facility called Mountain View Home, appeals the decision of the Human Services Board upholding determinations by the Department of Aging and Independent Living (DAIL) that substantiated petitioner's neglect of a resident who died under her facility's care and that found several licensing regulation violations. We affirm in all respects, except that we remand the matter and direct the Board to pay petitioner, to the extent that it has not already done so, for her reasonable costs in producing a record of the Board hearing.

On April 9, 2005, a twenty-two-year-old male resident of Mountain View, R.R., died after experiencing flu-like symptoms during the previous week. R.R. had diagnoses of schizophrenia, attention-deficit disorder, and oppositional-defiance disorder, for which he had been prescribed several medications, including Clozapine. An autopsy revealed that the cause of death was lobar pneumonia with a contributing factor of acute Clozapine intoxication. Shortly after the incident, DAIL assigned a public health nurse surveyor to investigate the circumstances of R.R.'s death. See 33 V.S.A. § 6906(a) (requiring DAIL to investigate reports of the neglect or abuse of elderly or disabled adults). The nurse surveyor examined documents and interviewed petitioner, the facility nurse, and other staff at Mountain View who had cared for R.R. She also interviewed R.R.'s psychiatrist and examined laboratory reports at the psychiatrist's office. The nurse surveyor's investigation revealed that although R.R. had been experiencing elevated temperatures fluctuating as high as 106 degrees during the week before he died, and also had had uncharacteristic episodes of stool incontinence, petitioner did nothing more than have a staff caregiver ask R.R. whether he wanted to be taken to the emergency room, an offer which he declined.

Based on the investigation, the nurse surveyor issued a May 31, 2005 report substantiating neglect by petitioner because she did not ensure that R.R. received appropriate medical services. *Id.* § 6906(c) (requiring submission of a written report on an investigation of abuse or neglect of an elderly or disabled adult). The nurse surveyor stated in her report that R.R. was not capable of deciding what medical interventions were appropriate in his condition because of his psychiatric diagnoses, the drugs he was taking, and his high fever. She concluded that petitioner should have notified the staff nurse of R.R.'s condition and explored other options for getting him medical treatment. She also found several violations of residential care licensing regulations related to the incident. Petitioner filed a plan in which she indicated how she intended to correct all deficiencies by July 15, 2005. On September 1, 2005, the nurse surveyor and another DAIL official made an unannounced visit to Mountain View to check on whether petitioner had complied with her plan of correction. During their visit, they found a number of deficiencies with respect to medical management, including some of the same ones that had contributed to R.R.'s death.

Following DAIL's substantiation of the report of neglect and confirmation of the violations of several licensing regulations, petitioner appealed to the Human Services Board. The Board conducted a de novo evidentiary hearing over four days between August 2 and October 17, 2006. Following the hearing, the Board issued a lengthy written decision upholding the substantiation of neglect and the licensing regulation violations. Petitioner appeals that decision to this Court, indicating that she is challenging the substantiation of neglect, the finding of licensing regulation violations, DAIL's imposition of a two-year ban on admissions to Mountain View, the Board's refusal to stay its proceedings until any criminal charges against her were resolved, and the Board's refusal to reimburse her for court reporter fees she incurred because of the Board's equipment failure.

Before addressing the merits of the Board's decision, we consider petitioner's argument that the Board erred by denying her motion to stay the proceedings pending the resolution of any criminal charged filed against her. In support of the motion, which was made following the third day of the Board hearing, petitioner's attorney averred that near the end of the day on September 7, the third day of the Board hearing, an assistant attorney general indicated that she would be filing criminal charges against his client. Petitioner's attorney then sought a continuance of the hearing for at least three weeks so that his client could consult a criminal attorney and obtain advice as to whether she should testify any further at the hearing. The Board granted the three-week continuance, but denied petitioner's later request to continue the hearing until any criminal proceedings were resolved. Here, on appeal, petitioner argues that the Board's denial of her motion to stay the hearing until resolution of any criminal proceedings denied her due process and a fair hearing because it forced her not to testify when she otherwise certainly would have.

Upon review of the record, we find no due process violation and no abuse of discretion in the Board's decision to deny petitioner's motion for a stay of the hearing pending the resolution of any criminal charges. As for petitioner's unsupported due process claim, the Fifth Amendment to the United States Constitution "does not . . . mandate a stay of civil proceedings pending the outcome of similar or parallel criminal proceedings." Jacksonville Sav. Bank v. Kovack, 762 N.E.2d 1138, 1141 (Ill. App. Ct. 2002); see Rosenberg v. Bd. of Educ. of Sch. Dist. No. 1, Denver Pub. Sch., 710 P.2d 1095, 1101 n.11 (Colo. 1985) (en banc) ("There is no right to a continuance of administrative proceedings pending the outcome of parallel criminal

proceedings.”); In re Hotel & Rest. Employees & Bartenders Int’l Union Local 54, 496 A.2d 1111, 1133-34 (N.J. Super. Ct. App. Div. 1985) (stating that commission did not have constitutional obligation to grant stay of civil administrative proceeding pending resolution of criminal investigation; rather, party seeking the stay “was merely put to the constitutionally acceptable choice of whether to testify or to remain silent”).

The record reveals that the Board had already completed three of the four days of the hearing at the time petitioner moved for a stay of the proceedings. During the first and second day of the hearing, DAIL’s attorney called petitioner as a witness and examined her extensively concerning the circumstances of R.R.’s death, the substantiation of neglect, and the finding of licensing regulation violations. At that time, petitioner’s attorney not only objected to some of the DAIL attorney’s questioning but also questioned petitioner himself extensively. During her testimony, petitioner admitted to facts that formed the basis for DAIL’s substantiation of neglect and finding of licensing regulation violations. Although petitioner claims on appeal that DAIL misrepresented numerous facts that she had no opportunity to correct, the record indicates that petitioner had an opportunity to provide her side of the story and to contest DAIL’s account of what occurred. Given the status of the Board proceedings, the substantial testimony that petitioner had already given, and the uncertainty as to whether and when criminal charges would be filed, the Board did not abuse its discretion in denying petitioner’s request for a stay pending the resolution of any criminal proceedings. See State v. Meneley, 22 P.3d 124, 136-37 (Kan. 2001) (stating that party seeking stay of civil proceeding pending resolution of criminal charges has burden of establishing necessity of stay and demonstrating that denial of stay amounted to an abuse of discretion).

As for the merits of the Board’s decision, petitioner generally claims that the decision is wrong, indicating that others besides herself are responsible for what happened to R.R. The only specific claim of error that we can discern from her brief is her suggestion that DAIL failed to prove “scienter.” Upon review of the record, we find no error. By statute, neglect is defined in relevant part as the “purposeful or reckless” failure of a caregiver to provide the services, including medical services, necessary to maintain the health and safety of a vulnerable adult. 33 V.S.A. § 6902(7). If the record did not reflect intentional wrongdoing by petitioner, it nevertheless supported a finding of reckless conduct. Recklessness is generally understood to be a conscious disregard of a known risk amounting to a gross deviation from the standard of conduct reasonably expected from a person under the same circumstances. State v. Brooks, 163 Vt. 245, 251 (1995). There is no question that petitioner was the owner and operator of a facility obligated to provide medical care to its residents. The Board found overwhelming evidence that petitioner breached her obligation to ensure that R.R.’s medical needs were met and that he was kept safe. The Board correctly characterized as contrary to “common sense” petitioner’s failure to realize that a temperature spiking at 106 degrees and the onset of incontinence commanded a greater medical response than offering the resident a ride to the emergency room. Similarly, the record supports the Board’s conclusion that petitioner’s failure to call in the facility’s nurse, or consult with the resident’s mental health treatment providers over his refusal to go to the emergency room, amounted to neglect as defined by the statute.

In rejecting petitioner’s explanation that she was merely honoring R.R.’s right to refuse treatment, the Board noted R.R.’s known limited ability to assess his own needs and cited several different alternative and obviously reasonable courses of action that she could have taken. The

Board also cited various licensing regulations that were violated regarding not only R.R.'s treatment but also the treatment of other residents both before and after R.R.'s death. The record amply supports the Board's findings, which, in turn, support its conclusions and decision to uphold the substantiation of neglect and finding of licensing regulation violations.

Petitioner also argues that the Board failed to address her contention that DAIL wrongfully imposed a ban on admissions of over two years even though Mountain View was found to be in compliance with all regulations as of November 2005. The Board did address petitioner's complaint as to the remedy imposed by DAIL, albeit briefly. Noting that DAIL's initial and follow-up investigations uncovered significant deficiencies in the operation of petitioner's facility, the Board stated that it would not substitute its judgment for that of DAIL as to the appropriate remedy for the violations. For the most part, petitioner complains that the lengthy ban on new admissions was onerous and financially disastrous for her. Given the seriousness of the initial neglect and violations, which resulted in the death of an individual, and petitioner's subsequent failure to comply with her own plan of correction, we find no error in the Board upholding DAIL's lengthy ban on admissions. See 33 V.S.A. § 7111(f) (stating that the licensing agency may suspend admissions to a facility based on violations that may directly impair the health or safety of residents); Huntington v. Dep't of Soc. & Rehab. Servs., 139 Vt. 416, 419-20 (1981) (noting that the appropriate remedy for violations relating to community care regulations is within the discretion of the licensing agency rather than the Board).

Finally, petitioner argues that she should be reimbursed for costs she incurred in producing a record of Board hearings after the Board's recording equipment failed. The Board's recording equipment failed during the initial hearing, and another hearing was scheduled with a new hearing officer. As the Board acknowledged in its decision, the recording equipment malfunctioned again on August 2, 2006, the first day of the new hearing. Fortunately, petitioner had hired a court reporter for the reconvened hearing, and that reporter made a record of the proceeding. Petitioner employed the reporter for the remaining three days of the hearing, but we find nothing in the record indicating whether the Board's recording equipment failed on any day other than the first day, August 2. Shortly after the third day of the hearing, petitioner's attorney sent the Board a bill for petitioner's costs for producing a record of the first two days of hearing on August 2-3. The hearing officer indicated in a written memorandum that due to equipment failure at the August 2 hearing, the transcript produced by petitioner's court reporter would be the official record for that day. The hearing officer directed petitioner to submit a copy of the invoice for the court reporter's services, and the Board would then determine what share the State would cover. Petitioner's attorney submitted an invoice for \$2,103.95, which included costs for producing the record for the August 2-3 dates. Our review of the record does not reveal any decision as to whether, or how much, the State would pay for the transcript.

We conclude that because the Board's recording equipment failed and the Board deemed the transcript produced by petitioner's court reporter as the official record for the August 2 hearing date, the Board must reimburse petitioner for, at minimum, the full amount of the cost of producing a record for that date. Nothing in the record indicates that the Board's recording equipment failed to operate on any hearing date other than August 2, but petitioner's personal expense to preserve the record may have been reasonably necessary given the Board's demonstrated inability to guarantee the same on two previous occasions. We remand to the

Board to determine the reasonableness of this action and to reimburse petitioner if it is found reasonable.

Affirmed in all respects, except that the matter is remanded to the Human Services Board to determine petitioner's reasonable costs for producing a record of the Board hearing and to reimburse petitioner for those costs.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice