University of Tennessee, Knoxville
Trace: Tennessee Research and Creative Exchange

Tennessee Department of State, Opinions from the Administrative Procedures Division

Law

4-13-2010

Gaston Nduwimana

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

Part of the Administrative Law Commons

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov

BEFORE THE COMMISSIONER OF THE TENNESSEE
CIVIL SERVICE COMMISSION
AND THE COMMISSIONER OF THE
DIVISION OF INTELLECTUAL DISABILITIES SERVICES

IN THE MATTER OF:	
Gaston Nduwimana	**DOCKET NO: 26.45-105386J** **09.10-106239J**

INITIAL ORDER

This matter was convened as a contested case hearing in Nashville, Tennessee, on April 13, 2010, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Division of Intellectual Disabilities Services. Fredrick Zimmerman, Assistant General Counsel for the Division of Intellectual Disabilities Services, represented the State. The Respondent, Gaston Nduwimana, appeared *pro se*.

This contested case hearing consolidated two separate cases. The first case is an appeal of the termination of Mr. Nduwimana's employment at Clover Bottom Developmental Center for a violation of the Protection from Harm policy and conduct unbecoming an employee in the State service. The second case involves the State's proposal to place Mr. Nduwimana's name on the registry of names of persons determined to have abused or neglected vulnerable individuals ("Abuse Registry") as prescribed by T.C.A. §68-11-1004(a)(2). In the interest of judicial economy the cases were consolidated and heard together.

Upon consideration of the entire record in this case, it is concluded that Respondent's termination was not warranted and should be reversed, and Respondent's

name shall not be placed on the Abuse Registry. These determinations are based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mr. Nduwimana was employed since 2004 as a developmental technician with Clover Bottom Developmental Center. As part of his job duties Mr. Nduwimana was charged with "one-to-one" care of a service recipient with a history of aggressive behavior.

2. On July 2, 2009, the State alleges that Mr. Nduwimana forced service recipient M.J. up against the wall, with both hands around his neck, and hit him several times with an open hand, and then slung him to the floor. Mr. Nduwimana denies such incident.

3. M.J. is a sixteen year resident of Clover Bottom with a long history of violence and aggressive behaviors. He was previously admitted to the Harold Jordan Center due to allegations of aggravated sexual battery of a two-year old child. He has a mental illness diagnosis.

4. Employees at Clover Bottom undergo Professional Crisis Management (PCM) training. The training consists of teaching employees how to use various holds to protect service recipients as well as employees in the event of an aggressive episode. The training is based on the principle that employees are never allowed to hit a service recipient, even in self defense.

5. An investigation was conducted, the allegations of abuse substantiated, and Mr. Nduwimana was terminated.

6. Matthew Law, a Board Certified Behavior Analyst, testified on behalf of the State. Mr. Law testified that M.J.'s frequent behaviors include physical aggression, verbal

aggression, property destruction, inappropriate sexual behavior, manipulation, and accusations of abuse. Mr. Law said that he saw M.J. throw a garbage can at Mr. Nduwimana on the day of this incident. M.J. also swung a tree limb at Mr. Nduwimana. Mr. Law then stated that M.J. and Gaston went into a building and saw them "trading slaps and hits." He stated that Mr. Nduwimana grabbed M.J. by the throat and pushed him to the ground.

7. Geary Searcy, a grounds supervisor at Clover Bottom, testified that he witnessed the incident. Mr. Searcy stated that he saw M.J. targeting Mr. Nduwimana. Mr. Searcy stated that he attempted to get another staff member to take Mr. Nduwimana's place, but he was unsuccessful. Mr. Searcy testified that he did not see Mr. Nduwimana hit and slap M.J., but he did see Mr. Nduwimana grab M.J. by the throat. When asked if he could have done anything to help, Mr. Searcy stated that he could have called a code yellow, but he didn't because he thought that bringing more people to the area might give M.J. more of an audience and escalate his behavior. Mr. Searcy stated that he noticed a cut above Mr. Nduwimana's eye.

8. On cross examination when asked why he did not try to physically assist Mr. Nduwimana with M.J., Mr. Searcy replied, "Had I went out there I would have been attacked as well. I'm not as fast as you. I can't run that fast. And I would have been hit. I was just coming off of having surgery a few months earlier. I had heart problems."

9. Mr. Searcy testified that only he and Mr. Law witnessed the incident, although several other witnesses who testified claimed that they saw the incident as well.

10. Della Hall, a Clover Bottom Supervisor, testified on behalf of Mr. Nduwimana. Ms. Hall stated that she saw Mr. Nduwimana trying to get away from M.J. and she called for help. She stated that Matthew Law arrived at the scene after he was called, but just stood watching with his arms crossed. Ms. Hall stated that "Code yellow wasn't called… and usually that is what the Grounds Supervisor or the B.A. does." She further explained that a "code yellow" means that all people on campus come to help. She explained that she did not call a code yellow because if the grounds supervisor and the B.A. are present

it is up to them to make the call. Ms. Hall stated that she did not see Mr. Nduwimana hit M.J.

11. Michael Johnson, another Grounds Supervisor at Clover Bottom, testified that a code yellow is supposed to be called if a staff person is being targeted by a service recipient.

12. Beatrice Alouch, an employee at Clover Bottom at the time of this incident, testified that "the rule here is when a client has a behavior they [the grounds supervisor or B.A.] have to call the code yellow.

13. Mr. Nduwimana testified that he was actually the victim in this matter due to the fact that Mr. Law and Mr. Searcy failed to use their expertise and failed to call for the code yellow.

14. The State submitted as an exhibit the CBDC Behavior Support Program for M.J. [exhibit 7]. On the first page of the document it states "after a behavioral episode, he [M.J.] will make statements that the staff hit, kicked, or punched him." Furthermore, on page four of the document it lists the appropriate way of handling M.J.'s behavior. It states, "For Physical Aggression: Remove the target of M.J.'s aggression from harm's way." Mr. Searcy, during his testimony, stated that M.J. was targeting Mr. Nduwimana.

CONCLUSIONS OF LAW

1. Tennessee Code Annotated § 68-11-1001(a) provides that "the Department of Health shall establish and maintain a registry containing the names of any persons who have been determined to have abused, neglected, or misappropriated the property of vulnerable individuals."

2. The term "vulnerable person," under the law, includes anyone "who, by reason of advanced age or other physical or mental condition, is vulnerable to abuse, neglect, or misappropriation of property, and who was, at the time of the commission of an alleged offense, receiving protective services from s state agency pursuant to law…." TENN. CODE ANN. § 68-11-1004(a)(1)

3. The DIDS Policy pertaining to "Protection from Harm," states that physical abuse is any physical motion or action (e.g., hitting, slapping, punching, kicking, pinching) by which bodily harm occurs.

4. The Department of Health is the Petitioner in this matter, the party that initiated the proceedings, and as such, it is assigned the "burden of proof." The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A "preponderance of the evidence" means the "greater weight of the evidence," or "the more probable conclusion, based on the evidence presented." The burden of proof is generally assigned to the party seeking to change the present state of affairs with regard to any issue. Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. In the instant case, that means that the Department of Health must prove, by a preponderance of the evidence, that the Respondent abused or otherwise harmed a vulnerable individual, as defined by the laws of this State.

5. The Department has not met its burden. The record does not establish, by a preponderance of the evidence, that the Respondent abused M.J. Out of ten witnesses who testified in this matter, Mr. Law is the only one who stated that he saw Mr. Nduwimana slap M.J. and grab him by the throat. Mr. Searcy stated that he saw Mr. Nduwimana grab M.J. by the throat, but did not see Mr. Nduwimana slap M.J. Ironically, the two people who testified that Mr. Nduwimana abused M.J. are the two people who had the responsibility to remedy the situation by calling for a code yellow, and both failed to do so. Mr. Law stated that he did not call for a code yellow because, in his opinion, calling for a code yellow gives M.J. more targets. Similarly, Mr. Searcy stated that he did not call for a code yellow because "more people causes more problems with M.J." So

what we had was M.J., a Clover Bottom resident with a long and documented history of violent behaviors, running around throwing trashcans and tree limbs at Mr. Nduwimana, while the Behavior Analyst and Grounds Supervisor stood by doing absolutely nothing. Either one of them could have called for a code yellow which would have summoned all available staff to the area to assist Mr. Nduwimana with this extremely aggressive and violent resident, but both decided to let Mr. Nduwimana continue to be the target of M.J.'s aggression. Mr. Nduwimana was bleeding from a cut over his eye he suffered when M.J. hit him with the trashcan. Clearly, when a staff member has been injured by a resident, and the episode is still escalating, a code yellow should have been called. The poor judgment exhibited by the Behavior Analyst and Grounds Supervisor during this incident makes their testimony less credible. Furthermore, no credible proof was offered to corroborate the testimony that Mr. Nduwimana injured M.J. In his witness statement [Exhibit 14], Mr. Law states that M.J. had a reddish mark on the side of his head, but that he [Mr. Law], did not know what left the mark. The nurse noted in her report that M.J. had a scratch mark on the left side of his neck, but did not say what caused the scratch. It is entirely possible that M.J., while swinging tree limbs and throwing trash cans, could have slightly scratched himself with one or both objects. No photos or other testimony was offered to prove the extent of M.J.'s injuries. Mr. Nduwimana submitted photos of the injuries he received when M.J. struck him with the trashcan.

Both the Grounds Supervisor and the Behavioral Analyst testified that they did not call for a code yellow because they thought it would escalate M.J.'s behavior, and perhaps that is true. However, if they were not going to call for a code yellow, then clearly, some alternative plan of action should have been in place. Both Mr. Law and Mr. Searcy testified that they were familiar with professional crisis management (PCM) techniques, yet neither of them attempted to assist Mr. Nduwimana, even after he had been injured by M.J. Mr. Nduwimana testified that he did not hit M.J., and that he did not grab him by the throat. Mr. Nduwimana stated during his testimony:

> "During the time I try to protect myself and protect the individual as well, and to redirect him by using

> PCM technique. I never hit him. I never put my hands on his throat, nor did I push him to the ground"

Considering all the testimony, including the testimony of the other employees who witnessed the incident, and the fact that the two people accusing Mr. Nduwimana of wrongdoing are the two people who should have called for a code yellow, Mr. Nduwimana's version of the incident on July 2 is the more probable description of what actually happened.

Accordingly, it is hereby ORDERED that the Respondent's name shall not be placed on the Abuse Registry as prescribed by Tenn. Code Ann. §68-11-1004, and his termination from Clover Bottom Developmental Center was improper and is OVERTURNED. Mr. Nduwimana is hereby reinstated to employment at his former rate of pay, with full back pay and benefits. It is further ORDERED that Mr. Nduwimana shall be fully credited with any leave he would have accrued, plus longevity benefits. Such back pay shall be reduced by any compensation he may have received, as per Tenn. Code Ann. §59-7-3045(e)(2), and offset by any income he may have earned from alternative employment, as per Department of Personnel Rule 1120-11-.05(4)(d).

_____

This Initial Order entered and effective this 15th day of June, 2010.

_____
Rob Wilson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 15th day of June, 2010.

Thomas G. Stovall, Director
Administrative Procedures Division