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May 2015

Emmanuel Duru vs. Mental Health & Developmental Disabilities

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May 4, 2015

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RE: In the Matter of: Emmanuel Duru

Docket No. 15.04-128004J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

**BEFORE THE TENNESSEE DEPARTMENT OF MENTAL HEALTH
AND SUBSTANCE ABUSE SERVICES**

IN THE MATTER OF:

EMMANUEL DURU

DOCKET NO. 15.04-128004J

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **May 19, 2015**.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472**. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

**BEFORE THE TENNESSEE DEPARTMENT OF MENTAL HEALTH
AND SUBSTANCE ABUSE SERVICES**

IN THE MATTER OF:

EMMANUEL DURU,

Respondent.

DOCKET NO: 15.04-128004J

INITIAL ORDER

This contested case was heard in person in Memphis on March 27, 2015, by Administrative Judge Kim Summers, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Commissioner of the Tennessee Department of Mental Health and Substance Abuse Services. John Coons, Esq. and Alex King¹ represented the Department in this matter. The Respondent was present and represented by Michael Harrell, Esq.

The issue in this matter is whether to uphold the Department's decision to place Respondent's name on the Department of Health's Abuse Registry pursuant to Tenn. Code Ann. § 68-11-1004. After consideration of the evidence and argument of the Parties, it is determined that the Respondent's name is not appropriately placed on the Abuse Registry. This determination is based upon the following Findings of Fact and Conclusions of Law.

SUMMARY OF EVIDENCE

The following individuals provided testimony at the hearing – Shoronda Monix, Facility Investigator for Memphis Mental Health Institute (MMHI); Barrett Stephens, Facility Investigator for Western Mental Health Institute; the Respondent; Grady Bryant, retired Psychiatric Technician; and Jennifer Newell, Nurse with MMHI, retired.

¹ Mr. King participated in the hearing pursuant to Section 10.03 of Tennessee Supreme Court Rule 7.

Ms. Monix provided the following testimony – on January 5, 2014, as she exited the elevators on the third floor of Memphis Mental Health Institute (MMHI), she heard a commotion and a patient say, “don’t hit me anymore;” she looked in the room and saw the Respondent push the patient back on the bed and hit her twice in the head with a closed fist; the conduct of the Respondent was clear and unmistakable.

The Respondent provided the following testimony – he and two other psychiatric technicians held down a combative patient so that a nurse could administer an injection; he was stationed by the patient’s legs and was kicked in the leg when the patient was released; he left the room after retrieving his identification badge that had been snatched by the patient; the conflict was no different than on any other day and certainly did not cause him to hit a patient.

Jennifer Newell testified that the entire matter has been the result of a misunderstanding.

Two exhibits were entered into evidence: EXHIBIT 1, Department of Mental Health, Policy Number 11-2; EXHIBIT 2, Memphis Mental Health Institute, map of 3rd floor.²

FINDINGS OF FACT

1. The Respondent is a Psychiatric Technician who had been employed by Memphis Mental Health Institute (MMHI) since 2001. His employment with MMHI was terminated on February 8, 2014.

2. On January 5, 2014, the Respondent was asked to provide assistance holding down a combative patient so that Nurse Keisha Speight, could administer an injection. Two other Psychiatric Technicians – Glenda Pryor and Grady Bryant – were also asked to provide assistance.

² Following a hearsay objection by Counsel for the Respondent, the investigation report and termination letter were not entered into evidence as exhibits.

3. The Respondent was positioned at the patient's feet, and Mr. Bryant was positioned at the patient's head. The attention of the Psychiatric Technicians was entirely focused on the patient while the injection was being administered.

4. Mr. Bryant witnessed no inappropriate interaction between the patient and the Respondent other than the patient kicking the Respondent.

5. When Ms. Monix was approaching the patient's room, Nurse Speight was leaving. The Psychiatric Technicians remained behind to de-escalate the patient.

6. After looking in the patient's room, Ms. Monix reported seeing the Respondent forcefully strike the patient twice with a closed fist.

7. Mr. Stephens was asked to investigate the incident. The allegation of abuse was substantiated following the investigation.

8. The patient had no visible signs of injury following the alleged incident. No evidence was presented that the patient required medical treatment for any related injury.

9. The Respondent has always been well-liked by the patients and has been good at de-escalating conflict.

APPLICABLE LAW

1. RULE 1360-4-1-.02(3) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies states, in pertinent part:

The "petitioner" in a contested case proceeding is the "moving" party, i.e., the party who has initiated the proceedings. The petitioner usually bears the ultimate burden of proof.

2. The Department of Health maintains an Abuse Registry pursuant to Tenn. Code Ann. § 68-11-1001(a) that contains the names of individuals who have been determined to have abused, neglected, misappropriated or exploited the property of vulnerable individuals.

3. Tenn. Code Ann. § 68-11-1002(6) defines a “vulnerable person” as someone who:

(A) Is under eighteen (18) years of age; or

(B) Is eighteen (18) years of age or older and, by reason of advanced age or other physical or mental condition, is vulnerable to or has been determined to have suffered from abuse, neglect or misappropriation or exploitation of property and is or has been:

(i) The subject of any report of harm, abuse, neglect, or exploitation of property made to any state agency or investigative authority with responsibility to investigate those reports pursuant to title 37, chapter 1, parts 1 or 6, title 71, chapter 6, part 1, or pursuant to any other provision of law or regulation;

(ii) Receiving protective services from a state agency pursuant to law;

(iii) The victim of any criminal offense that constitutes abuse, neglect, or misappropriation or exploitation of property;

(iv) In the care of either a state agency, an entity that is licensed or regulated by a state agency, or in the care of an entity providing services under the provisions of a contract between that entity and a state agency; or

(v) Receiving services in the person's home from any agency licensed or regulated by or contracted to a state agency, including, but not limited to home and community-based services, home health care, or other health care-related services provided through state or federal funds to assist persons to remain in their homes.

4. Pursuant to Tenn. Code Ann. § 68-11-1003:

The department of health shall include the name of an individual on the registry when it receives notification from an agency of Tennessee state government that the individual has been found by that agency, **pursuant to that agency's procedures and definitions**, to have committed abuse, neglect, or misappropriation or exploitation of the property of a vulnerable person. (Emphasis added)

5. Pursuant to Tenn. Code Ann. § 33-2-402(1), “abuse” is defined as “the knowing infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.” (Emphasis added)

6. The Department’s Policy Number 11-2 provides the following pertinent definitions –

3.1 – Abuse – the knowing infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.

3.1.2 – Physical Abuse – harmful or painful physical contact, including, but not limited to, the intentional striking, shoving, or pushing of a service recipient by anyone, including another service recipient. Also included is the use of excessive force when restraining a service recipient.

7. The Department’s Policy Number 11-2 specifies the following with respect to abuse of a service recipient –

4.1.1 – An employee shall not engage in any abuse, whether emotional, physical, sexual, or verbal, of service recipients. Examples of abuse shall include, but are not limited to, the following conduct:

4.1.1.4 – Cause or encourage harmful or painful physical contact with a service recipient, including, but not limited to, the intentional striking, shoving, or pushing of a service recipient by anyone, including another service recipient.

ANALYSIS and CONCLUSIONS OF LAW

1. The patient was a vulnerable person as defined by Tenn. Code Ann. § 68-11-1004(6).

2. According to the testimony of Investigator Monix, the Respondent struck the patient at least three times – the two times that she allegedly witnessed and at least one time prior to her appearance to which the patient responded, "stop hitting me." She testified that the blows that she witnessed were clear and unmistakable and could not be misconstrued. Certainly, any such clear and unmistakable conduct would have been witnessed by the others in the room, and any such corroborating testimony would have been presented by the Department at the hearing in order to sustain its burden of proof. Instead, testimony was provided only by Mr. Bryant, who denied seeing the Respondent strike the patient but did witness the patient kicking the Respondent in the leg.

3. No resulting injury was ever observed on the patient.

4. The Respondent testified that the conflict with the patient was no different than any other. Having never before struck a patient, it makes no sense that he would do so on this occasion, placing his career and livelihood at risk.

5. The preponderance of the evidence provided in this matter does not support a finding that the Respondent committed abuse of a vulnerable person.

6. The greater weight of the evidence compels the conclusion that Investigator Monix was mistaken in her conclusions about the Respondent's conduct.

7. An allegation of abuse is serious both for the vulnerable person and the alleged perpetrator. The Department has not met its burden of proof to substantiate these serious allegations and, as such, the decision to place Respondent's name on the Abuse Registry is **OVERTURNED**, and Respondent's appeal of this decision is **GRANTED**.

The policy reasons for this decision are to uphold the laws of the State of Tennessee while providing appropriate protections for its citizens.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the 4th day of MAY 2015.



KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 4th day of MAY 2015.



J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.