

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

S.S.,¹

Appellant

v.

Docket No. DPPC-22-0537

Disabled Persons Protection Commission,
Respondent

Appearance for Petitioner:

S.S., *Pro Se*

Appearance for Respondent:

Andrew Levrault, Esq.
Disabled Persons Protection Commission
300 Granite Street, Suite 404
Boston, MA 02184

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Appellant appeals a decision by the Disabled Persons Protection Commission ("DPPC") that she be placed on a registry of abusers. The Appellant bit a disabled person in her care. Although the DPPC has not established that this conduct was a serious physical injury within the meaning of the statute, it did prove by a preponderance of the evidence that the Appellant's conduct, which was intentional and caused the victim pain, was abuse per se under the statute. This conduct warrants the Appellant's placement on the registry because the record does not establish that the "incident was isolated and unlikely to reoccur and that the [Appellant] is fit to provide services or supports to persons with intellectual or developmental disabilities."

¹ A pseudonym. I do not use her name because of the Confidentiality Order entered in this case and the general requirements of confidentiality in G.L. c. 19C, § 15. Because of the order, the statute, and the applicable regulations, pseudonyms will be used for the names of the victim and the witnesses as well.

DECISION

On October 6, 2021, the Appellant bit CA, a disabled individual who lived at the residential program (the “Home”) where the Appellant worked as a caregiver. As a result of this conduct, the DPPC decided that the Appellant should be placed on a registry of abusive care providers. The Appellant appeals this determination.

I held a hearing on April 16, 2023 via the WebEx conferencing platform. The hearing was recorded via WebEx. The parties stipulated to twenty-six facts in their Joint Prehearing Memorandum, which I mark as “Exhibit 1” for identification. I admitted the parties’ agreed-upon Exhibits A through Q into evidence.

In addition to the Appellant, the following witnesses testified:

- MT: the residential manager at the home where the Appellant worked and the victim, CA, resided;
- KF: a developmental services worker who worked at the home;
- MS: a staff investigator with the Department of Developmental Services (“DDS”); and
- RW: a trainer with DDS.

On May 16, 2023, the DPPC filed a post-hearing brief, at which point the record was closed. The Appellant did not file a post-hearing brief.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

CA and the Home

1. At the time of the incident precipitating this matter, CA was a 26-year-old man who lived in a residential program operated by DDS’s Northeast Residential Services. (Stipulation No. 8).

2. CA receives services from DDS. His diagnoses include autism, bipolar disorder, and microcephaly. (Stipulation No. 9).
3. CA meets the definition of a person with an intellectual disability and developmental disability as set forth in 118 CMR 2.02. (Stipulation No. 11).
4. There are four individuals, including CA, living in the Home. There are usually two staff assigned to the Home at all times, which may be increased to three staff, depending on the schedule and needs of the residents. (Testimony of MT).
5. Direct care staff are responsible for assisting the residents with activities of daily living, such as hygiene, meals, outings/events, transportation, medication administration, and supervision. (Testimony of MT).
6. CA is the subject of an individual support plan ("ISP"), which details his care needs and goals for the upcoming year. (Testimony of MT).
7. CA's verbal skills are limited, and "[h]e gets frustrated and can escalate when others are trying to guess what [he] is saying." CA can be a sweet and lovable resident, but at times he can be difficult and act out physically. (Testimony of MT and KF).
8. CA is also the subject of a behavior support plan ("BSP"). (Stipulation No. 10). A BSP is crafted by the individual's clinician to address certain maladaptive behaviors. (Testimony of MT).
9. CA's BSP is written in an "if-then" format. For example, if CA engages in aggressive behaviors, staff are instructed to respond with a specific action, such as reminding CA to have "good hands" or referencing a preferred activity if CA calms down. If the behavior escalates, then staff can engage in physical

interventions - starting with the least restrictive measures. (Exhibit C).

10. CA has required restraints in the past, but the frequency of his need for restraints has “decreased considerably” over time. (Testimony of MT).

DDS Training

11. DDS staff are trained to address client behaviors. (Testimony of MT, RW, KF, and Appellant).
12. DDS has a 20-hour curriculum for staff on how to respond to behavioral incidents, known as Proactive Approaches to Behavioral Challenges (“PABC”). The focus of the PABC curriculum is on prevention and de-escalation of challenging behaviors. (Testimony of RW).
13. PABC trains staff that physical interventions should always start with the least restrictive intervention. (Testimony of RW).
14. Staff are taught that if there is a behavioral incident during transport, they should pull over the vehicle—provided it is safe to do so. (Testimony of RW).
15. PABC also instructs that if a client is angry at or targeting a specific staff person, then the staff should seek to remove that targeted staff member from the situation, as their presence may be the source of the behavior. (Testimony of RW).

The Appellant

16. Appellant began working for DDS in July of 2018 as a Developmental Service Worker. (Stipulation No. 12 and Testimony of Appellant).
17. The Appellant began at the Home in 2020. The Appellant worked in the Home until her termination from DDS after the incident at issue in this case. (Testimony of Appellant and MT).

18. The Appellant completed PABC training. (Exhibits F and G). The Appellant was trained on CA's ISP and BSP. (Exhibit E; Testimony of MT).
19. The Appellant is a care provider within the meaning of 118 CMR 2.02. (Stipulation No. 15).
20. The Appellant had previously received a two-day suspension for sleeping on the job/inattentiveness. (Testimony of Appellant).

The Incident

21. On October 6, 2021, the residents had been at an outing. They were transported by van and were returning to the home. (Testimony of KF).
22. There were four residents in the van. KF was driving. The Appellant was sitting next to CA in the row behind the driver's seat. There was a seat or a space between the Appellant and CA. Three other residents were in the back seat. (Testimony of KF).
23. CA was wearing a seat belt during the ride. (Testimony of KF).
24. CA became agitated at some point during the ride. He had seen a can of soda and wanted it. The Appellant attempted to explain that the can was empty, but CA nevertheless became worked up and upset. (Testimony of Appellant).
25. CA was screaming and scratching at the Appellant. KF directed CA to stop and asked him to have "safe hands." The Appellant provide similar instructions. (Testimony of KF).
26. The Appellant had scratch marks on her right arm as a result of this incident. (Exhibit K, Exhibit M).
27. KF asked the Appellant if she wanted KF to pull the van over. But the Appellant

declined, observing that they were almost back at the residence. (Testimony of KF).

28. The group then returned to the Home. KF offered to take CA inside because it appeared to KF that the Appellant was the target of CA's aggression, but the Appellant declined. (Testimony of KF).

29. The Appellant was, in fact, the target of CA's behaviors. (Testimony of Appellant, KF, and MT).

30. KF asked the Appellant if she was "okay," and the Appellant replied that she was "fine." (Testimony of KF).

31. MT had accompanied staff and residents to the outing. MT rode separately and returned to the residence when "the situation was already happening in the driveway." (Testimony of MT).

32. Upon arriving, MT observed the Appellant standing outside the van crying. CA was inside the van and behavioral, including punching the windows and seats, yelling, screaming, and "clearly upset." MT thought that the Appellant was the target of CA's behaviors, so MT asked the Appellant to leave the area. (Testimony of MT).

33. CA wanted to talk about what had happened, and MT advised CA that they could talk inside the home. (Testimony of MT).

34. When the Appellant returned to the residence, she was crying. The Appellant reported to KF that CA had twisted her hand. (Testimony of KF).

Aftermath of the Incident and Investigation

35. The following morning, KF was assisting CA with a shower when KF noticed a

mark on CA. KF asked a coworker about the injury, but the coworker did not know anything about it. (Testimony of KF).

36. KF asked CA about the injury, and CA reported that “[Appellant’s first name] did it.” (Testimony of KF).²

37. The injury was caused by the Appellant having bitten CA on October 6. (Testimony of Appellant, KF, and MS).

38. The bite left a bite mark-shaped bruise on CA’s left arm. There was an arc-shaped mark, and below the ends of the arc-shaped mark were two dark bruises. This bruise pattern was visible six days later. (Testimony of MS, Exhibit J, Exhibit K).

39. Although the record contains no statement from CA that the bite was painful, I find by a preponderance of the evidence that it was. It was inflicted by an adult, and the resulting bruise pattern was visible six days later. (Testimony of MS).

40. MT asked CA about the source of the injury. CA made a biting motion with his mouth and repeated the Appellant’s first name. (Testimony of MT).

41. CA talked about the incident “all the time” for some unspecified period of time after it had occurred. (Testimony of MT).

42. When MT asked the Appellant about the incident, she denied having bitten CA and showed MT scratch marks on her arm. (Testimony of MT).

43. On October 7, 2021, DPPC Case No. I-15081 was opened for investigation.

² Because CA has limited verbal skills (Testimony of MT and KF), it is not clear whether he said those words (or words to that effect) or instead conveyed this information, as he does in later exchanges, through a combination of words and gestures. Either way, I find that he communicated this information to KF.

(Stipulation No. 18 and Exhibit A).

44. On October 12, 2022, MS interviewed the Appellant, who reported that CA had attempted to bite her and that CA had likely bitten his own arm while she was trying to redirect him by pushing his arm away. (Testimony of MS; Exhibit K).

45. On October 15, 2022, the Appellant told her therapist (“AM”) she had reported that a client bit himself, when in fact, the Appellant had bit him “in retaliation.”

The Appellant also stated that she had lied to the investigator. (Exhibit K).³

46. AM filed an abuse report with DPPC later that day. (Exhibit A; Exhibit K).⁴

47. After speaking with AM, MS re-interviewed the Appellant. The Appellant then acknowledged that she bit CA, “but just a little bit.” She said that CA had bitten and scratched her, and she “just wanted him to stop.” When asked why she lied during her first interview, the Appellant initially stated that she “may have blacked-out” during the first interview. The Appellant then conceded that she lied during her first interview to protect her job. The Appellant acknowledged that her actions were contrary to her training and her duties. (Testimony of MS and

³ Exhibit K is the Investigation Report. Among other things, it recounts Investigator MS’s interview with the Appellant’s therapist. As described below, the Appellant had told her therapist, who I presume is a mandatory reporter, that she had bitten CA and lied about it. The therapist later reported this to the DPPC.

⁴ The intake record documents the report DPPC received from AM. (Exhibit A). The brief narrative indicates that AM had reported that the Appellant said she “bit [CA] so [CA] could not grab and scratch [the Appellant] anymore.” (*Id.*). It is not apparent to me that the intake document is admissible under M.G.L. c. 30, § 9B, and the comment is an out-of-court statement that recounts what AM told the DPPC staff person about what the Appellant had said to her. I will assume for the sake of argument that the comment is admissible. Nevertheless, I accord it no weight under the circumstances. Unlike the investigative report, which provides some context for how its information was elicited and whose author was available to testify and recite his training and background, I have little basis for assessing the reliability of the account contained in the intake record.

Exhibit K).

48. The Appellant was terminated for her actions in October of 2022. (Testimony of MS).

This Appeal

49. On August 16, 2022, the DPPC mailed the Appellant a Notice of Right to Respond which contained a copy of the Investigation Report in DPPC Case No. I-15081, along with instructions for filing a Petition for Review ("Petition"). (Stipulation No. 23).

50. The Appellant submitted a timely Petition on August 31, 2022. (Stipulation No. 24).

51. On October 28, 2022, the DPPC issued its Petition Decision, affirming the findings of the Investigation Report in DPPC Case No. I-15081. (Stipulation No. 25).

52. On November 17, 2022, the Appellant filed a timely appeal of the DPPC's Petition Decision with the Division of Administrative Law Appeals pursuant to M.G.L. c. 19C, § 5. (Stipulation No. 26). The appeal notes the following grounds for the Appellant's appeal of the DPPC's Petition Decision: "Isolated incident, self-defense, deformation [*sic*]." (Exhibit O). I assume that "deformation" is a mistake and that the Appellant meant "defamation."

53. In her Appeal letter, the Appellant remarked that she suffered from PTSD resulting from domestic abuse. She maintained that she had acted in self-defense and noted: "Seeing how I know the individual involved does have an intellectual disability as do I. We both can understand right from wrong he is a very smart

individual as well as combative and knows who is an easy target and I feel with this one time of this happening during a time when I was not in a safe place physically or mentally I would like to be forgiven for my actions as others have been before me.” (Exhibit O).⁵

The Appellant’s Emotional State and Intentions

54. Because her mother has been employed by DDS for decades, she spent her entire life exposed to individuals with disabilities and had thus grown up interested in their well-being. The Appellant cares about individuals with disabilities.

(Testimony of Appellant).

55. The Appellant had experienced trauma as a result of an abusive relationship.

(Testimony of Appellant).

56. Prior to the incident at issue, the Appellant “was calling out [sick]” because she did not feel mentally fit to continue working with the residents of the Home.

(Testimony of Appellant).

57. At present, the Appellant does not want to work for DDS again because it is not a good environment for her. (Testimony of Appellant).

58. The Appellant conceded that her actions were “childish” and “wrong.” The Appellant does not believe that she has the mental composure to continue to serve persons with intellectual and developmental disabilities. The Appellant admitted “[i]t would probably be in my best health and theirs not to continue to work with them.” (Testimony of Appellant).

⁵ The record does not contain any information on who the “others” were, what they had done, or how and why they had been “forgiven.”

CONCLUSION AND ORDER

The DPPC has determined that the Appellant has committed abuse and abuse per se and that her name should be placed on “a registry of care providers against whom [DPPC] has made a substantiated finding of registrable abuse.” M.G.L. c. 19C, § 15(b). The DPPC bears the burden in this appeal to “establish[] registrable abuse by the care provider, based on a preponderance of the evidence.” M.G.L. c. 19C, § 15(c).⁶

“Registrable abuse” is defined as

an act or omission of a care provider that results in serious physical or emotional injury or constitutes abuse per se of a person with an intellectual or developmental disability; provided, however, that “registrable abuse” shall not include instances in which the commission, 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.

M.G.L. c. 19C, § 15(a).

Because the parties have stipulated that CA is a “person with an intellectual or developmental disability” and that the Appellant was a “care provider” (Stipulation Nos. 11 and 15), this appeal turns on whether (a) the Appellant caused CA “serious physical [] injury”;⁷ and/or (b) whether her conduct “constitute[d] abuse per se”; and (c) whether

⁶ The DPPC states in its post-hearing brief that “in weighing the evidence, DALA must accept the Investigative Report for the truth of the matter asserted therein.” If DPPC intends to suggest that the Investigative Report is “admissible into evidence for the truth of the matter asserted therein,” M.G.L. c. 30, § 9B, then it is correct. If DPPC is suggesting that the statements recited in the Investigative Report must be credited as true, that suggestion is incorrect. See *A.C. v. DPPC*, DPPC-22-0154, at *11 (DALA Dec. 15, 2022).

⁷ DPPC does not appear to press a theory that the Appellant’s actions caused a serious emotional injury. In any case, the record does not support a finding of serious emotional

“the incident was isolated and unlikely to reoccur and [the Appellant] is fit to provide services or supports to persons with intellectual or developmental disabilities.”

a. DPPC has not established serious physical injury

A “serious physical injury” is defined as an “[i]mpairment of the physical condition of a Person with a Disability.” 118 CMR 2.02. It includes “any significant: bleeding; bruising; burn; sunburn; abrasion; laceration; or puncture of the skin.” *Id.* It is not clear where the dividing line is to be drawn between non-significant bruising and bruising of the requisite severity to qualify as a serious physical injury.

Some guidance is to be found in the commentary to 118 CMR 2.02, which identifies several considerations for determining whether there is “Reasonable Cause to Believe that the injury is a Serious Physical Injury resulting from Abuse.”⁸ Several of

injury, which requires either (a) “an observable or measurable reduction in the person's ability to function from the person's customary range of performance or customary behavior”; or (b) the “development of post-traumatic stress disorder.” 118 CMR 2.02. While the incident was clearly, and justifiably, quite upsetting to CA, the record does not reflect a reduction in functioning or the development of post-traumatic stress disorder.

⁸ The commentary reads in full as follows:

In determining whether there is Reasonable Cause to Believe that the injury is a Serious Physical Injury resulting from Abuse, the Commission shall consider the significance of the injury in the totality of the circumstances including, but not limited to:

- the shape, size, number and/or pattern of the injury(ies), including indicators that the injury(ies) may have been sustained by the application of force from an identifiable object (*i.e.*, belt, hand, blunt object);
- the location of the injury on the Person with a Disability;
- prior injuries of a similar nature;
- the level of dependence of the Person with a Disability including, but not limited to, his or her supervision requirements; ability to ambulate; the requirements of his or her care; and the extent to which the individual is able to participate in activities of daily living;

these considerations appear to pertain to the origin of the injury rather than its severity.

Those that pertain to severity, such as “the effect the injury had on the Person with a Disability’s ability to function physically” and “the nature and extent of any medical treatment needed to address the injury,” do not support a finding that the bruising here was significant because there is no evidence concerning the effect of the bruise on CA’s ability to function or any medical treatment he may have received.

Although the bruise was painful, that does not suffice to establish a serious physical injury. In contrast with abuse per se, which includes the “application of physical force in a manner that inflicts physical pain,” the definition of serious physical injury requires more: namely, “[i]mpairment of the [victim’s] physical condition” Although it is possible that the pain resulting from an injury could be of sufficient intensity, duration, or character that it impairs the physical condition of the victim, the record does not disclose any such impairment in this case.

Based on the record before me, I cannot conclude that the bite was a serious physical injury within the meaning of the statute.

b. *The DPPC has established abuse per se*

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- the effect the injury had on the Person with a Disability's ability to function physically;
 - the nature and history, if any, of prior self-injurious behavior by the Person with a Disability; and
 - the nature and extent of any medical treatment needed to address the injury.

118 CMR 2.02, Commentary to “Serious Physical Injury.”

“Abuse per se” includes “the intentional, wanton or reckless application of a physical force in a manner that inflicts physical pain or Serious Emotional Injury.” 118 CMR 2.02.

Here, there is no dispute that the Appellant bit CA. The parties do dispute her reason for biting him. The Appellant states in her appeal letter to DALA that she bit CA in self-defense. (Exhibit O). I note that there is no self-defense exception in the statute or the regulations that would preclude a determination of abuse or abuse per se. It is possible that self-defense could bear on whether the conduct in question “was isolated and unlikely to reoccur,” thus possibly precluding a finding of registrable abuse. The question of how a valid claim of self-defense would fit into the statutory and regulatory scheme need not be resolved here, however, because I do not find that the Appellant bit CA in self-defense. On the contrary, I find that she bit him because she was angry at him for scratching her.

My conclusion regarding *why* she bit CA turns in large part on *when* she bit him. I find that the Appellant bit CA at some point after KF brought the other residents inside. I do not credit the Appellant’s testimony that she bit CA during the van ride. I think it probable that KF would have heard CA cry out in pain if he had been bitten by the Appellant during transport. More importantly, the Appellant’s testimony was, at best, equivocal. For example, at one point she testified: “I’m trying to remember. It might have been, mostly it was, I think it was during transport.” Because her memory is fairly concrete with respect to other aspects of this incident, I conclude that her equivocations on this basic point reflect an effort to avoid acknowledging that she bit CA after they had already arrived at the home. If she had bitten CA during the van ride, that could be

viewed as a regrettable response to a distressing and unfolding situation. By contrast, if she had bitten CA after they had already returned to the home and she had had an opportunity to exit from the altercation, that would suggest that she bit CA in anger.

Moreover, the Appellant later told her therapist that she bit CA out of “retaliation” (Exhibit K), and testified at the hearing that her behavior was “childish and wrong.” (Testimony of Appellant). These are not the words one would choose to use in describing an act of self-defense.

Because the bite was retaliatory, I find it more probable than not that the Appellant bit CA with the intention of causing him pain. Because the Appellant bit CA with the intention of causing CA physical pain and because (as I have found) physical pain did result, the basic requirements of abuse per se are met.

- c. *The Appellant is not “fit to provide services or supports to persons with intellectual or developmental disabilities.”*

The conclusion that the Appellant engaged in abuse per se does not end the inquiry, however, because, as noted above, registrable abuse:

shall not include instances in which the commission, 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.

M.G.L. c. 19C, § 15(c).

I agree with DPPC’s conclusion that the Appellant is not “fit to provide services or supports to persons with intellectual or developmental disabilities.” Even if the Appellant has benign intentions, the present condition of her emotional and mental health makes it doubtful that she can consistently and reliably live up to those good intentions. The Appellant has candidly acknowledged that continuing in this field is not consistent

with her emotional health and states that she has no plans to return. At present, the Appellant lacks fitness to provide supports or services to persons with disabilities. Accordingly, she does not meet the standards for precluding a finding of registrable abuse.

The DPPC has proved by a preponderance of the evidence that the Appellant committed registrable abuse. The DPPC may place the Appellant on the abuse registry.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: October 26, 2023