

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals  
14 Summer Street, 4th Floor  
Malden, MA 02148  
[www.mass.gov/dala](http://www.mass.gov/dala)

J.L.,<sup>1</sup>  
Appellant

v.

Docket No. DPPC-22-0415

Disabled Persons Protection Commission,  
Respondent

**Appearance for Appellant:**

J.L.

**Appearance for Respondent:**

Andrew Levrault, Esq.  
Deputy General Counsel  
Disabled Persons Protection Commission  
300 Granite Street, Suite 404  
Braintree, MA 02184

**Administrative Magistrate:**

Kenneth Bresler

**SUMMARY OF DECISION**

While evidence and indications exist that appellant shot a developmentally disabled person with paintballs, the evidence does not rise to preponderance of evidence that appellant did so and committed abuse or abuse per se. Appellant should not be placed on abuse registry.

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<sup>1</sup> The appellant's initials. I don't use his name because of the 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, J.L., appeals the determination by the Disabled Persons Protection Commission (DPPC) that he committed abuse or abuse per se of a disabled person, which constituted registrable abuse, that is, abuse that would place him on the registry of abusers.

I held a remote hearing on April 11 and on June 13, 2023. I held and recorded the April 11 hearing by Webex. On June 13 Webex was not operating correctly and DPPC arranged for the hearing to be held on Teams. However, it could not be recorded on Teams. I recorded the June 13 hearing with an audio recorder at the Division of Administrative Law Appeals (DALA).

On April 11, 2023 J.L. represented himself, testified, and called no other witness. DPPC called as witnesses the alleged victim, the alleged victim's former housemate, an investigator for the Department of Developmental Services (DDS), and the director of operations for the organization that runs the alleged victim's group home. (This decision will refer to Housemate 1; the investigator; and the director.) After reviewing the recording of the April 11, 2023 hearing, I had enough questions about the evidence that I held a second day of hearing on June 13, 2023. *See Order Regarding More Evidence.*

On June 13, 2023 J.L. again represented himself. He testified and called as a witness a fellow staff person at the group home. (This decision will refer to Staff Person 1.) At my request, DPPC again presented as witnesses the director and investigator for more questions.

I admitted 21 exhibits, Exhibits A through Q, which DPPC offered, and Exhibits R through U, a series of text message screenshots, which J.L. offered.

Both parties submitted post-hearing briefs in August 2023.

## **Findings of Fact**

### Group home

1. An organization called ServiceNet runs a group home in Hamden County for people with developmental disabilities. (Ex. A, director testimony)
2. The group home
  - A. houses up to five residents;
  - B. has a large and fenced back yard; and
  - C. is funded by DSS. (Director testimony)
3. A neighboring home has a deck from which the neighboring home's residents can partially see the group home's back yard. (Director testimony (neighbors can "kind of look over...if they want to"))
4. At the time of the alleged incident in or before September 2020, the group home had three residents whom this decision calls the alleged victim, Housemate 1, and Housemate 2. (Director testimony)

### Alleged victim

5. The alleged victim was a DDS client. (Director testimony; Ex. A, p. 1)<sup>2</sup>
6. The alleged victim
  - A. had a history of trauma;
  - B. had suffered two brain injuries;
  - C. had intellectual disabilities and was developmentally disabled;
  - D. had a history of self-injury. (Director testimony; Ex. E)

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<sup>2</sup> Page numbers are to the record – they appear in the bottom left corner of pages – not the page number of the individual exhibits.

7. The alleged victim's diagnoses include psychotic disorder with bipolar features, impulse control disorder, posttraumatic stress disorder, fetal alcohol syndrome, and seizure disorder. (Ex. D, p. 114 (Individual Support Plan))

8. The alleged victim "was adjudicated incompetent and was appointed a legal Guardian." (Ex. B (DPPC's Initial Response Form), p. 12)

9. At the time of the alleged incident in September 2020, the alleged victim was under one-on-one supervision on Monday through Friday from 9:00 a.m. to 3:00 p.m. That is, one staff member was assigned to supervise the alleged victim, and no other group home resident, at all times during the relevant periods. On Monday through Friday, from 3:00 p.m. to 11:00 p.m., the alleged victim was under line-of-sight supervision. That is, a staff member had to be able to see the alleged victim, except when he was in his bedroom or a bathroom, at all times during the relevant periods. (The alleged victim's supervision during other times is not in evidence.) (Director testimony; Ex. D, p. 115)

#### Housemate 1

10. Housemate 1 was

- A. intellectually disabled;
- B. on the autism spectrum; and
- C. had a treatment plan. (Director testimony)

#### J.L.

11. In September 2020 J.L. was a staff member at the group home. ServiceNet assigned hours at various of its group homes as his schedule allowed. When he worked at the group home that figures in this appeal, J.L. worked the 3:00 to 11:00 p.m. shift on Mondays through Thursdays. (Director testimony; Ex. C, p. 31)

12. J.L. owned a paintball gun. During his off hours, he played paintball. While working at the group home, J.L. discussed paintballing. On at least one occasion, he brought a paintball or paintballs to the group home to show the residents. (Ex. C, pp. 22, 26; J.L. testimony)<sup>3</sup>

#### Alleged incident

13. The gist of the alleged incident is that J.L. brought his paintball gun to the group home in early September 2020. He offered to shoot residents of the group home with paintballs for \$10. The alleged victim accepted this offer. J.L. shot the alleged victim twice with a paintball, causing the alleged victim to sustain bruising to his back, and bruising and some bleeding to his left calf, after alleged victim picked it. (Ex. C, pp. 21)

14. The “[d]ate and time of incident is not clear.” (Ex. B, p. 4)

15. If the alleged incident happened, it probably happened in the first half of September 2020, on a Monday, Tuesday, Wednesday, or Thursday, between 3:00 and 11:00 p.m. (J.L.’s usual shift), more specifically, in daylight hours.

#### How the alleged incident came to light

16. The circumstances of how the alleged incident came to the attention of DDS and DPPC are not precisely established, but that is not significant to the appeal.

17. The circumstances were probably these:

A. Sometime between September 7 and 14, 2020 Housemate 1 told his mother that he had seen J.L. shoot the alleged victim with a paintball. (Housemate 1 testimony; director testimony)

B. On or before September 14, 2020 one or both of Housemate 1’s parents

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<sup>3</sup> On April 11, 2023 J.L. testified that he owned a paintball gun. On June 13, 2023 he testified that he never owned a paintball gun. I find that he owned a paintball gun.

reported the alleged incident to the director. (Director testimony)

C. On September 14, 2020 the director reported the alleged incident to DDS. (Ex.

I)

18. A possible variation of the circumstances is as follows: On September 15, 2020 Housemate 1 reported the alleged incident to a DDS service coordinator. (Ex. C, p. 5)

Director's questions to and assessment of Housemate 1

19. When the director learned about the alleged incident, she asked Housemate 1 about it. He reported that J.L. had offered to hit the alleged victim with a paintball, but he, Housemate 1, had refused to be hit because he knew that paintballs hurt. (Director testimony)

20. The director found the account of Housemate 1 credible based on her experience with him. (Director testimony)

21. In the director's experience with Housemate 1, when he was not being truthful, he avoided eye contact, kept his head down, and did not respond to questions. (Director testimony)

22. The director believed Housemate 1's account because he did not do any of those things while talking with her. (Director testimony)

23. The director also believed Housemate 1 because his father is a police officer. (Director testimony)<sup>4</sup>

Director's questions to and assessment of the alleged victim

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<sup>4</sup> Whether this narrative has discrepancies and whether they are significant is unclear. Housemate 1 testified that he told his mother about the alleged incident. The director testified that she heard about the alleged incident from Housemate 1's parents. She also testified that that Housemate 1 has been known not to be always honest with his father, a police officer. How the director knows that Housemate 1 is not always honest with his father is unclear. I asked DPPC to arrange for the testimony of Housemate 1's parents, but DPPC could not reach them.

24. The director asked the alleged victim about the alleged incident. It appeared to her that the alleged victim was afraid to tell the truth. After a few minutes, he told her that J.L. had brought in a paintball gun to the group home and offered to give the alleged victim \$10 if he allowed J.L. to shoot him. The alleged victim agreed, J.L. told him to run, and J.L. shot him twice. (Director testimony)

25. The alleged victim is not an accurate reporter of dates and times. (Director testimony)

26. The director found the account of the alleged victim credible based on her experience with him. (Director testimony)

27. In the director's experience with the alleged victim, when he was not being truthful, he would avoid eye contact and his body language "was all over the place." In recounting the alleged incident, he looked directly at the director. (Director testimony)

28. In addition, when the alleged victim is telling the truth, he is adamant, as he was while recounting the alleged incident. (Director testimony)

#### Director's assessment of alleged victim's injuries

29. The director has seen the alleged victim injure himself with a fork. She has seen him hit himself in the face. His injuries have been above his hands. The director has not known him to inflict injuries on his back or legs, as occurred in this case. She has seen him pick scabs and enlarge them. (Director testimony)

30. The director opined that the alleged victim's injuries were not consistent with his previous or subsequent self-injuries. (Director testimony)

31. The director's son has engaged in paintballing and been injured. The director opined as a layperson that the alleged victim's injuries were consistent with and very similar to those from paintballs. (Director testimony)

Photographs and treatment of the alleged victim's injuries

32. On September 15, 2020 the group home's residential manager photographed the alleged victim's injuries on his lower back and calf. (Ex. C, p. 21)

33. The photographs show an oval bruise/abrasion on the alleged victim's left back above his buttocks, and a scab above the ankle on his left calf. (Ex. H)

34. On September 15, 2020 the alleged victim was brought to a walk-in medical care facility. He told the facility that he had been shot accidentally by paintballs three weeks before. (Ex. C. p. 21; Ex. G, p. 38)<sup>5</sup>

Investigator's questions to and assessment of alleged victim<sup>6</sup>

35. The alleged victim "is capable of participating in full conversation[s] and answering open ended questions," according to the investigator. (Ex. B, p. 12)

36. On September 23, 2020 the investigator interviewed the alleged victim. Because of the COVID-19 pandemic, the investigator conducted the interview by FaceTime. (Ex. B, p. 12; Ex. C, p. 22; Investigator testimony)

37. The alleged victim told the investigator the following account: In early to mid-September 2020 J.L. brought a paintball gun to the group home and showed it to the three residents in the yard. He offered them \$10 if they allowed J.L. to shoot them in the back with the

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<sup>5</sup> I accept as fact that the alleged victim told medical personnel that he had been shot accidentally three weeks before. The alleged victim's characterization of the shooting as accidental is not dispositive. The alleged victim's report that the alleged incident happened three weeks before does not help establish when it happened.

<sup>6</sup> The summaries of the interview of the alleged victim differ slightly between the initial response form (Ex. B) and investigation report (Ex. C), even though the summaries are based on the same interview. For example, the initial response form states that the alleged victim reported that "the other residential staff witnessed the incident." (Ex. B, p. 12 (quotation is of the report, paraphrasing the alleged victim)) The investigation report states that the alleged victim reported that the other staff members were in the group home and may not have witnessed the alleged incident. (Ex. C, p. 22)



paintball gun. The alleged victim agreed. J.L. told him to start running and hit him with two paintballs, injuring his back and calf. J.L. paid \$10 to the alleged victim. He told the alleged victim not to tell anyone or he would take the money back. The alleged victim sustained bruising to his lower back and his left calf, which also bled, and which he later picked. Both paintball strikes were painful. The injury to his calf was painful for several days until the wound healed. He was not upset. Other staffers were in the group home and may not have witnessed the alleged incident. (Ex. B, p. 12; Ex. C, p. 22; Investigator testimony)

38. On March 16, 2021 the investigator interviewed the alleged victim again. (Ex. C., p. 17; Investigator testimony) His account was consistent with his first account. (Investigator testimony)

39. The investigator knew the alleged victim from several prior investigations. In some prior investigations, the alleged victim was an alleged victim; in some prior investigations, he was a witness. The investigator testified to the following things about the alleged victim: He is talkative and able to convey his point. He is usually a very reliable reporter. He has reported incorrect information, but will usually retract it and report what actually happened. (Investigator testimony)

40. One way that the investigator has assessed the alleged victim's accounts is by asking him the same question in different ways or by questioning him again six or eight months later. If the alleged victim made up an account, he can't remember it six or eight months later. (Investigator testimony)

41. The alleged victim is straightforward about certain things and concrete, the investigator testified. He has admitted to the investigator: You know what? I made up that story. (Investigator testimony)

42. The investigator testified that in prior investigations the alleged victim had changed his account five or six times. When I pressed him, the investigator testified that he could recall one time that the alleged victim had changed his account. (Investigator testimony)

Investigator's questions to and assessment of Housemate 1

43. On October 6, 2020 the investigator interviewed Housemate 1 by FaceTime. Housemate 1 told the following account: In mid-September 2020 J.L. and the group home's three residents were in the group home's yard. J.L. took a paintball gun from his vehicle to show the three residents. J.L. asked the three residents if they would agree to be shot for \$10. The alleged victim agreed; the other two residents declined. J.L. told the alleged victim to run and fired the paintball gun two or three times, hitting him in the back and leg. The alleged victim fell to the ground, screamed in pain, and said that his leg and back were hurt. Housemate 1 was unsure if J.L. paid any money to the alleged victim. J.L. asked the three residents not to tell anyone. Housemate 1 told a DDS coordinator about the alleged incident. (Ex. C, p. 21)

44. The investigator knew Housemate 1 from previous investigations. His assessment of Housemate 1 is that he is talkative and capable of expressing what he thinks and feels. His answers to questions show he understands them. He tends to be honest even when it is detrimental and gets him in trouble. (Investigator testimony)

Investigator's questions to Housemate 2

45. The investigator's interviews with Housemate 2 were inconclusive. (Ex. C, pp. 21-22, 25 (report referred to "inconsistent information"); Investigator testimony)<sup>7</sup>

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<sup>7</sup> On October 21, 2020 the investigator interviewed Housemate 2 by FaceTime with the help of a residential manager. Housemate 2 told the investigator that J.L. owned and displayed a paintball gun; remembered "playing paintball" with J.L. and the alleged victim; but did not remember the alleged victim being shot with a paintball. (Ex. C, p. 21) Later on the same day, the residential manager contacted the investigator to report that Housemate 2 had admitted lying to the

#### Staff Person 1's assessment of the alleged victim

46. Staff Person 1's assessment of the alleged victim is as follows: The alleged victim can be both truthful and untruthful. He is capable of lying to get someone in trouble whom he doesn't like. It is not clear when he is telling the truth or an untruth. (Staff Person 1's testimony)

47. There was no "bad blood" between the alleged victim and J.L. (Staff Person 1's testimony)

#### Staff Person 1's assessment of Housemate 1

48. Staff Person 1's assessment of Housemate 1 is as follows: Dealing with Housemate 1 was stressful. He was a hothead, quick to anger and fight. He lied frequently and was untrustworthy. He sometimes called the police on the group home's telephone and made false reports, at least two or three times, including falsely reporting that he was going to kill himself or the group home's staff was trying to harm him. He stole belongings, such as clothes and games, from the rooms of other group home residents. He "cheeked" pills, that is, retained them in his cheek, instead of swallowing them, and saved them in his bureau drawer. Staff members found such pills during searches of Housemate 1's room. (Staff Person 1's testimony)

49. Staff Person 1 testified that Housemate 1 and the alleged victim did not like each other. (Staff Person 1 testimony)

#### Conflicting evidence about Staff Person 1

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investigator; reported seeing J.L. shoot the alleged victim; stated that he did not want to get J.L. in trouble; and had declined to be reinterviewed immediately. On March 15, 2021 Housemate 2 agreed to a second interview with the investigator. He said that he did not remember the first interview; did not remember "playing paintball" with J.L. or the alleged victim; and was unaware of a paintball gun at the group home or whether the alleged victim had been shot with a paintball. (Ex. C, p. 22)

50. The director testified that Staff Person 1 told her that J.L. had brought a paintball gun to the group home. (Director testimony)

51. Staff Person 1 told the investigator that he did not see a paintball gun at the group home. (Ex. C, p. 21) He testified that he never saw J.L. with a paintball gun and never told the director that he had seen J.L. with a paintball gun at the group home. (Staff Person 1 testimony)

#### J.L.'s assessment of Housemate 1

52. J.L. testified that Housemate 1 had a pattern of faking seizures, cheeking pills, trying to elope, and causing problems with the group home's staff. (J.L. testimony)

53. When a resident of the group home leaves without permission or supervision, it is called eloping. (J.L. testimony, Staff Person 1 testimony)

#### Alleged victim's testimony in the hearing

54. On April 11, 2023 the alleged victim testified in the hearing as follows: He was in the back of the group home when J.L. offered him \$10 if he got shot. After J.L. shot him, he, the alleged victim, got mad and ran away. His housemate (presumably Housemate 1) followed him to ask why he was mad and to report that the alleged victim had a hole in his pants<sup>8</sup> and was bleeding on his leg and back. (Alleged victim testimony)

55. When asked if he had to go to the doctor, the alleged victim said no. (Alleged victim testimony)

#### Housemate 1's testimony in the hearing

56. On April 11, 2023 Housemate 1 testified in the hearing as follows: J.L. brought a paintball gun to the group home, showed it to people, cleaned it, and offered to shoot people for

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<sup>8</sup> The pants were not introduced into evidence and were not the subject of any other testimony or report.

\$20. He told the alleged victim to run around the front yard and fired about five paintballs at the alleged victim, hitting him about five times. The alleged victim said that he was hurting and said “Ow, ow.” J.L. asked Housemate 1 if he wanted to get shot. J.L. got nervous. He said not to tell anyone, but Housemate 1 told his mother. (Housemate 1 testimony)<sup>9</sup>

Housemate 1’s elopement from the group home

57. On September 7, 2020 Housemate 1 eloped either from a vehicle or from the group home. (J.L. testimony, Staff Person 1 testimony, Exs. S and T)<sup>10</sup>

58. Staff Person 1 testified as follows: He and J.L. took the three group home residents to get pizza. On the way back, J.L. drove Housemate 1 in one vehicle. Staff Person 1 drove the alleged victim and Housemate 2 in a second vehicle. (Both vehicles belonged to ServiceNet.) J.L. called Staff Person 1 to say that Housemate 1 had tried to jerk the steering wheel and crash the vehicle, and then left the vehicle and darted off. Staff Person 1 saw Housemate 1 on the road trying to run away. The elopement happened close to the group home, within about a 30-second drive away. Staff Person 1 and J.L. restrained Housemate 1 on a neighbor’s lawn, police arrived, and then a Crisis vehicle arrived. Crisis is a company that works with ServiceNet. The Crisis vehicle transported Housemate 1 to the hospital. (Staff Person 1 testimony)

59. J.L.’s handwritten incident report seems to report the following: Housemate 1 eloped from the group home. J.L. saw him outside. J.L. went outside and got Housemate 1 into a vehicle. While in the vehicle, Housemate 1 jerked the steering wheel as J.L. drove. (Ex. T)

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<sup>9</sup> Housemate 1 did tell the investigator that the money at stake was \$10, not \$20. (Ex. C, p. 21)

<sup>10</sup> As with the account of the alleged incident that is the subject of this appeal, the details of Housemate 1’s elopement conflict. However, because his elopement is not directly related to the alleged incident of J.L. shooting the alleged victim with two paintballs, the conflict between accounts is not significant in and of itself.

60. The director's testimony seemed to indicate that Housemate 1 eloped from the group home. (Direct testimony)

61. On September 8, 2020 J.L. texted his incident report about the elopement to a person at ServiceNet. (Ex. T; J.L. testimony)

62. Also on September 8, 2020 J.L. texted answers to questions about the elopement to that person at ServiceNet. (Ex. S; J.L. testimony)

63. While in the hospital, Housemate 1 told his mother about the alleged incident involving J.L. and a paintball gun. (Director testimony)

64. Housemate 1 was in the hospital from September 7 to 22, 2023.<sup>11</sup> (Director testimony)

J.L.'s testimony in the hearing

65. The alleged victim was one of his favorite clients. (J.L. testimony)

66. Housemate 1 eloped on same day as, and before, the alleged paintball incident. He was in the hospital and so could not have witnessed the paintball incident. (J.L. testimony)

67. Two of his coworkers were present "that day." (J.L. testimony)

68. J.L. denied shooting two paintballs at the alleged victim. (J.L. testimony)

Procedure

69. After an investigation by the investigator, on June 14, 2022, DPPC wrote a letter to J.L. stating that it had determined that sufficient evidence existed to conclude that he had committed abuse or abuse per se, which constituted registrable abuse. (Ex. N)

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<sup>11</sup> In the record is that Housemate 1 was hospitalized after he eloped. What is not in the record is why he was hospitalized for over two weeks after he eloped.

70. On June 21, 2022 J.L. wrote two emails to DPPC denying the allegations against him. On June 27, 2022 DPPC received the same messages from J.L. in written form. (Ex. O)

71. DPPC considered J.L.'s communications to be a petition for review. On September 8, 2022 DPPC denied J.L.'s petition for review. (Ex. P)

72. On September 27, 2022 a timely appeal was filed for J.L. (Ex. Q)

### **Discussion**

G.L. c. 30, §9B provides that an investigative report in a DPPC case "shall be admissible into evidence for the truth of the matters asserted therein." G.L. c. 30A, §11(4) reads in part: "All evidence, including...investigation reports...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...." Under G.L. c. 30A, §11(2), "Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs."

DALA generally does not have discretion in admitting DPPC's investigative reports into the record, G.L. c. 30, §9B, G.L. c. 30A, §11(4), for the truth of the matters asserted in them. G.L. c. 30, §9B. DALA does have discretion under G.L. c. 30A, §11(2) whether to "give[] probative value" to the double hearsay that appears in DPPC investigative reports – such as what a group-home resident told a group-home staffer who told it to an investigator – and other hearsay. Thus, DALA must generally *accept into evidence* DPPC investigative reports for the truth of the matters asserted in them, but is not required to *accept as truth*, that is *believe*, the matters asserted in the reports.

As for witnesses:

“The credibility of any witness or the veracity of any witness’[s] statements given” at a DPPC proceeding “may not be challenged solely on the basis of his disability.” G.L. c. 30, §9B.

Among other things below, I assess the credibility of the hearing’s witnesses, although not on the basis of some witnesses’ developmental disabilities.

Evidence/indications that J.L. shot the alleged victim with paintballs

- Not one, but two residents of the group home – the alleged victim and Housemate 1 – testified that J.L. shot the alleged victim with paintballs. (Alleged victim and Housemate 1 testimony)

- The alleged victim had two injuries, one on his back and one on his calf (. (Ex. B, p. 12; Ex. C, p. 22) that were consistent with having been shot with paintballs, according to one witness. (Director testimony)

- J.L. had no problem with the alleged victim. (J.L. testimony) Thus, the alleged victim had no motive to falsify his report that J.L. had shot him with paintballs. (Director testimony; DPPC br. 29)

- J.L. engaged in paintballing and brought paintballs to the group home to show residents and his fellow staff members. (J.L. testimony)

The first two points are the strongest evidence and indications that J.L. shot the alleged victim with paintballs. In addition, Housemate 1 was hospitalized when he reported the alleged incident and thus not in a position to collude with the alleged victim, with whom he did not get along, in falsifying the report of the alleged victim. That tends to prove that the alleged incident happened. (DPPC br. 29) However, the first two points can be countered.

The alleged victim’s and Housemate 1’s testimony was generally consistent because *it wasn’t detailed*. For example, no one during the hearing, including me, asked the alleged victim



or Housemate 1 what the paintball gun looked like, including its color, or the color of the paintball paint that presumably splattered the alleged victim. Apparently, no one posed those questions to the alleged victim and Housemate 1 during the investigation either. That is possibly because the alleged victim and Housemate 1 are developmentally disabled. Perhaps people assumed that the alleged victim or Housemate 1 did not know, or did not or could not remember what the paintball gun looked like or what the color of the paintball paint was. In any event, the alleged victim and Housemate 1 were not asked detailed questions that could further confirm that an event happened.

In fact, the alleged victim and Housemate 1 recounted some details inconsistently. The alleged victim recounted that J.L. offered to and did pay him \$10. (Alleged victim testimony; Ex. B, p. 12; Ex. C, p. 22; Investigator testimony; Director testimony) However, Housemate 1 testified that J.L. offered to pay residents of the group home \$20 if they allowed him to shoot them (Housemate 1 testimony). (Housemate 1 also told the investigator that \$10 was the amount. (Ex. C, p. 21))

The alleged victim testified that J.L. shot him with paintballs in the group home's back yard. (Alleged victim testimony) The director's testimony about the backyard (it is large and fenced, and a neighboring home has a deck with a partial view into it) and her lack of testimony about the front yard indicates that she assumed that the alleged incident happened in the back yard. However, Housemate 1 testified that J.L. shot the alleged victim in the front yard. (Housemate 1 testimony)

Housemate 1's testimony not only conflicts with the alleged victim's, it makes less sense. The group home's setting, such as how isolated it was, was not the subject of much evidence. But the group home has at least one neighboring home (on whose lawn J.L. and Staff Person 1

restrained Housemate 1 after he eloped. (Staff Person 1 testimony)) Housemate 1's testimony makes less sense because it means that if J.L. shot the alleged victim, he did so more or less in public. If J.L. shot the alleged victim with a paintball gun, why did he not do so in the more private back yard?

It is true that two witnesses recounted to various people that J.L. shot the alleged victim with paintballs and so testified at the hearing – but those two witnesses have diminished credibility.

#### Alleged victim's credibility

Although the director found the alleged victim's account credible based on her experience with him, her experience with him includes his not being truthful. (Director testimony) She testified that she is able to detect when he is not telling the truth, but I am not convinced that that is the case. I am left with a witness, the alleged victim, whom the director informs me tells both truths and untruths and whose testimony I am wary of.

The investigator characterized the alleged victim as usually a very reliable reporter who has reported incorrect information, but will usually retract it (Investigator testimony) This testimony was not reassuring to me. I am left not knowing when the alleged victim retracted incorrect information and how and when the investigator knew or could know whether, if, and when the alleged victim did *not* retract incorrect information. I also don't know how to reconcile an assessment that the alleged victim is *very reliable* with the assessment that he *usually* retracts incorrect information.

The investigator also testified that in prior investigations the alleged victim had changed his account either five or six times on one hand, or once on the other hand. (Investigator testimony) This testimony was also not reassuring to me. I am left with a witness, the alleged

victim, who does not sound to me to be a very reliable reporter and whose testimony I am wary of.

Staff Person 1 testified that the alleged victim can be both truthful and untruthful. He is capable of lying to get someone in trouble whom he doesn't like (although that does not include J.L., according to the evidence). It is not clear when he is telling the truth or an untruth. (Staff Person 1's testimony) Staff Person's testimony left me wary of the alleged victim's testimony.

In addition, the alleged victim's memory is suspect. He did not remember going to the doctor, although he went to a walk-in medical care facility on September 15, 2020. (Ex. G)

#### Housemate 1's credibility

Although the director found Housemate 1's account credible based on her experience with him, her experience with him includes his not being truthful. (Director testimony) She testified that she is able to detect when he is not telling the truth, but I am not convinced that that is the case.

Staff Person 1 testified that Housemate 1 lied frequently and was untrustworthy. He sometimes called the police on the group home's telephone and made false reports, at least two or three times, including falsely reporting that he was going to kill himself or the group home's staff was trying to harm him. (Staff Person 1's testimony) If Housemate 1 was willing to lie to police, I am not convinced that he was unwilling to lie to me under oath. I am wary of Housemate 1's testimony.

Thus, I have two witnesses corroborating a report, but only generally and not in detail, two witnesses whose credibility I question and whose testimony I am wary of, and one of whose memory I question. I question their credibility, not based on their disability or demeanor during their testimony, but on the conflict in details in their testimony and based on other witnesses'

assessments of their credibility.

I now discuss other evidence or indications that the alleged incident occurred.

#### Alleged victim's injuries

I have the director's layperson's opinion that the injuries are consistent with the alleged victim having been shot with paintballs. However, the director testified that the alleged victim engaged in self-injury. Her testimony that she had not known the alleged victim to have self-injured his back or self-injured places on his body below where his hands hang, such as his calf, did not convince me that he could not have been responsible somehow for those injuries, even accidentally.

#### The alleged victim's lack of motive to falsely report the alleged incident

The director testified that the alleged victim had no motive to falsify his report that J.L. had shot him with paintballs. (Director testimony) However, the alleged victim was not the person who first reported the alleged incident; Housemate 1 did so. When the director first asked the alleged victim about the report, he was reluctant to talk about it. (Director testimony)

#### J.L. involvement with paintballing

J.L. engaged in paintballing and brought paintballs to the group home to show residents and his fellow staff members. (J.L. testimony) That makes the alleged incident plausible. If J.L. had no involvement with paintballing, one could more easily discount the alleged incident. But J.L.'s involvement with paintballing and his discussion of it at the group home also makes a false report of the alleged incident plausible. The alleged victim, Housemate 1, and Housemate 2 knew about J.L.'s involvement with paintballing and could generate a false report of the alleged incident.

#### Housemate 2's inconclusive report

The investigator's interviews with Housemate 2 were inconclusive; the investigator characterized the information from Housemate 2 as "inconsistent." (Ex. C, pp. 21-22, 25 ("inconsistent information"); Investigator testimony)

Yet in denying J.L.'s petition for review, DPPC relied in part on the investigator's interviews with Housemate 2. (Ex. P, pp. 123-24, 126) In its post-hearing brief, DPPC mentioned and also seemed to have relied in part on the interviews with Housemate 2 (DPPC Br. 21-22)

In this decision, I take no account of Housemate 2's inconclusive report. Taking his report into account would entail double hearsay: crediting what Housemate 2 said to a residential manager who said it to the investigator.

As stated above, I'm allowed to take hearsay into account if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. G.L. c. 30A, §11(2). I don't believe that reasonable persons are accustomed to relying on double hearsay when deciding whether another person may continue working in his chosen field.

#### J.L.'s credibility

J.L. was not credible. He testified both to owning a paintball gun and to never having owned a paintball gun. (J.L. testimony) That is not the end of the matter, however.

As courts in other cases have said: "[N]either party was credible...." *Siebert v. Dermigny*, 875 N.Y.S.2d 68, 69 (N.Y.A.D. 1 Dept. 2009). "[B]oth parties had credibility problems."<sup>12</sup> *Higgins v. Loveland*, 2004 WL 1753137, 2 (Mich. Ct. App. 2004). "[T]he testimony was so equivocal and contradictory that it falls well short of clearly preponderating in

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<sup>12</sup> I realize that the alleged victim and Housemate 1 are not parties to this case. Nonetheless, the quotations from other cases illustrate the conundrum facing factfinders who disbelieve witnesses for both parties.

either direction.” *Id.*

That J.L. (a non-credible witness) has denied doing what the alleged victim and Housemate 1 (other non-credible witnesses) contend that he did is not affirmative evidence, let alone a preponderance of the evidence, that he shot the alleged victim with paintballs.

Puzzling factor against J.L.

J.L.’s position is that he did not shoot the alleged victim with paintballs. He also testified on both days of the hearing that Housemate 1 was not at the group home on the day of the alleged incident; thus, Housemate 1 could not have witnessed what he claimed to have witnessed. J.L. also testified that two of his coworkers were present that day, presumably meaning that they would have witnessed or become aware of the alleged incident if it had happened. (J.L. testimony)

The alleged incident did not happen on any specific identified day. If it happened, it was sometime before September 14, 2023, which was the date when it was reported. What day was “that day” and what did J.L. mean by testifying that two of his coworkers were present that day? How can J.L. contend both that he did not shoot the alleged victim with paintballs and that Housemate 1 was not present to witness it? If the alleged incident never happened, then it doesn’t matter that Housemate 1 had eloped, had been hospitalized, and was absent from the group home; it doesn’t matter how many staff members were present on an unspecified day, staff members who may have become aware of an incident if it happened.

In general, legal parties are allowed to propound alternative, even contradictory, theories. J.L. is allowed to argue that he did not shoot the alleged victim with paintballs and if he did, it happened at a time in September 2020 when Housemate 1 was absent from the group home. However, I note two things. It is hard to convincingly argue in the alternative. And this is not

J.L.'s explicit argument. This alternative argument – J.L. did not shoot the alleged victim with paintballs and if he did, it happened when Housemate 1 could not have witnessed it – is my conjectural construction, trying to make sense of J.L.'s testimony and this puzzling factor.

Was J.L. admitting that *something* happened on a day in September 2020? I don't know. Nonetheless, this puzzling factor weighs against J.L.

Puzzling factor in favor of J.L. and absence of evidence against him

The puzzling factor against J.L. is countered by a puzzling factor in favor of J.L. and the absence of certain evidence against him.

The report that J.L. shot the alleged victim with paintballs is puzzling precisely because J.L. engaged in paintballing. That means that he paid money to shoot people with paintballs at a paintball establishment. He had a ready supply of live targets. I assume that shooting paintballs at this ready supply of targets was more challenging than shooting the alleged victim because the targets in a paintball establishment were either hiding or trying to evade getting shot, and capable of shooting back.

It is *possible* that J.L. brought his sport to his workplace, that being able to shoot live targets at a paintball establishment was not satisfying enough to him, and that he decided to abuse and sport with disabled people with paintballs. But how *likely* is that, considering that he had a legitimate outlet for his fondness or passion for paintballing? Not likely.

The absence of evidence against J.L. is this: What did the paintball gun look like? Testimony is lacking, as I've discussed. What color was or colors were the paintballs that hit the alleged victim? Testimony is also lacking on this point, as I've also discussed. Where are the pants that the alleged victim was wearing that a paintball made a hole in? (Alleged victim testimony) They're not in evidence, as I've discussed, which is a hole in the evidence. Where are

the alleged victim's pants and shirt with the paint from the paintball on them? The investigation and hearing did not touch on them. Wouldn't another staff member at the group home have noticed paint on the alleged victim's clothes immediately after the alleged incident? Does the alleged victim do his own laundry? If so, did anyone ask about the location and state of his clothes on or after September 14, 2020, when the alleged incident was reported? If the alleged victim does not do his own laundry, did anyone notice paint on his clothes while laundering his clothes? Did anyone go to inspect the back yard or front yard to look for evidence of paint? If not, why not? These answers are not in evidence.

I'm not suggesting that the investigator, DPPC, or anyone connected with the group home is concealing information. I am suggesting the possibility that no one raised these questions, which would have supported or undermined the allegation against J.L.

#### J.L.'s argument about the police and District Attorney

The fact that neither the police nor District Attorney charged J.L. criminally is not evidence or an indication that J.L. did not shoot the alleged victim with paintballs, as he argues. (E.g., Ex. Q) The police department and District Attorney's Office are separate entities from DALA, I am not privy to their internal decision-making, and I am not bound by their decisions not to act their non-actions. In addition, the standard ultimately governing a criminal charge, beyond a reasonable doubt, is (1) high and (2) higher than the standard at issue in this appeal. The police and District Attorney's Office might have decided that evidence to establish J.L.'s criminal guilt beyond a reasonable doubt could not be obtained. I do not know.

#### Preponderance of the evidence

I must decide by a preponderance of the evidence whether J.L. shot the alleged victim with paintballs. Preponderance of the evidence means that it is "more probable than not" that the



alleged incident occurred. *Continental Assurance Co. v. Diorio-Volungis*, 51 Mass. App. Ct. 403, 409 n.9 (2001). Is it possible that J.L. shot the alleged victim with paintballs? Yes. Evidence supports that possibility. Is it more probable than not that J.L. shot the alleged victim with paintballs? No.

I need not counter, negate, or explain every piece of evidence or indication that J.L. shot the alleged victim with paintballs. Evidence and indications of J.L.'s culpability exist, evidence and indications that cannot be easily countered, negated, or explained. However, the same is true of evidence, absence of evidence, and indications that J.L. did *not* shoot the alleged victim with paintballs: They cannot be easily countered, negated, or explained. Neat and tidy explanations and the act of tying up of loose ends are for advocates. I am a factfinder, not an advocate. The factual allegations are messy here. I do not have and do not need to have explanations to make sense of and tidy up all conflicting factual allegations, puzzling factors, and things that don't quite make sense.

I am not throwing up my hands and saying, "I can't tell what happened, so DPPC does not prevail" or "The major witnesses are not credible, so a pox on both your houses." This decision and the fact that I called a second day of hearing should reflect that I have tried hard to discern where the truth lies.

### **Conclusion and Order**

The Disabled Persons Protection Commission has not proved by a preponderance of the evidence that J.L. committed abuse or abuse per se of a disabled person, which constituted registrable abuse. DPPC may not place J.L. on the registry of abusers.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth Bresler  
Administrative Magistrate

Dated:

NOV -1 2023