

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

KIJAH GOLDSBERRY,

:

C.A. No: 13A-04-003 (RBY)

:

_____ **Appellant,**

:

v.

:

:

:

**THE STATE OF DELAWARE
DEPARTMENT OF HEALTH AND
SOCIAL SERVICES, THE DIVISION
OF LONG TERM CARE RESIDENTS
PROTECTION,**

:

:

:

:

:

Appellees.

:

:

:

Submitted: September 12, 2013

Decided: October 23, 2013

*Upon Consideration of Appellant's Appeal from
the Department of Health and Social Services*

AFFIRMED

ORDER

Kijah Goldsberry, *Pro se.*

Lisa Barchi, Esq., Deputy Attorney General, Department of Justice, Wilmington,
Delaware for Appellees.

Young, J.

SUMMARY AND PROCEDURAL POSTURE

Kijah Goldsberry (“Appellant”) has appealed the Department of Health and Social Services’ (“The Board”) April 2, 2013 decision to place Appellant on the Adult Abuse Registry for a five year period, and to flag her name in the federal Certified Nursing Assistant Registry. The record created in the Appellant’s hearing before the Board provides sufficient factual basis to support the Board’s determination that Appellant, while acting as a nurse, abused an aged patient. Accordingly, the Board’s decision is free from legal error, and is **AFFIRMED**.

FACTS

On October 6, 2012, Resident L.C., while seated in her geri-chair, tore her adult diaper. Nurse Agnes Nthambiri (“Nthambiri”) asked L.C. to return to her room. Nthambiri’s testimony in the Record is that she saw nothing unusual about L.C.’s mouth at the time. According to Appellant, aide Natasha helped her to use a Hoyer lift to take L.C. back to her room. Later, she told nurse Nthambiri that L.C. was bleeding from her mouth. Appellant stood approximately 15 feet away from Nthambiri when Appellant made that statement. Nthambiri saw nothing in the Appellant’s hair or on her uniform. Then, Nthambiri went to L.C.’s room, where she observed blood on the patient’s lip and gown.

Nthambiri testified that Appellant said L.C. had hit herself. During the hearing on March 21, 2013, the Hearing Officer asked Appellant how she believed L.C. was injured if L.C. did not do it herself or if Appellant was not culpable. Appellant stated that she did not know. Appellant further stated that, after L.C. threw a perineal pad in Appellant’s face, she left the room for 15 minutes. She

alleges that, during that time, she was not aware of anyone's going into L.C.'s room. Nevertheless, after Appellant returned, she claimed to have noticed the room in disarray.

When the Board questioned L.C. about what happened, she said "Can you get her out of my room? She put her hand in my mouth." As Nthambiri cleaned up the blood and changed the patient's gown, L.C. stated several times that Appellant put her hands in L.C.'s mouth, adding that she did not want Appellant to take care of her ever again.

When questioned by Appellant, Nthambiri testified that she did not recall that L.C. was bleeding from a needle stick to her arm. She also testified that L.C. does not receive any injections. Nthambiri testified that blood was on the front of L.C.'s gown, her hand and her mouth. At 9:40 pm on October 6, 2012, L.C. was taken to the Emergency Department at Christiana Care Medical Center ("Christiana"), where she was examined in the early morning of October 7, 2012. At Christiana, forensic nurse, Angela McNulty ("McNulty"), examined L.C., taking photos of her injuries. McNulty testified that when she asked L.C. how she was injured, L.C. responded that she got into a fight with "Kijah". McNulty later testified that the injuries were likely caused by blunt force trauma.

Appellant testified that L.C. had been agitated since morning. When she saw a small piece of gauze on L.C.'s arm in the morning, she did not see any bleeding. Appellant was asked by the hospital to return L.C. to her room after lunch. Appellant testified that another certified nursing assistant went into the room with her. Then, once in the room, L.C. started throwing pieces of a soiled brief in her

face. Appellant left the room, went to the nursing station, then back to the room to remove the Hoyer lift that she had left in the doorway. Appellant then came out of the room to get Nthambiri, stating that L.C. was bleeding from her mouth.

At the hearing, Appellant admitted during cross examination that she had failed to mention the care provider named “Princess”, an environmental services person, or that L.C. had made false statements about staff, in either her written statement made on the day of the accident, or in her interview with the investigator for Long Term Care Residents Protection (“LTCRP”).

A note informing Appellant that she could subpoena witnesses and present documentary evidence was attached to a notice sent to Appellant on January 17, 2013, telling her she had been placed on the Adult Abuse Registry. At the hearing on March 21, 2013, Appellant made claims that the witnesses she wanted (“Princess” and the environmental services worker) were afraid to testify because they feared losing their jobs. Further, she alleged that the letter she received did not tell her she could subpoena outside witnesses. The hearing officer advised Appellant that, if these witnesses were available to testify at the hearing, she was free to call them. Neither witness was present during the incident or had direct knowledge of the incident.

At the hearing, L.C. was unable to identify the Appellant, who was present in the hearing room. However, when the State asked who injured her by putting fingers in her mouth, she replied “Kijah.” At the start of L.C.’s testimony, the name “Kijah” was not mentioned, but L.C. told the hearing officer the same thing that she had told the forensic nurse when asked about the person who hurt her.

At the hearing, Appellant testified that she was not able to make copies of L.C.'s medical record. Long Term Care investigator ("LTC investigator"), Colleen Gray-Mackey, testified that, in order to prevent Health Insurance Portability and Accountability Act violations ("HIPAA"), records cannot be copied. Appellant was unclear about which part of the record she wanted to have admitted. Appellant claimed that there was a note in the record showing that Nthambiri had told the nursing supervisor that the supervisor would hear the same story from the resident that Nthambiri told. Appellant alleges that this information was also in the medical record. This record was readily available, but Appellant did not ask to have the record brought to the hearing room at any point.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence and free from legal errors.¹ Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."² It is "more than a scintilla, but less than preponderance of the evidence."³ An abuse of discretion will be found if the Board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce

¹ 29 Del C. §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

³ *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

injustice.”⁴ Questions of law will be reviewed *de novo*.⁵ In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the Board. Further, when determining “if there is a distinction to be made in the standard of review of agency decisions it lies in the deference due an agency’s interpretations of its own rules or regulations.”⁶

DISCUSSION

I. Failure Of Notice and Opportunity to Subpoena Witnesses

Appellant argued that the Board prevented the witnesses, that she requested be called during the hearing, from testifying. First, Appellant contended that she subpoenaed L.C.’s records to be produced as evidence for the hearing. At the hearing Appellant was accompanied by the LTC investigator. According to Appellant, the LTC investigator informed her that she was not able to make any copies of the alleged victim’s medical records. Instead, Appellant would only be able to take notes.

Second, Appellant argued that a statement produced at the hearing was inaccurate. Hearing Officer, Mrs. White stated that Appellant testified that she went back into L.C.’s room to remove the Hoyer lift. However, Appellant never made this statement in her interviews with the National Health-Career Association

⁴ *Delaware Transit Corp. v. Roane*, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)0.

⁵ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

⁶ *Public Water Supply Company v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999).

(“NHA”) & Don and LTC investigator. Appellant contended that the DLTCRP was not able to produce evidence of her telephone interview with the investigator, which was conducted on November 21, 2012. Further, Appellant argued that both of the parties in the telephone interview would have been important witnesses, but that she was not able to question these witnesses, because they were not present during the hearing for testimony. Moreover, Appellant asserted that the original time sheet of Natasha Allen, the certified nursing assistant, who helped Appellant to transfer L.C. back to her room, had an audit time sheet adjustment. Therefore, Appellant argued that the time sheet produced at the hearing was not an original.

Appellant failed to take advantage of clear instructions that the Board gave her for subpoenaing witnesses. Although Appellant is acting *pro se*, she is expected to comply with the rules of the tribunal.⁷ In the instant case, the Board provided the Appellant with the regulations that guide the proceedings in Adult Abuse Registry hearings. In the scheduling letter sent to Appellant on February 6, 2013, the Board gave Appellant explicit instructions for subpoenaing witnesses. On March 14, 2013, the Board sent the Appellant a letter with the witnesses requested by the State. In addition, the Board gave the Appellant two separate documents informing her of her obligations if she wanted to have witnesses appear on her behalf.

The Hearing Officer allowed Appellant to call any witness she could find on the day of the hearing. Because none of her witnesses ever received mention in her

⁷ *Laub v. Danberg*, 2009 WL 1152167, (Del. Super. Mar. 4, 2009).

written statement or her interview with the LTC investigator, none of her witnesses was on notice for the hearing. Appellant knew one of her witnesses as “Princess”, but did not investigate to find the real name of “Princess” before the hearing. Appellant did not comply with the instructions mailed to her on several occasions; therefore, she found herself without witnesses at the hearing because of her own doing.

II. Substantial Evidence for Board’s Decision

On appeal, Appellant asked this Court to substitute its judgment for the Hearing Officer’s opinion. However, an appellate court does not substitute its judgment regarding factual findings. The Court must uphold the administrative decision if it was based on substantial evidence.⁸ Even if the appellate court would reach a different conclusion, the Court may not overturn a decision that is based on sufficient evidence. In this case, the Hearing Officer’s decision rested on substantial, admissible evidence of witnesses that testified at the hearing, the appellant’s testimony, and photographs showing L.C.’s injuries. This constitutes sufficient evidence on which to base the Board’s decision. Accordingly, the Court must affirm.

⁸ *Squire v. Board of Educ of Red Clay Consol. Dist.*, 2006 WL 258309 *6 (Del. Super January 18, 2006) (citing *Board of Education v. Shockley*, 155 A.2d 323 (Del. 1959)).

III. No Prejudice Due to Questions of Identification

Appellant suffered no harm as a result of L.C.'s inability to identify her at the hearing. The State's questions to L.C. were neither leading nor suggestive of an answer. D.R.E. 611 (c) states that leading questions should not be used on direct examination except as may be necessary to develop the subject's testimony. Courts may allow leading questions on direct examination.⁹

The State's questions to L.C. did not suggest an answer. In fact, L.C. did not identify the Appellant, who was in the room, even after being asked several times if she could identify her, or if she could remember the Appellant's name. During the hearing, when the Hearing Officer asked L.C. to look around the room to determine if she could identify the Appellant, L.C. responded that she did not see her. Once again, no one in the room suggested an answer. However, L.C. did describe Appellant as the person who injured her by the end of her testimony.

Further, in subsequent testimony, other witnesses testified that L.C. told them that the Appellant was the person who caused her injuries. During L.C.'s testimony, the forensic nurse reviewed her notes in the hospital record, and later testified that L.C. fought with a "person named 'Kijah'." Nthambiri testified that L.C. was upset when the Appellant came into her room after the incident. Then, L.C. asked the Appellant to leave. L.C.'s inability to identify the Appellant in the hearing room did not impact to Appellant's case. Instead, it was the testimony of L.C. and the other witnesses about the identity of the person who inflicted injuries,

⁹ *Christiana Care Health Services, Inc v. Crist*, 956 A.2d 622, 626 (Del. Super. 2008).

Goldsberry v. Dept. of Health & Social Services
C.A. No.: 13A-04-003 (RBY)
October 23, 2013

that allowed the Hearing Officer to conclude that Appellant abused L.C.

Although L.C. could not identify the Appellant during her testimony, L.C. consistently recited the facts of the incident over time, which was an important factor in the Board's decision to place Appellant on the Abuse Registry. Because the Hearing Officer's opinion was based on an analysis of substantial evidence, this Court will not disturb the decision of the Board.

CONCLUSION

For the foregoing reasons, the decision of the Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc

oc: Prothonotary
cc: Ms. Barchi, Esq.
Ms. Kijah Goldsberry
Opinion Distribution
File