

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala

A.C.,¹
Appellant

v.

Docket No. DPPC-22-0154

Disabled Persons Protection Commission,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Appellant committed registrable abuse, and DPPC may place her on the abuse registry.

¹ The appellant's initials. I don't use her name because of the Second Amended Order Regarding Confidentiality in this case and the general requirements of confidentiality in G.L. c. 19C, §15 and 118 CMR 9.00. Because of the order, statute, and regulation, this decision also does not name the victim, witnesses, and other people with disabilities.

DECISION

The appellant, A.C., appeals the decision of the Disabled Persons Protection Commission (DPPC) to place her on the abuser registry.

I held a hearing on August 1 and 2, 2022 by Webex, most of which I recorded.²

DPPC called the following witnesses:

An investigator for the Department of Developmental Services (DDS). (DDS served the victim,³ and licensed and funded her group home. (Stipulation) The initial intake that led to this appeal was to DDS. (Ex. A))

The clinical director of the non-profit organization that runs the group home where the victim lives. On June 13, 2021, the day of the incident is the subject of this appeal, she was a behavioral analyst for the non-profit organization. This decision refers to her as the behavioral analyst.

The non-profit organization's division director.

Staffer D, who worked in the group home where the victim lived.

Staffer N, who also worked in the group home.

The victim did not testify. None of her housemates testified. A.C. testified on her own behalf.

I admitted 12 exhibits. Both parties submitted post-hearing briefs.

² After returning from the lunch break on August 1, 2022, I neglected to restart the recording devices. The parties agreed to recreate Staffer D's and the division director's testimony, which was not recorded, from their notes. The parties have cited the testimony of Staffer D and the division director in their post-hearing briefs and do not disagree as to what the two witnesses testified to. The significance of the unrecorded testimony is less than it would have been if Staffer D or the division director had been present at the incident on June 13, 2021. Neither were present, although the victim did later tell them about it.

³ The statute refers to "victims." G.L. c. 19C, §15. A regulation refers to "victim of registrable abuse." 118 CMR 14.05.

Findings of Fact

Group home

1. On June 13, 2021 the victim lived in a group home in Massachusetts, which a non-profit organization runs. (Behavioral Analyst testimony)
2. The group home had five residents. (Staffer N testimony) For the purposes of this decision, three are relevant: the victim, Housemate J, and Housemate B.⁴
3. In the behavioral analyst's opinion, Housemate J does not have the cognitive ability to make up a story about the incident on June 13, 2021. (Behavioral Analyst testimony)
4. On June 13, 2021 the group home had three staff members working: A.C.; Staffer N; and Staffer D, who was not present during the incident that is the subject of this decision. (Ex. C, Staffer N testimony)
5. The three staff members helped the group home's residents with activities of daily living, dispensed medications, kept the residence clean, and performed other duties. (Staffer N and A.C. testimony)
6. The victim felt close with the division director, sought her approval, and tried to avoid her disapproval. (Division Director testimony)
7. The nonprofit organization is licensed by DDS. (Stipulation)
8. The victim's residential placement at the group home is funded by DDS. (Stipulation)

Victim

9. On June 13, 2021 the victim was a 39-year-old woman who lived in the group home. (Ex. C, p. 5)

⁴ The housemates are not identified by name to protect their confidentiality under my Second Amended Order Regarding Confidentiality.

10. The victim's clinical diagnoses include Asperger syndrome, anxiety disorder, and depressive disorder. (Stipulation; Ex. C, p. 5)

11. The victim is friendly, can be anxious and sensitive to what people say, is worried about hurting other people's feelings, is worried about getting in trouble and losing privileges, and can ask repetitive questions. (Behavioral Analyst testimony; Staffer N testimony (victim is anxious); A.C. testimony (victim is anxious); Ex. C, p. 5)

12. The victim is developmentally disabled under 118 CMR 2.02. (Stipulation)

13. The victim is supported by DDS. (Stipulation)

14. In the behavioral analyst's opinion, the victim does not have the cognitive ability to make up a story about the incident on June 13, 2021. (Behavioral Analyst testimony)

June 13, 2021

15. The incident began around 5:30 p.m. on June 13, 2021. (Staffer N testimony; Ex. C, p. 5⁵)

16. Although three staff members were supposed to be on duty and three were on duty that day, only two staff members were on duty at 5:30 p.m. (Staffer N testimony; Ex. C, p. 7)

17. A.C. entered the kitchen and accused the victim of taking food without permission. (Staffer N testimony; Ex. C, p. 5)

18. A.C. threatened to tell the division director that the victim was not following rules. (Staffer N testimony; Ex. C, p. 5)

19. The victim became anxious, begged A.C. not to call the division director, was screaming, and was apologizing to A.C. (Staffer N testimony; Ex. C, p. 5)

⁵ 118 CMR 9.03(1) appears to bar me from directly quoting the investigation report, but not from paraphrasing it. Paraphrasing the investigation report appears to be represent a balancing of 118 CMR 9.03(1) and G.L. c. 30, § 9B. DPPC accepts this balancing.

20. A.C. continued to threaten to call the division director. The victim yelled and cried.
(Ex. C, p. 5)

21. At some point during the incident, possibly at this point, A.C., instead of helping to de-escalate the situation, stood and laughed at the victim. (Staffer N testimony)

22. Housemate J, who was witnessing the scene, also began crying. She yelled at A.C. to stop bothering the victim and for both A.C. and the victim to stop yelling and making so much noise. (Ex. C, p. 5)

23. Housemate J began banging her hands, arms, or both on the kitchen table, then ran toward A.C. and the victim, and tried to hit one or the other. (Ex. C, p. 5)⁶

24. While Staffer N tried to de-escalate the situation by redirecting the victim and Housemate J, A.C. continued to argue with the victim. (Ex. C, p. 5)

25. Staffer N used her cell phone to call the administrator on duty. (Staffer N testimony)

26. Staffer N went toward the laundry room, which was off the kitchen, so that she could hear the phone conversation with the administrator on duty. (Staffer N testimony)

27. Around this time, Staffer N heard a loud sound behind her where the victim was standing. The sound may have been one person slapping another person. (Staffer N testimony; Ex. C, p. 5)

28. Staffer N turned and saw the victim holding her face as if she had just been slapped.
(Ex. C, p. 5)

29. Later, while still in the kitchen, Staffer N tried to clean dishes in the sink. (Staffer N testimony)

30. The victim, A.C., and Housemate J were near each other. They were near and behind

⁶ Housemate J's agitation is not part of the case against A.C.

Staffer N. (Staffer N testimony)

31. Staffer N again heard what sounded like a loud slap. (Staffer N testimony; Ex. C, p. 5)

32. After she heard the second possible slap, Staffer N checked the victim's face for any mark and saw none. No marks emerged later. (Staffer N testimony; Ex. C, p. 6)

33. After the first or second slapping sound, Staffer N heard Housemate J yell to A.C., "Don't hit her." (Ex. C, p. 6)

34. At some point, Staffer N called 911 and the police responded. (Staffer N testimony; Ex. C, p. 5)⁷

35. After the police left, the victim appeared nervous for the rest of the shift. She repeatedly asked if she would get into trouble. (Ex. C, p. 6)

36. When Staffer D returned to the group home, the victim approached her to talk about the incident. She was crying and upset, and her account rambled. (Ex. C, p. 7)

37. Later that day, Staffer D "checked in" with the victim and asked about the incident. The victim repeatedly apologized and asked Staffer D not to call the division director. (Ex. C, p. 7)

38. On June 15, 2021 the group home suspended A.C. (Ex. C, p. 5).

Statements to the behavioral analyst about the incident and A.C.

39. On June 15, 2021, two days after the incident, the behavioral analyst made her weekly visit to the group home. (Behavioral Analyst testimony)

⁷ The police report (Ex. N) does not add information that is useful to my decision. The police report indicates that the police interviewed Staffer N, but not other staff members, the victim, or her housemates.

40. Housemate J told the behavioral analyst that a staff member had slapped the victim. Housemate J was upset. (Behavioral Analyst testimony)

41. The victim told the behavioral analyst that she and A.C. had had a verbal altercation, which left the victim scared and anxious. (Ex. C., p. 8)

42. The behavioral analyst asked the victim if A.C. had slapped her two days before, and the victim said that she could not really remember. (Ex. C., p. 8)

43. The behavioral analyst opined to the investigator that the victim was likely reluctant to state that A.C. had slapped her, even if A.C. had done so, because the victim tends to take responsibility for disputes or incidents, fears that she will be punished for them, and apologizes for them. (Ex. C., p. 8)

44. The victim became overly anxious while discussing the incident. (Ex. C., p. 8)

45. The victim seemed nervous when she asked the behavioral analyst whether A.C. would return to work at the group home. The victim was clear that she did not want A.C. to work at the group home again. (Ex. C., p. 8) She said that she did not want to live in the group home if the staff member returned. (Behavioral Analyst testimony)

46. For weeks later, the victim said to the behavioral analyst things along the lines of: Why me? I don't know why she did that to me. I don't know why anyone would hit me. I don't know why she slapped me. (Behavioral Analyst testimony)

47. The victim was apprehensive that the staff member would return to work at the group home. (Behavioral Analyst testimony)

The investigation

48. Because of the pandemic, the investigator did not visit the group home. (Ex. B, p. 3; Ex. C, p. 4)

49. On June 18, 2021 the investigator interviewed the victim remotely. (Ex. C, p. 14)⁸

50. On June 30, 2021 the investigator completed his initial response form. (Ex. B, p. 6)

51. On December 29, 2021 the investigator completed his investigation report form. (Ex. C, p. 20; stipulation)

52. The investigation report form is more detailed than the initial response form. (Exs. B and C)

Investigation report

53. Housemate J told the investigator the following (and I find these as facts):

A. A.C. and the victim argued.

B. Housemate J became angry at them and ran to yell at them.

C. Housemate J saw A.C. slap the victim twice on her face.

D. Housemate J found it difficult to sleep that evening because she was shocked and upset at what she had seen.

(Ex. C, p. 6)

54. The investigation report recounted the following about the investigator's interview of the victim (and I find these as facts):

A. A.C. kept threatening the victim with calling the division director, which upset her.

B. The victim purported not to remember all details of the incident, including whether A.C. or Housemate B slapped her.

C. The victim repeatedly apologized for misbehaving during the incident.

⁸ Presumably, the investigator interviewed other witnesses remotely around this time, but those dates are not in the record.

D. The victim was more concerned about being in trouble than in answering questions. She had difficulty focusing on the investigator's questions.

(Ex. C, p. 6)

55. Due to her disabilities, Housemate B was not able to provide any substantive information to the investigator about June 13, 2021. (Ex. C, p. 7)

56. The remaining two housemates were not able to provide substantive information to the investigator. The two remaining housemates had been in their bedrooms during the incident of June 13, 2021 and did not witness it, according to Staffer N and A.C. (Ex. C, p. 7)

(Ex. C, pp. 5-9)

57. The investigation report concluded that the victim was a victim of abuse under G.L. c. 19C and 118 CMR. (Ex. C, p. 11)

58. The investigation report concluded that sufficient evidence existed that the victim sustained a serious emotional injury due to an act of abuse *per se*. (Ex. C, p. 11)

59. The investigation report concluded A.C. had abused the victim. (Ex. C, p. 11)

60. The investigation report based its conclusions on two allegations: A.C. slapped the victim; and A.C. threatened the victim with calling the division director. (Ex. C, p. 12, 2nd full para.)

61. On January 18, 2022 DPPC informed A.C. that it had sufficient evidence that she had committed registrable abuse. (Ex. J)

62. On March 7, 2022 A.C. submitted a timely petition for review to DPPC. (Stipulation) A petition for review is DPPC's internal appeal. 118 CMR 14.02.

63. On March 31, 2022 DPPC denied A.C.'s petition for review, thus affirming a finding of registrable abuse against A.C. (Letter from Aoife Martin, DPPC Assistant General Counsel, to

Edward A. Prisby, Esq., A.C.'s lawyer; stipulation)

64. On April 18, 2022 A.C. timely appealed to the Division of Administrative Law Appeals. (DALA Appeal Form)

Discussion

Administrative law tribunals generally do not need to observe the rule against hearsay.

G.L. c. 30A, sec. 11(2).

Furthermore, G.L. c. 30A, sec. 11(4) reads in part:

All evidence, including any records, *investigation reports*, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, *shall be offered and made a part of the record* in the proceeding....

(Emphasis added.)

Still furthermore, G.L. c. 30, sec. 9B provides that an investigation report in a DPPC case “shall be admissible into evidence for the truth of the matters asserted therein.” (Emphasis added.)

Considering these three provisions, a DPPC investigation report will almost certainly be admitted in a DPPC hearing before the Division of Administrative Law Appeals. No contrary scenario or possible exceptions come to mind.

However, G.L. c. 30, sec. 9B’s reference to “the truth of the matter asserted” does not require an Administrative Magistrate of the Division of Administrative Law Appeals to believe that every alleged fact in an investigation report is the truth.⁹ G.L. c. 30A, sec. 11(2) also provides:

Evidence may be *admitted and given probative effect* only if it is the kind of

⁹ I assume that DPPC agrees. When DPPC stated in its post-hearing brief that “DALA must accept the Investigation Report for the truth of the matter” (DPPC Br. 23), I assume that DPPC meant that DALA must accept the report *into evidence*, not that it must accept the report as truth. See DPPC Br. 25 (“DALA should admit the 19C Investigation Report...”).

evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

(Emphasis added.) The statute acknowledges that the process of admitting evidence is separate from the process of giving it probative effect. I note this in general, not because I doubt the truth of the investigation report in this case.

I base my finding that A.C. slapped the victim twice on the following:

- Staffer N heard two sounds that sounded like slaps. (Staffer N testimony; Ex. C, p. 5)
- After the first slapping sound, Staffer N turned and saw the victim holding her face as if she had just been slapped. (Ex. C, p. 5)
- After one of the slapping sounds, Staffer N heard Housemate J yell to A.C., “Don’t hit her.” (Ex. C, p. 6)
- Housemate J told the investigator that she saw A.C. slap the victim twice on her face. (Ex. C, p. 6)
- Housemate J told the behavioral analyst that a staff member had slapped the victim.

Housemate J does not have the cognitive ability to make up a story such as the incident of June 13, 2021. (Behavioral Analyst testimony)

• For weeks after June 13, 2021, the victim said to the behavioral analyst things along the lines of: Why me? I don’t know why she did that to me. I don’t know why anyone would hit me. I don’t know why she slapped me. (Behavioral Analyst testimony) The victim does not have the cognitive ability to make up a story such as the incident of June 13, 2021. (Behavioral Analyst testimony)

I conclude that it is “more probable than not,” *Continental Assurance Co. v. Diorio-Volungis*, 51 Mass. App. Ct. 403, 409 n.9 (2001) that A.C. slapped the victim twice. Therefore, DPPC has proved by a preponderance of the evidence, *id.*, that A.C. did so.

I base my finding that A.C. threatened to call the division director on the following:

- Staffer N told the investigator and testified that A.C. did so and that the victim became anxious, begged A.C. not to call the division director, was screaming and crying, and was apologizing to A.C. (Staffer N testimony; Ex. C, p. 5)

- The victim told the behavioral analyst that she and A.C. had had a verbal altercation, which left the victim scared and anxious. (Ex. C., p. 8)

- The victim told the investigator that A.C. kept threatening her with calling the division director, which upset her. (Ex. C, p. 6)

- Housemate J told the investigator that A.C. and the victim argued. (Ex. C, p. 6)

I conclude that it is more probable than not that A.C. threatened to call the division director. Therefore, DPPC has proved by a preponderance of the evidence that A.C. did so.

A.C.'s threatening to call the division director caused the victim serious emotional injury, as defined by 118 CMR 2.02: "An injury to the... emotional state of a Person with a Disability...." It is possible to distinguish, on one hand, A.C.'s injury to the victim's emotional state from A.C.'s threatening to call the division director and, on the other hand, A.C.'s injury to the victim's emotional state from slapping her. Before A.C. slapped the victim, the victim became anxious, begged A.C. not to call the division director, was screaming and crying, and was apologizing to A.C. Evidence of a serious emotional injury to a person with a disability includes anxiety and fear. 118 CMR 2.02. A.C. caused both anxiety and fear in the victim before she slapped her. Although the victim is an anxious person, A.C. increased her anxiety.

When A.C. slapped the victim twice, she committed abuse *per se*, as defined by 118 CMR 2.02: "the intentional... application of a physical force in a manner that inflicts physical pain or Serious Emotional Injury...." Application of physical force was intentional because A.C.

slapped the victim more than once. Evidence that the victim experienced pain is not in the record. She did hold her face as if she had just been slapped (Ex. C, p. 5), but that could have been in surprise and not pain. However, the victim did suffer serious emotional injury. Again, it is possible to distinguish, on one hand, A.C.'s injury to the victim's emotional state from A.C.'s slapping her and, on the other hand, from A.C.'s threatening to call the division director. For weeks after June 13, 2021, the victim said to the behavioral analyst, in response to having been slapped, things along the lines of: Why me? I don't know why she did that to me. I don't know why anyone would hit me. I don't know why she slapped me. (Behavioral Analyst testimony) Again, evidence of a serious emotional injury to a person with a disability includes anxiety. 118 CMR 2.02. A.C. caused the victim anxiety by slapping her. DPPC has proved by a preponderance of the evidence all elements of the definition of abuse *per se* applicable in this case.

It may or may not be true that other staff members of the group home regularly or occasionally tried to modify the victim's behavior by saying that they would call the division director, as A.C. has testified. It may or may not be true that A.C. learned from other staff members that they could sway the victim by saying that they would call the division director, also as A.C. has testified. (See also A.C. Br. 10) However, I note three things. One, the name of this case is *A.C. v. DPPC*. Other staff members may or may have told the victim that they would call the division director, but DPPC has not proceeded against them. Their cases are not before me. Two, if other staff members told the victim that they would call the division director, I don't know how gently or harshly they did so. Three, I do know that when A.C. told the victim that she would call the division director, she did not do so gently. She tormented and agitated the victim, causing her anxiety and fear.

Registrable abuse is

an act...of a care provider that results in serious...emotional injury or constitutes abuse per se of a person with an intellectual or developmental disability.

G.L. c. 19C, §15. Because A.C. is a care provider who committed abuse *per se* and caused serious emotional injury, she committed registrable abuse.

However, that is not the end of the inquiry. Registrable abuse does “not include instances” in which DPPC,

upon weighing the conduct of the care provider and its outcome, determines that the incident was isolated and unlikely to reoccur and that the care provider is fit to provide services or supports to persons with intellectual or developmental disabilities.

G.L. c. 19C, §15. See also 118 CMR 14.02(3). DALA, too, may make this determination. G.L. c. 19C, §15.

A.C. has not presented evidence or argued that she is eligible for this exception.

Therefore, this exception does not apply. A.C. committed registrable abuse, and DPPC may place her on the abuse registry.

A.C. argues that she should not be placed on the abuse registry because the investigator violated investigation protocol. (A.C. Br. 15) Although A.C. does not invoke 118 CMR 14.02(2), I note two things about that provision because it is the provision most relevant to A.C.’s argument, even though it is ultimately not relevant. One, the provision allows a determination of abuse to be reversed if “non-compliance” with investigative protocol “resulted in the reasonable likelihood of substantial prejudice” to the alleged abuser. 118 CMR 14.02(2) A.C. does not argue that she was so prejudiced, let alone substantially prejudiced. Two, 118 CMR 14.02(2), allows DPPC to reverse a determination of abuse at the petition-for-review stage, DPPC’s internal review process. I am aware of no statute or regulation that authorizes the Division of

Administrative Law Appeals to keep an abuser from being placed on the abuse registry because DPPC did not follow its investigation protocol. A.C. does not bring such a statute or regulation to my attention.

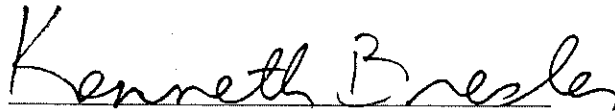
I make no finding on whether DPPC did or did not follow its investigation protocol.

The parties spent some time at the hearing exploring the issue of whether A.C. filed an online incident report about June 13, 2021, using another staff member's credentials, and if so, the circumstances and reason. The investigation report mentions this issue. (Ex. C, pp. 5, 12) DPPC mentioned the issue briefly in its brief. (DPPC Br. 29) I find that deciding this issue will not illuminate the credibility of A.C. and other witnesses and the core issues of whether A.C. slapped the victim and threatened to call the division director.

Conclusion and Order

DPPC proved by a preponderance of the evidence that A.C. committed registrable abuse. The "unlikely to reoccur" exception does not apply. DPPC may place A.C. on the abuse registry.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth Bresler
Administrative Magistrate

Dated: DEC 15 2022

