

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**S.S.,<sup>1</sup>**

No. DPPC-24-0274

Appellant,

Dated:

v.

**Disabled Persons Protection Commission,**  
Respondent.

**Appearances:**

For Appellant: S.S. (pro se)

For Respondent: Kristyn Dusel Kelly, Esq.

**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

The appellant applied physical force to a disabled person he was supervising. However, the record evidence does not establish that the incident caused the disabled person physical pain or a serious emotional injury. The appellant's name may not be entered in the statutory registry of care providers who have committed registrable abuse.

**DECISION**

**Preface**

This is an appeal from a decision of the Disabled Persons Protection Commission (commission) to enter the appellant's name in the registry of care providers established by G.L. c. 19C, § 15. An evidentiary hearing took place on January 28, 2025. The appellant testified on his own behalf. The commission called the investigator who conducted the commission's investigation (investigator). I admitted into evidence exhibits marked A-G without objection.

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<sup>1</sup> In accordance with 118 C.M.R. § 9.03(1) and an interlocutory protective order, this decision anonymizes the names of the appellant, the disabled person, the hearing witnesses, and the percipient witnesses.

The matter arises from an incident involving the appellant and a disabled person he was supervising (resident). The incident began in a retail store and continued into an adjacent parking lot. It was witnessed by: the store's cashier (cashier), a woman who was shopping there (shopper), and a bystander who was present in the parking lot (bystander).

The Danvers police department investigated. Exhibit B is a report of that investigation. It describes out-of-court statements made by the cashier, the shopper, and the bystander. The investigator's knowledge about those individuals' statements was limited to the information appearing in Exhibit B. The investigator did testify to additional out-of-court statements he heard from the resident's mother.

The commission's case thus revolves around hearsay and hearsay-within-hearsay. On balance, outright exclusion of this evidence would not be appropriate. Police reports tend to be among the kinds of evidence that reasonable people would rely upon in the conduct of serious affairs. *See* G.L. c. 30A, § 11(2); *Doe v. Sex Offender Registry Bd.*, 486 Mass. 749, 758 (2021); *MacDonald v. Gutierrez*, 81 P.3d 975, 980 (Cal. 2004). The appellant also expressed no interest in calling and examining the declarants. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm 'n*, 401 Mass. 526, 530-31 (1988).<sup>2</sup> As further specified below, the probative value of the various hearsay assertions varies in accordance with their respective indicia of reliability. *See Commonwealth v. Costa*, 490 Mass. 118, 124 (2022).

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<sup>2</sup> The appellant was instructed by two prehearing orders to consult the procedural guidance appearing on DALA's website, which includes information about subpoenaing witnesses to testify. *See* Subpoenas in Administrative Proceedings, <https://www.mass.gov/info-details/subpoenas-in-administrative-proceedings>.

**Findings of Fact**

1. The appellant began working with disabled persons approximately in 2018. He received on-the-job training about deescalating behavioral issues. English is not his first language. (Appellant.<sup>3</sup>)

2. As of early 2022, the appellant was employed at the group home where the resident resided. The resident’s diagnoses include autism and a developmental issue. The resident makes sounds but does not speak in words. He has a history of challenging behaviors. (Appellant; investigator.)

3. On January 6, 2022, the appellant volunteered to accompany the resident on an expedition to a thrift shop. The appellant’s supervisor gave him \$20 for the resident to shop with. The appellant and the resident travelled to the store by van. (Appellant.)

4. At the store, the resident gathered a stack of items and carried them to the cash register. The total cost of the items exceeded the resident’s budget. The appellant asked the cashier to process only \$20 worth of purchases. (Appellant; cashier.)

5. The resident became agitated and loud. The appellant shouted at the resident to stop making animal noises. The resident ran out of the store into the parking lot. (Appellant; cashier; shopper.)

6. In the parking lot, the appellant made his way over to the resident, took hold of his clothing, and guided him into the van. The bystander thought she saw the appellant give the resident a “cuff upside the head.” The shopper heard the bystander yelling, “Don’t hit him.” I conclude that the appellant applied physical force as he pulled or pushed the resident into the van. (Appellant; shopper; bystander.)

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<sup>3</sup> The testimony and hearsay declarations are cited by witness or declarant.

7. The bystander’s brief, indirectly reported account does not warrant findings more specifically descriptive of the appellant’s physical act. The record sheds no light on the bystander’s proximity to the van, the clarity of her viewpoint, her level of confidence in her observations, or her interpretation of the idiom, “cuff upside the head.” (Appellant; bystander.)

8. A preponderance of the evidence also does not establish that the appellant inflicted pain on the resident. No record information sheds light on the resident’s immediate reaction. Physical contact with another person’s head area may be vicious, playful, or incidental. The result of such contact may be severe pain, fleeting discomfort, or even pleasant sensations. The shopper, not the bystander, called the police, and the record says nothing about her analysis or mindset in doing so. (Appellant; shopper; bystander.)

9. During the ensuing months, the appellant was charged in the Salem District Court with assault and battery on a person with disabilities, G.L. c. 265, § 13F.<sup>4</sup> After a period of pretrial probation, the charges were dismissed. (Appellant; exhibit C.)

10. Approximately eighteen months after the January 6, 2022 incident, the investigator interviewed the resident’s mother. She stated that the resident has been crying more often since the incident. This indirectly reported assertion does not warrant a finding that the incident caused the resident a serious emotional injury. The mother made her statement long after the resident’s behavior reportedly changed; she provided minimal detail; she offered no insight into whether the resident’s environment may have changed in any other ways during the pertinent months; also, the mother was reportedly upset that the appellant had not been criminally convicted. (Investigator.)

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<sup>4</sup> The elements of that offense do not apparently include pain or harm to a victim. *See Commonwealth v. St. Louis*, 473 Mass. 350, 360-61 (2015); *Commonwealth v. Jimenez-Torres*, 98 Mass. App. Ct. 1107 (2020) (unpublished memorandum opinion).

11. In March 2024, the commission issued a decision determining that the appellant's name should be entered in the registry of care providers established by G.L. c. 19C, § 15. The appellant timely appealed. (Exhibit G; administrative record.)

### Analysis

The commission is responsible for maintaining a registry of care providers who have committed "registrable abuse." G.L. c. 19C, § 15(b)-(c). An individual whose name appears in the registry cannot be hired as a care provider to disabled persons. *Id.* § 15(d). The commission bears the burden of proving registrable abuse by a preponderance of the evidence. *Id.* § 15(c).

Overlapping provisions define "abuse" as an act or omission that "results in serious physical or emotional injury to a disabled person." *Id.* § 1. *See id.* § 15(a); 118 C.M.R. § 2.02. Even if no injury is "manifested," abuse includes several forms of "abuse per se." *See* G.L. c. 19C, § 15(a); 118 C.M.R. § 2.02.

The form of abuse per se alleged here is "the intentional, wanton or reckless application of physical force in a manner that inflicts physical pain or [s]erious [e]motional [i]njury." 118 C.M.R. § 2.02. In cases of disabled persons who cannot articulate their physical or emotional states, the presence or absence of pain or emotional injury may be judged by the likely reactions of a "reasonable person" in the "same set of factual circumstances." *Id.* The definition of the term "serious emotional injury" centers around "an observable or measurable reduction in the [disabled] person's ability to function . . . including, but not limited to, a state of anxiety, fear, depression or withdrawal . . . ." *Id.*<sup>5</sup>

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<sup>5</sup> Conduct that otherwise would qualify as "abuse" is excluded from that category in the case of certain types of "accidents," including where the harm to the disabled person was "caused by [an] application of an appropriate degree of physical force given the circumstances." 118 C.M.R. § 2.02. It is not necessary to determine whether this standard is satisfied here.

The application of these standards to the appellant's case is dictated by the findings of fact presented earlier. The resident is a disabled person. The January 6, 2022 incident involved an "intentional . . . application of physical force" by the appellant. *See* 118 C.M.R. § 2.02. However, the brief hearsay and double-hearsay statements offered by the commission do not establish that the resident suffered either physical pain or a serious emotional injury. *Id.* It follows that commission has not demonstrated that the appellant committed abuse. *See* G.L. c. 19C, § 15(a); 118 C.M.R. § 2.02.<sup>6</sup>

### **Conclusion and Order**

The commission's decision is REVERSED. The appellant's name may not be entered in the registry of care providers established by G.L. c. 19C, § 15, in connection with the incident litigated in these proceedings. Any appeal from this decision must be brought in the Superior Court within 30 days.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

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<sup>6</sup> Even proven abuse is not "registrable" if "the incident was isolated and unlikely to reoccur and . . . the care provider is fit to provide services . . . to persons with intellectual or developmental disabilities." G.L. c. 19C, § 15(a). *See* 118 C.M.R. §§ 2.02, 14.02. It is not necessary to determine whether this standard is satisfied here.