

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

S. W.
Petitioner,

v.

Docket No. DPPC-22-0043

Disabled Persons Protection Commission
Respondent,

Appearance for Petitioner:

David Roulston, Esq.
14 Osgood Street
Greenfield, MA 01301

Appearance for Respondent:

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

Administrative Magistrate:

James P. Rooney

Summary of Decision

DPPC alleged that a worker at a group home for disabled men who had been convicted of sexual offense abused one of the residents by repeatedly kicking and hitting a resident over a two month period. The evidence fails to show that this occurred and hence the worker's name is not to be placed on the abuse registry.

DECISION

S. W. appealed a January 20, 2022 determination by the Disabled Person Protection Commission (DPPC) that his name be placed the Abuser Registry for abusing a disabled person, J.P., who lived at the group home in Greenfield, Massachusetts where he worked. DPPC concluded that S.W. committed abuse *per se* by "repeatedly touching [S.W.'s]

body parts” and sexual abuse by “unwanted and inappropriate touching of [J.P.’s] clothed chest and buttocks.” (Ex. T.) S.W. denied the charges and questioned how the word of a person who has made frequent false charges could be credited. (Ex. T.)

I held a hearing at the Division of Administrative Law Appeals on October 18, 2022, which I recorded digitally. I admitted twenty-five exhibits proposed by DPPC. (Exhibits A-Y.) I admitted six of the eight exhibits proposed by S.W. He withdrew two exhibits. (Exhibits 1-5 and 7.) J.P. testified remotely, while the other witnesses were live. DPPC presented testimony from Department of Developmental Services investigator Jeanette Seixas. S.W. testified for himself and presented the testimony of Kevin Linker and Andrew Sutton, who were respectively the Program Manager and Site Manager at the group home where J.P. lived and S.W. worked during the relevant period.

Findings of Fact

Based on the testimony and exhibits presented at the hearing and reasonable inferences from them, I make the following findings of fact:

1. S.W. is a 66 year old man. He had a variety of jobs before working with the developmentally disabled. He was a computer technician, a disc jockey and a store manager for the University of Massachusetts. After he was laid off from his store manager position, he switched careers again, this time to care for the developmentally disabled. (S.W. testimony.)
2. S.W. began working in 2006 or 2007 for ServiceNet at a group home for developmentally disabled male sex offenders on Raymond Road in Greenfield that the company operates for the Department of Developmental Services. The home maintains a log called EHANA in which events during a shift that might be of interest to clinicians

can be reported. It also maintains shift notes that serve as a general description of events during a shift. Staff are mandatory reporters. If a staffer believes a report of abuse made by a resident, he is obliged to report it.¹ (S.W. and Linker testimony.)

3. S.W. normally worked an overnight shift at Raymond Road from 11:00 p.m. to 9:00 a.m. During that shift, he dispensed medications prescribed to the residents, talked to the sleepless, and performed general housekeeping duties. During the Covid pandemic, he worked 80-90 hours per week due to staff shortages. He found the work fulfilling and maintains relationships with some ex-clients. With the permission of the management of the group home and sometimes on his own time, he has taken residents camping, has gone bike-riding with a resident, and taught one of the residents how to DJ a dance. In the years he worked at Raymond Road, the only discipline he received were two verbal warnings, one relating to a medication error and the other over an argument with another staff member. (S.W. testimony.)

4. J.P. is a Level 3 sex offender. He has been diagnosed with schizoaffective disorder, bipolar disorder, poly substance dependence, mild developmental disability and Type 2 diabetes. He has been adjudicated as incompetent and consequently has a guardian.

(Exs. A, T, and I.)

5. J.P. has experienced trauma “at many stages in his life that have affected his learning of prosocial attitudes, problem solving skills and social development.” His parents were substance abusers. He was neglected by his mother and he was physically and sexually assaulted by his father, who smashed J.P.’s head against a wall and locked him and his

¹ Although there is mention in the record of one female staffer, the staff were generally all male because of the nature of the residents.

siblings in a room for days. He was removed from the home at age five and ended up in various foster homes “possibly due to his psychotic symptoms, aggression and self-injurious behaviors.” (Ex F - Service Net Targeted PBS Plan.). In one of them, he was sexually abused. He was bullied at school because of his low intellectual functioning. He later started using drugs and became a gang member. He overdosed once. He was jailed a number of times, once for a sex crime. In prison, he was sexually and physically assaulted. He has been homeless at times and lived in other state facilities. Because of these traumatic events in his life, J.P. does not like to be touched and is very reactive. (Exs. A and T.)

6. In 2020, J.P. began living at the Raymond Road group home with three other male sex offenders, all of whom were more high functioning than he was. (Linker testimony.) The staff at Raymond Road were instructed to know where J.P. was at all times, including in the yard. Staff were also instructed to monitor J.P.’s behaviors that the program sought to decrease, including elopement, verbal outbursts, physical aggression, and self-injurious behavior. (Ex. F.) Staff were told not to touch J.P. and to always have another staff member present when interacting with him,² but to stay six feet away from him if alone. Management was aware that J.P. cut himself and therefore, on June 22, 2020, directed that all sharps were to be locked because J.P. had “several incidents of superficial cutting since moving into Raymond Road.” (Exs. B and D.) Chimes were put

² The record is not clear why this directive was issued – whether it was because J.P. was assaultive or because J.P. made unfounded allegations against staff, which having a witness would undercut. Complying with this directive would not typically have been possible for S.W. because he usually worked the night shift alone. (S.W. testimony.)

on the exterior doors to alert staff if J.P. tried to elope. If he threatened to elope, staff were to “validate that [he] is experiencing something upsetting” and “offer [him] the option of calling Crisis to speak to them if he thinks that it would be helpful.” (Ex. F.)

7. J.P.’s time at Raymond Road presented challenges for the staff. Program manager Kevin Linker thought J.P. was one of the ten most challenging clients in his career. J.P.’s “anger, frustration, and verbal outbursts occur almost daily. Based on clinical observation and staff reporting, [J.P.] will either interpret what someone says incorrectly and become enraged, or he will perseverate on something and put a twist on what was said or done by someone, framing it as a personal affront to [him] or as staff attempting to take away his rights.” Sometimes J.P. was friendly with staff; other times he would try to get them fired. According to Mr. Linker, “Within five minutes of moving into Raymond Road, [J.P.] became quite upset with the house manager [and verbally threatened him] because of a misunderstanding over money and cigarettes.” On the first overnight at Raymond Road, J.P. accused S.W. and another staffer of ordering him to go to bed. S.W. denied that this happened, but the other staff member quit over the accusation. (Linker and S.W. testimony; Ex. F.)

8. J.P. did not like being at the Raymond Road facility. In the first year he was at Raymond Road, J.P. attempted to elope twelve times, and was successful seven times. On February 10, June 10, October 11, and November 6, 2020 he called the police to report that he does not want to be at Raymond Road and asked for police help to leave. (J.P. testimony; Ex. 3; Ex. F - Targeted PBS Plan.)

9. One of the ways J.P. used to get away from Raymond Road was by cutting himself. He acknowledged cutting his wrists while there six to eight times. He denied being

suicidal. He testified that he would give himself a “little scratch” that would not cut too deep when he needed to get away from whatever situation was bothering him at Raymond Road. He knew he would be taken to the hospital. He denied cutting himself since he moved to his present facility where he is happy. (J.P. testimony.)

10. Police reports show that the police department responded to Raymond Road numerous times after J.P. cut his wrists. On April 30, 2020, police responded after J.P. had made “superficial cuts to both wrists.” On June 20, 2020, J.P. cut one of his wrists and told the police he was upset because he had not received his check. On July 25, 2020, J.P. told the police he cut his wrist because he “just wanted to be removed from [the] house and is having issues.” On April 21 and June 18, 2021, police again responded to calls that J.P. cut himself. (Ex. 3.)

11. The staff who knew J.P. during this period were uncertain what exactly triggered J.P. to cut himself. Mr. Linker could not discern a pattern in this behavior. He testified that there were no known precursors. (Linker testimony.) Site manger Andrew Sutton thought that J.P. cut himself at times when he was in major distress or angry, particularly when he was not getting his own way. (Sutton testimony.)

12. One thing that J.P., an avid smoker, cared about was access to cigarettes and the ability to smoke them. The police were called on June 6, 2020 when J.P. caused a disturbance because he was “not able to get his usual cigarette allotment.” The facility did not allow smoking inside or on the porch. Residents who wanted to smoke had to go outside into a smoking tent. J.P. was allowed to “smoke cigarettes outside of the house (in the yard) as long as staff is able to visually observe [him] at least once every 15 minutes.” J.P. objected to this rule and called the police about it. When angered he

would sometimes smoke inside to show his displeasure. S. W. rigorously enforced the house's smoking rule, in part because non-smoking residents complained when J.P. violated it. J.P. did not like this, and sometimes would refuse to stop smoking and tell S.W. to just write him up. (J.P., S.W., and Sutton testimony.)

13. J.P. had a made complaints of abuse at the two previous facilities where he was housed. Raymond Road staff were told to address any such complaints as follows:

At Templeton [J.P.] was reported with a history of misrepresenting situations, which continued at Winchendon. Whenever [J.P.] tells staff he would like to make a complaint that he has been abused, or that staff or other residents have done misdeeds, staff assist [him] as necessary in leaving a description of the alleged incidents on the voice mail of his Human Rights Officer/DDS caseworker. Staff should notify nursing if [J.P.] alleges physical/sexual abuse. [J.P.] is extremely vigilant of his surrounding and the people with him.

[Ex. F.]

14. J.P. has made numerous complaints about staff members that were logged by staff. At another group home, he complained in March 2018 that a staff member touched his belly and laughed, then later tried to force J.P. to get out of a chair in which he wished to sit by putting his "ass in [J.P.'s] face." A few days later, J.P. said that a staff member leaned over him while he was looking in a refrigerator and "pressing his private parts against [J.P.'s] back." In April 2020, while at Raymond Road, he reported that a staff member was urinating outside the building. The staff member was transferred to another ServiceNet facility. Mr. Sutton testified that J.P. later told him the allegation was not true; he just wanted to "get rid of the jerk." On July 30, 2020, J.P. reported that a staff member rubbed his shoulders, which made him feel uncomfortable. On August 14, 2020, he accused a staff member of stuffing a wet paper towel down his shirt, rubbing his shoulders, and then chasing him around with a staple gun. On August 28, 2020, he again

complained that a staffer had squeezed his shoulder. Although it is not clear whether this is the incident that was the subject of testimony at the hearing, on an occasion in which J.P. had accused a new staff member of rubbing his shoulders, the staffer admitted doing so and was transferred. On September 4, 2020, he claimed to have seen a staff member “masturbating while using his own laptop computer.” That staff member was also transferred to another ServiceNet facility. On September 30, 2020, he complained that when he spilled coffee, a female staff member swore at him using a racial epithet. He went outside to smoke, and when he came back in, she refused to apologize, so he began to throw things. According to the Mr. Linker and a resident who was present, the staffer “did not say anything but that she would help [J.P.] pick up the coffee.” On May 5, 2021, he said he saw a staff member using a vape with marijuana in it. (Ex. 4; Linker and Sutton testimony.)

15. J.P. accused both Mr. Linker and Mr. Sutton of stealing his money. Mr. Linker was able to show through available records that the accusation was false. Mr. Sutton had cashed in a lottery ticket for J.P. who erroneously thought the ticket was for \$40 not \$30. J.P. also accused Mr. Sutton of trying to poison him. J.P. also accused other residents of taking his things, including cigarettes and hair clips. Searches would typically reveal that he had just misplaced the item. (Linker, Sutton, and S.W. testimony.)

16. Sometime on the evening of June 5, 2021, J.P. made three superficial cuts in his left wrist with a razor he had secreted in his room. (J.P. testimony; Ex. X.) At 8:30 p.m., Greenfield police officers responded to the group home after receiving a call that J.P. had cut his wrists. An officer who responded had spoken to J.P. earlier that evening about issues he was having with an unnamed staff member. The officer found J.P. at a picnic

table and asked him if he felt suicidal. J.P. responded that he feels that way “all the time” and wanted to go to the hospital. (Exs. I and T.) J.P. was taken to Baystate Franklin Medical Center. The patient care transport report stated that J.P. said he had:

been having arguments and disagreements with staff for a long time and tonight cut his left wrist 3 times with a razor blade, stating that he wanted to end his life and that he wanted to leave the group home . . . [and] that he had been trying to communicate concerns about this treatment at the group home without success and didn’t know what else to do beside harm himself.

(Ex. T.) J.P. told hospital staff that he was “being bullied at the group home” and “would like to be placed in a new facility.” The hospital noted that J.P. had a history of self-injurious behavior. He told the doctor who treated him that he cut himself because he was “upset with staff [who were] talking about him” and that he does not “get along with one particular staff who he believes is harassing him.” He told the doctor that he had made eight or nine suicide attempts, including one in March 2019 in which he cut himself because he was “upset with a former housemate.” The “small abrasions” on J.P.’s wrist required only minor treatment. They were washed out, but because the “depth [was] not significant,” they did not require stitches. J.P. was discharged to the group home the following day. (Exs. J, K, and T.)

17. Prior to cutting himself, J.P. called DPPC and reported that S.W. had for two months been punching him, kicking him in the buttocks, and hitting him in the arms, chest and shoulder and that he had reported each incident to group home management. He said he would like to be moved to a new group home. (Ex. M.)

18. When interviewed by Investigator Seixas on June 7, 2021, J.P. told her that for two months S.W. had been “putting his hands on him,” rubbing his ears, touching his chest, punching him in the arm, and touching his buttocks with his foot. J.P. said he thought the

buttocks touching was sexual in nature. J.P. told the investigator that he felt “‘disgusted’ and ‘under pressure’ because [S.W.] had been touching his ‘butt’ and [J.P.] was tired of staff not believing him, so [J.P.] went to his room and cut his wrists with a razor.” He acknowledged to the investigator that S.W. was not at the group home when he cut himself, but he did not want to be there when S.W. started work at 11:00 p.m.³ (Ex. Q.)

19. J.P. told the investigator that he had informed three group home staff members, including Site Manager Andrew Sutton, Senior Counselor John Menapace, and Counselor Robert Velez, about these actions of S.W. J.P. also stated that S.W. “touches all the individuals in the home and has seen S.W. pinch their nipples, touch[] their ears, and twist[] a towel and hit[] them with it.”

20. The investigator reported that Mr. Sutton told her that S.W. likes to “joke around” with J.P., but he has “never seen [S.W.] overstep and touch someone inappropriately.”

The investigator also reported that J.P. had told Mr. Sutton that S.W. “was ‘horseplaying’

³ The log of J.P.’s various complaints reflects that on June 7, 2021, J.P. reported to DPPC that at staffer:

keeps putting his hands on [me]. [J.P.] states that [the staffer] touches him kicks him in his buttocks, and hits [him] multiple times in his arms, chest, and shoulders. [J.P.] states he repeatedly asks [the staffer] to stop and [the staffer] believes this is funny. [J.P.] states he has notified the higher chain of command or all incidents involving [the staffer]. J.P. is suffering from PTSD as a result of [the staffer’s] many assaults.

(Ex. 4.)

The testimony at the hearing was that J.P. made a report to DPPC on June 5, 2021. (Ex. M.) It is not clear whether there were two reports to DPPC or just one.

to the point that [J.P.] felt uncomfortable,” but did not specify what he meant.⁴ Mr. Sutton added that J.P. and S.W. had a “big blowup” the week before that had “come out of nowhere.” At some point, most likely after the blowup, Mr. Sutton told S.W. to “lay off the joking and being rough with the guys.” Mr. Sutton went to the hospital when J.P. was taken there and overheard him tell hospital staff that S.W. had touched him on the buttocks. (Ex. Q.)

21. Mr. Menapace said he’s heard “locker room talk” between S.W. and J.P.⁵ The investigator’s report does not mention that he conveyed to her that he had or seen any of the touching that J.P. had described or that J.P. had told him of this. (Ex. Q.)

20. Mr. Velez told the investigator that on June 4, 2021, J.P. told him that S.W. had been “kicking [J.P.] on the butt and [J.P.] doesn’t like it, but staff did not believe him.” (Ex. Q.)

22. Investigator Seixas spoke once with S.W. In her report, she stated that:

[S.W.] reported that he tries to be friends with [J.P.] and all the individuals in the home and it is just “horseplay” that goes on between them. [S.W.] states that horseplay is never physical and [J.P.] has never said that he was unhappy or has gotten upset with [S.W.] [S.W.] admitted the he will joke around with [J.P.] making punching and kicking motions in [J.P.]’s direction but never makes physical contact with [J.P.], then added that it is possible that [S.W.’s] foot could have made contact with [J.P.] without realizing it.

⁴ Mr. Sutton and S.W. testified that they do not use the term horseplaying. (Sutton and S.W. testimony.)

⁵ There was a good deal of testimony about “locker room talk” between J.P. and S.W. There are no charges related to it, however, and hence I am not making any particular findings regarding it. S.W. testified that J.P. was mostly friendly and would make joking banter in his direction, such as “Hey OG (old guy),” to which S.W. would respond “shut up you little girl.” S.W. testified that he did not initiate such banter because J.P. was too volatile. (S.W. testimony.)

(Ex. Q.)

23. The investigator did not follow up to attempt to learn about the blowup between J.P. and S.W. one week before June 5, 2021. Nor did she review the prior two months ServiceNet's EHANA logs or shift reports to see if they reflected any prior reports of the abuse J.P. alleged had been going on in that period. She also did not interview any of the other three residents of Raymond Road to see if they confirmed J.P.'s statement that S.W. had similarly abused them. (Seixas testimony.)

24. Investigator Seixas drew a conclusion from her investigation that J.P. was a victim of abuse. She wrote:

The information obtained during the investigation was sufficient to substantiate that [S.W.] committed acts of abuse *per se* (unwarranted pattern of touching), causing [J.P.] to sustain a serious emotional injury, which was demonstrated by [J.P.]'s self-injurious behavior of cutting his left wrist, causing bleeding abrasions, which constitutes a serious physical injury. Evidence also supports that [J.P.] was sexually abused by [S.W.], by [S.W.] engaging in an unconsented sexual activity, which included unwanted and inappropriate touching of the clothed chest and buttocks of [J.P.]

(Ex. Q.) The only evidence she cited beyond J.P.'s statements was that "[a]ll staff interviewed confirmed [S.W.] will 'horseplay' with [J.P.]. Several staff confirmed that [J.P.] had made complaints to staff regarding [S.W.]'s unwanted touching." *Id.*

25. On December 21, 2021, DPPC sent S.W. the investigator's report and told him that it had determined there was "sufficient evidence to conclude your act and/or omission constituted 'abuse' and 'abuse *per se*.'" (Ex. R.)

26. S.W. appealed two days later. Commenting on what he perceived to be the weaknesses in the investigation, he wrote:

I saw nothing in the statements from anyone at all (except the complainant) that supported any allegation of physical and/or sexual abuse. And, unfortunately for all

concerned, the complainant had a very clear history of making allegations and filing DPPC complaints against anyone and everyone whenever he's in a bad mood. He even made a complaint against myself and another overnight staff when he was first at the house. A statement that he admitted the next day was a total fabrication that he made up simply because he was angry about something.

...
I've been doing this job for close to 15 years without any breath of any allegation like this. Until a program participant with a history of making tragically common complaints – almost always completely unfounded. I'm also a 65 year old man who weighs 175 pounds. The complainant is half my age and several times my weight. He also has a history of being violent and aggressive. The idea that I might break an immaculate 15 year work history to antagonize and abuse someone much younger and larger than myself – especially someone with a history of violent attacks and assaults on program staff is an idea that makes absolutely no sense to me.

(Ex. S.)

27. About J.P.'s complaint that S.W. had been punching and kicking him for months, but staff did not believe him, S.W. observed:

1. Why is it that staff did not believe him? and
2. If the "touching" had been happening for several months, why is it that someone who usually filed at least a couple of complaints a week never filed a complaint about such constant and egregious treatment until it had been happening for a couple of months?
3. If I'd been punching, hitting, and kicking him multiple times, why is it that marks from all this constant abuse weren't listed in either the police statement or ER statement?

Id.

28. S.W. noted that he had reviewed ServiceNet's internal record system for the period from April 1, 2021 to June 5, 2012 and found:

constant entries from myself talking to the complainant about not smoking either in the house or on the front steps – and his anger and refusal to abide by this Servicenet rule and the human rights of the other program participants living there who'd complained, but I did not find a single instance of the complainant mentioning anything at all relating to being "touched."

Id.

29. There is no evidence that DPPC performed any further investigation after receiving S.W.'s appeal.

30. On January 20, 2022, DPPC sent S.W. a letter informing him that it "affirms that there is sufficient evidence that your act and/or omission constitute registrable abuse."

The letter went over the investigator's report at length and accepted her findings and conclusions that S.W. had physically abused J.P. The agency stated:

The totality of the circumstances supports a conclusion that the Petitioner committed abuse by the described physical actions against [J.P.] that cause [J.P.] to sustain emotional injury manifested by [J.P.] inflicting a serious physical injury upon himself. The evidence also supports a conclusion that the Petitioner committed abuse *per se*, in the form of a pattern of repeatedly touching [J.P.] body parts, which was neither required nor appropriate for tending to the safety and welfare of [J.P.]; and sexual abuse by unwanted and inappropriate touching of [J.P.'s] clothed chest and buttocks. Therefore, the preponderance of the evidence supports a conclusion that the Petitioner committed abuse *per se* and the findings of the Report are hereby affirmed.

(Ex. T.)

31. S.W. appealed. He noted that "[t]here's an incredible [staff] turnover at that house.

In point of fact, several staff have quit and refused to work in that house ever again solely because of the constant DPPC complaints from this client." He attached statements from three staffers in support. They stated:

The interactions I saw with the client who reported always the interactions either with jokes and other satirical banter and [S.W.] only responded verbally with the client. Never at any point did I witness any abusive interactions with [S.W.] and said client. Neither physical, nor sexual.

(Ex. U – Andrew Sutton unedited statement)

I worked with [S.W.] for 4yrs. I never once saw him do or say anything physical verbally or sexually inappropriate with any of the residents. I did however witness the complaining client making many frivolous and false complaints against several workers including [S.W.]

(Ex. U - Mickey Woolard statement.)

I never witnessed [S.W.] sexually abuse or assaulting any client in my presence and I've been a co-worker for almost 4 years.

(Ex. U – Walter Randall statement.)

32. At the hearing, additional information was presented about the relationship between S.W. and J.P. and about J.P.'s accusations concerning S.W. Although J.P. had a history of assaultive behavior, Mr. Linker's impression was that he was mostly just posturing, by flexing his arms, for example.

Neither Mr. Linker nor Mr. Sutton saw S.W. touch J.P.⁶

None of the staff who reported to Mr. Linker told him about any allegation of inappropriate behavior by S.W. toward J.P. None of the other residents reported to Mr. Linker that S.W. had touched any of them inappropriately. After learning of J.P.'s allegations, Mr. Sutton asked the other three residents if S.W. had touched any of them inappropriately or had seen S.W. touch J.P. inappropriately. None of them reported that S.W. had touched them inappropriately; none had seen any such behavior by S.W. toward J.P.

Although J.P. complained "all the time" to Mr. Linker about Raymond Road staff, he did not complain to him that S.W. was kicking or hitting him. On the other hand, Mr. Sutton had seen J.P. touch staff inappropriately, at a rate of about four times per shift. He tried to touch a staff member's chest, shoulders or hair. When he attempted to touch

⁶ Although S.W.'s regular shift was at night when he typically worked alone, he was working 80-90 hours per week during the relevant time period and hence other staff were present when he was working these extended hours, and so would have had an opportunity to observe his behavior toward J.P. (Finding 3.) J.P. also did not specify what time of day the alleged inappropriate behavior occurred.

S.W. (including efforts to tweak S.W.'s nipples), S.W. would tell J.P. not to touch him and attempt to redirect him.

As for the blowup between S.W. and J.P., according to Mr. Sutton it occurred when S.W. showed up 15 minutes early for the night shift. J.P. became angry and upset, saying S.W. was going to make him go to bed. Mr. Sutton thought that J.P. was fixated with S.W. (Linker, Sutton and S.W. testimony.)

Discussion

The Disabled Persons Protection Commission has determined that S.W. committed of abuse and abuse *per se* and that his 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 Department 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©.

DPPC's regulations define abuse as "An Act or Omission which results in Serious Physical Injury or Serious Emotional Injury to a Person with a Disability." 118 CMR 2.02. Abuse is abuse *per se* if it involves sexual abuse or "a pattern of touching neither required nor appropriate for tending to the safety and welfare of a Person with a Disability." *Id.* Here, DPPC has charged S.W. with inflicting both an emotional and a physical injury on J.P. According to DPPC's regulation:

A Serious Emotional Injury is evidenced by an observable or measurable reduction in the person's ability to function from the person's customary range of performance or customary behavior including, but not limited to, a state of anxiety, fear, depression or withdrawal; or the development of post-traumatic stress disorder including, but not limited to, symptoms resulting from being forced to engage in nonconsensual sexual activity.

Id.

A serious physical injury can include “any significant . . . bleeding.” *Id.*

The abuse and abuse *per se* that DPPC alleged occurred is based on J.P.’s claim that for a two month period S.W. had kicked him in his buttocks, and hit him multiple times in his arms, chest, and shoulders, that these touchings were sexual in nature, and that the fact that J.P. cut himself on June 5, 2021 shows that he suffered a serious physical and emotional injury.

None of this was proved.

The only evidence that S.W. touched J.P. once in this fashion, let alone repeatedly for over two months, came from J.P. DDS Investigator Seixas believed that he was telling the truth. She left the impression that she did not want to disrespect what he told her just because he is disabled. That is commendable, but that does not mean that J.P. must have been telling the truth or that he was incapable of fabricating a story. While J.P. testified well at the hearing, so did S.W., and I see no basis from their demeanor during the hearing for deciding which version of events was true.⁷

One of the time-tested methods of examining whether an allegation is true is whether it is corroborated. There is simply no corroboration here. None of the other staff or residents at Raymond Road claim to have seen S.W. touch J.P. at all during this period – let alone kicking him in the buttocks and hitting him in the arms, chest and shoulders.

⁷ DPPC makes much of the facts that the investigator’s report was admissible. That a document is admissible does not mean that a fact finder is obligated to accept as true every conclusion reached by the author of the document.

Investigator Seixas stated in her report that there was corroboration, namely that “[a]ll staff interviewed confirmed [S.W.] will ‘horseplay’ with [J.P.]. Several staff confirmed that [J.P.] had made complaints to staff regarding [S.W.]’s unwanted touching.” The staff she interviewed were S.W., Mr. Sutton, Senior Counselor John Menapace, and Counselor Robert Velez. S.W. denied touching J.P. at all. The most he said was that he might have once made a kicking motion that scraped J.P. (Finding 22.) That is hardly an admission of inappropriate touching on that one occasion or an admission of repeated inappropriate touching.

Mr. Sutton told the investigator that he had never seen S.W. touch J.P. in the fashion J.P. described. Nor did he say that anyone had told him that such inappropriate touching was occurring. He acknowledged that J.P. had told him S.W. was behaving inappropriately toward him but, because J.P. did not elaborate, he cannot be said to have been aware of an inappropriate touching allegation. (Finding 20.) He was aware that they engaged in some rough talk. Thus, when he told S.W. to stop such banter, not to stop kicking or hitting J.P., it shows that he had not been made aware of any allegation of kicking or hitting by S.W.

Likewise, Mr. Menapace told the investigator only that he had heard locker room talk between J.P. and S.W. The investigator did not include in her report any mention that Mr. Menapace had told her that J.P. told him that S.W. was hitting or kicking him or that he had seen this himself. (Finding 21.)

That neither Mr. Sutton nor Mr. Menapace told the investigator that they had been told about the alleged kicking and hitting is particularly significant because J.P. told the

investigator that he had complained to both of them that S.W. was kicking and hitting him. That neither man verified this tends to undermine J.P.'s credibility.

The only person who said that J.P. had complained to him was Mr. Velez. But what J.P. told him does not exactly bolster his credibility. Mr. Velez told the investigator that on June 4, 2021, J.P. told him that S.W. had been "kicking [J.P.] on the butt and [J.P.] doesn't like it, but staff did not believe him." (Finding 21.) What is most interesting about this statement is that it was made one day before J.P. cut himself, which I will address later. But the basic problem with it is that to believe J.P. was telling the truth, one must believe that he was accurately relaying both that S.W. had in fact been kicking him and that he had told other staff about this. There is no evidence that J.P. told other staff. None of the other staff Investigator Seixas interviewed, none of the staff who wrote statements supporting S.W., and none of the other staff who testified at the hearing made any statements to the effect that J.P. had complained to any of them before June 5, 2021 that S.W. had been kicking and hitting him. If J.P. had not complained to other staff about physical mistreatment by S.W., that would tend to undermine the other part of his statement to Mr. Velez that S.W. had been kicking and hitting him.

Along this line, Mr. Linker testified that J.P. frequently complained to him about staff, but did not complain to him about S.W. repeatedly kicking and hitting him. (Finding 32.) The failure of J.P. to complain to Mr. Linker about something so evidently serious when he readily made other complaints to Mr. Linker, tends to suggest that the kicking and hitting did not occur.

Had J.P. made repeated complaints to staff about S.W., one would have expected staff to memorialize such reports in the notes kept for each shift. The investigator did not

go back through two months of shift notes or EHANA log entries to check whether any such complaints had been made by J.P. S.W., however, reviewed the EHANA log for that period and found numerous entries regarding J.P. smoking in the house, but none about J.P. complaining that S.W. had been kicking and hitting him.⁸ (Finding 28.)

Again, the absence of any evidence that J.P. had been complaining about S.W. kicking and hitting him, when he said he had been complaining, also undermines his central claim that he was hit or kicked at all.

Similarly, the investigator did not ask the other residents of Raymond Road whether S.W. was kicking and hitting them as well, as J.P. had told her. But Mr. Sutton did, and none of these higher functioning residents confirmed J.P.'s allegations that S.W. touched them inappropriately. This also undercuts J.P.'s credibility.

Although the investigator wished to evaluate the truthfulness of this particular allegation by J.P. without being influenced by prior complaints by J.P., a fuller review of J.P.'s history at Raymond Road suggests a far more likely cause for J.P. to cut himself on June 5, 2021. While it is certainly true that J.P. could have been telling the truth in this

⁸ S.W. has an obvious self-interest in his representation of the contents of these records. DPPC had an opportunity to review these records if it wanted to, and was alerted to S.W.'s view of what they contained because he mentioned it in his appeal, but the agency did not thereafter perform its own review.

And just as important, S.W.'s counsel has asked for an opportunity to review these records, I had ordered DPPC to produce them, but the agency did not. As a sanction for DPPC's failure to produce these records, I could simply assume that the records it declined to produce would have been favorable to S.W. But though such a sanction would be warranted, it is not necessary in this instance because S.W.'s characterization of the EHANA log is both plausible and consistent with the other evidence.

one instance, even if he had a history of misrepresenting events previously, the examination of what occurred before that date is telling.

J.P. was unhappy at Raymond Road. He wished to leave and took an number of avenues to achieve this. He tried to elope twelve times during his first year there. He called the police to ask for help in getting him out of Raymond Road. (Finding 8.) And he cut himself, eight or nine times by his own admission, in the knowledge that he would at least be temporarily removed to the hospital. (Finding 9.)

While Investigator Seixas thought that cutting himself proved that J.P. must have been seriously emotionally and physically harmed by S.W. kicking and hitting him, an examination of the other instances in which he cut himself suggests otherwise. Mr. Linker and Mr. Sutton, who had a much longer exposure to J.P., did not think there was necessarily an obvious cause to explain the occasions in which J.P. cut himself. Mr. Linker could not discern a pattern in this behavior, while Mr. Sutton thought J.P. did this when he was in distress over something, was angry, and more particularly when he was not getting his own way. (Finding 11.) I am inclined to view this instance as one in which J.P. was attempting to get his own way.

First, the cutting was not an act of someone how had lost control or was suicidal. As J.P. explained, he made sure to give himself only a "little scratch." (Finding 9.) In none of the instances in which he cut himself did he do serious damage to himself. The cuts he gave himself on June 5, 2021 did not even require stitches. (Finding 16.) Thus, he cannot be said to have suffered a serious physical injury. Since the cutting was a deliberate act by J.P. that he carefully performed to avoid serious injury to himself, oftentimes done simply to give himself a break from Raymond Road, it cannot be said

that he was suffering a serious emotional injury when he cut himself on June 5, 2021, let alone that bad acts by S.W. were directly responsible for him cutting himself.

Second, the cutting appears to have been goal-oriented. Although J.P. was unhappy at Raymond Road, he appears to have sought to have some control over the situation by making complaints when something upset him. Some of his complaints appear to have been basically errors on his part. Reporting thefts by fellow residents when all that had happened was that he misplaced something can best be described as J.P. jumping to erroneous conclusions. (Finding 15.) His complaints that Mr. Linker and Mr. Sutton had stolen money from him can also best be described as misperceptions on his part. *Id.* But some of this complaints against other staff are of a different order.

It is true that J.P. made one accurate complaint that a new staffer had rubbed his shoulder without his permission, but what happened as a consequence is what is important. The staffer was transferred to another facility. (Finding 14.) This happened twice more when he complained that one staffer had peed off the porch and another had been masturbating. Each time, the accused staffer was transferred to another ServiceNet facility. *Id.* While the record does not reflect what ultimately came of any investigation into these charges, what J.P. had learned was that if he made a serious enough complaint against a staffer, that staffer was likely to be transferred and he would not have to deal with him anymore. Mr. Sutton confirmed that J.P. had acted this way in at least one instance. He testified that J.P. told him that he knew that staffer he accused of peeing off the porch did not do it, but that he just wanted to get rid of the jerk.⁹ *Id.*

⁹ It is also worth noting that J.P. made a false complaint that a female staffer swore at him and used a racial epithet. (Finding 14.) This cannot be ascribed to an error

The evidence shows that J.P. had reason to want to get rid of S.W. as well. The first night J.P. was at Raymond Road, he accused S.W. of trying to force him to go to bed. That was still an issue for J.P. the following year was shown by the blowup J.P. had one week before he cut himself when he got very upset that S.W. showed up early for the night shift and J.P. told Mr. Sutton he was upset because he thought that S.W. was going to make him go to bed. Added on to this were the efforts of S.W. to enforce the rules against smoking in the facility. The evidence is that J.P. cared deeply about access to cigarettes and the ability to smoke them and chafed at the strict smoking rules at Raymond Road. S.W., on the other hand tried to enforce those rules strictly. This appears to have led to numerous disputes with J.P., as S.W. referenced in the EHANA notes in the period just before June 5, 2021. In this light, the very fact that J.P. told Mr. Velez the day before he cut himself that S.W. had been kicking and hitting him repeatedly looks like an effort to set up an explanation as to why he would cut himself the next day.

Thus, it is more likely that not that J.P. cooked up the kicking and hitting accusation about S.W. in an effort to get him transferred to another facility so that J.P. would not have to face S.W.'s efforts to get him to go to bed or enforce the strict smoking policy, and maybe even achieve his ultimate goal to be moved to another facility.

Conclusion

DPPC has not proved by a preponderance of the evidence that S.W. abused J.P., that he committed abuse *per se*, or that S.W.'s alleged acts cause J.P. serious physical or

on J.P.'s part, but looks more like a deliberate effort to harm the staffer.

emotional harm. I therefore decline to affirm DPPC's decision, and as a consequence S.W.'s name shall not be placed on the registry of care providers against whom DPPC has made a substantiated finding of registrable abuse.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney
Acting Chief Administrative Magistrate

Dated: **JUL 25 2023**