

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR PERSONS WITH
DISABILITIES,

Petitioner,

vs.

Case No. 18-0658FL

ECO HOMES AND HEALTH SERVICES,
GROUP HOME OWNED AND OPERATED BY
ECO HOME AND HEALTH SERVICES,
LLC,

Respondent.

_____ /

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 12, 2018, in Orlando, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire
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For Respondent: Clifford J. Geismar, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, ECO Home and Health Services Group Home, owned and operated by ECO Home and Health Services, LLC ("Respondent" or "ECO Home"), committed the violations of the applicable statutes and rules alleged in the Administrative Complaint; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On or about January 17, 2018, Petitioner, Agency for Persons with Disabilities ("Petitioner" or "APD"), filed a two-count Administrative Complaint against ECO Home. Count I of the Administrative Complaint alleges that Sherman Carter, the owner and sole stockholder of ECO Home, sprayed P.P., a client and resident of ECO Home, in the face with pepper spray as Mr. Carter attempted to de-escalate a violent situation at an adult day training ("ADT") center on July 20, 2017. APD alleges that Mr. Carter's action violated section 393.13(4)(g)1., Florida Statutes, and Florida Administrative Code Rules 65G-2.009(6)(a) and (c), 65G-2.009(8)(d)2., and 65G-8.009(1). Count II of the Administrative Complaint alleges that Mr. Carter pepper sprayed the same client on September 25, 2017, at the ECO Home group home, in violation of the same statutory and rule provisions set forth under Count I.

On or about February 6, 2018, ECO Homes served APD with an Answer and a Request for Formal Administrative Hearing. On

February 9, 2018, APD referred the case to the Division of Administrative Hearings ("DOAH"). The case was scheduled for hearing on April 24 and 25, 2018. On April 12, 2018, APD filed a request for continuance, which was granted by Order dated April 17, 2018. The hearing was rescheduled for June 12, 2018, on which date it was convened and completed.

The parties submitted a joint Pre-hearing Stipulation, the factual stipulations of which were accepted and are included in the Findings of Fact below. At the hearing, Petitioner presented the testimony of Jessica Moreira, an adult protective investigative supervisor for the Department of Children and Families ("DCF"); Kietta Mayweather-Gamble, the owner of EduMatics, the ADT center where the alleged incidents of July 20, 2017, occurred; and Joyce Leonard, APD's regional program supervisor in the Quality Assurance/Quality Improvement unit. Over Respondent's objection, the record was held open to permit APD to take and submit the deposition testimony of Sara Swarthout, the Ocoee Police Department officer who responded to the incident at the EduMatics center and wrote an Offense Report about it. Petitioner's Exhibits 1 and 2 were entered into evidence. Petitioner's Exhibits 3 and 4 were admitted into evidence as Joint Exhibits 3 and 4.

Respondent presented the testimony of Sherman Carter; Coy J. Patterson, an employee of ECO Home during the period

relevant to this proceeding; Susan Carrington, a behavioral assistant who was at ECO Home working with R.P., another resident, during the period relevant to this proceeding; and Cheryl Seaton, the mother of R.P. Respondent's Exhibits F, H, I, and J were admitted into evidence.

The one-volume Transcript of the hearing was filed at DOAH on August 20, 2018. Both parties timely filed their Proposed Recommended Orders on August 30, 2018.

FINDINGS OF FACT

1. Among other duties, APD is responsible for regulating the licensing and operation of group home facilities in the State of Florida. APD's clients include vulnerable individuals with developmental disabilities attributed to autism, cerebral palsy, intellectual disabilities, Phelan-McDermid syndrome, Prader-Willi syndrome, or spina bifida.

2. APD's clients can choose to live in an institutional setting, group home, or independently. A client makes this choice with the assistance of a residential placement coordinator. A group home is a licensed facility providing a living arrangement similar to a family setting. The provider is responsible for the client's room and board, safety, transportation, and assistance with the activities of daily living.

3. ECO Home holds an APD-issued license to operate a group home. Sherman Carter is ECO Home's owner and sole corporate officer.

4. P.P. was a client of ECO Home. He lived at ECO Home from August 2016 until November 27, 2017. He is eligible for APD services due to his diagnosis of intellectual disability. He has also been diagnosed as schizophrenic.

5. Mr. Carter testified that P.P. was mostly happy while living at ECO Home. P.P. had certain behavioral quirks. He heard voices. He liked to watch wrestling and the show "Cops" on television. While watching television, P.P. would sometimes suddenly stand up and rip off his shirt, as if someone had spoken to him insultingly, and would say that he was going to "fuck up" this person.

6. Over time, staff at ECO Home learned how to de-escalate P.P.'s behavior by taking him for walks, for drives in the car, or by giving him a CD to listen to. The staff at ECO Home was trained in Professional Crisis Management ("PCM") restraint techniques, but never needed to employ them with P.P. while he was physically in the ECO Home.

7. Mr. Carter testified that de-escalation was necessary about once a week, and was almost certain to be needed on the Monday or Tuesday after P.P. had visited his mother over the weekend.

8. Count I of the Administrative Complaint alleges that Mr. Carter sprayed pepper spray in P.P.'s face as Mr. Carter attempted to de-escalate a violent situation at an ADT center on July 20, 2017.

9. While living at ECO Home, P.P. attended ADT classes at EduMatics, an ADT center in Ocoee. Kietta Mayweather-Gamble, the owner of EduMatics, testified that on July 20, 2017, she was driving to the center when she received a phone call from a staff person. The staff person told Ms. Mayweather-Gamble that P.P. was at the center with his mother and was acting in a way that no one at the center had seen before.

10. Ms. Mayweather-Gamble arrived at the center and encountered P.P. and his mother. P.P. was cursing and belligerent. Ms. Mayweather-Gamble told P.P. that he was not allowed to use such language at the center and told P.P.'s mother that she would have to leave and take P.P. with her.

11. The mother signed P.P. out of the center and left with him. However, she returned 10 minutes later with P.P., who was still enraged and cursing. The mother told Ms. Mayweather-Gamble that she had an appointment and could not take her son with her in his present state. Ms. Mayweather-Gamble told the mother that he could not stay at the center. She immediately phoned Mr. Carter and asked him to come get P.P. Mr. Carter told her he was on his way. Ms. Mayweather-Gamble testified

that she tried to force the mother to stay until Mr. Carter came to the center, but she left shortly before he arrived.

12. Ms. Mayweather-Gamble attempted to calm P.P., who was cursing and saying he was not going with Mr. Carter. P.P. picked up a chair. The scene reminded Ms. Mayweather-Gamble of the movie "Gladiator." She stayed calm and continued to speak to P.P. Ms. Mayweather-Gamble told P.P. that a Rasta does not behave in this way, appealing to his pride in his Jamaican heritage in a way that was usually successful. However, on this day, P.P. could not be talked out of his anger.

13. When Mr. Carter arrived, P.P. was in the EduMatics office with Ms. Mayweather-Gamble and Marcia Richardson, an EduMatics staff person. Mr. Carter entered the room and asked P.P. what was wrong. P.P. said, "Motherfucker, I'm not going nowhere with you. I want to go with my mother today." Mr. Carter tried verbally to calm P.P. and persuade him to put down the chair. He employed the Rasta compliment, to no avail. He told P.P. they would go for a drive. P.P. continued to berate Mr. Carter and complain that his mother "left me in this fucking place."

14. P.P. finally said, "If I go anywhere with you today, I'm going to kill you." P.P. then threw the chair at Mr. Carter, who ducked it. P.P. threw another chair at a wall. When P.P. bent down to pick up a third chair, Mr. Carter jumped

over the desk that separated them and took P.P. down using PCM technique.

15. During the scuffle, P.P. managed to draw blood by biting Mr. Carter's arm. Mr. Carter also cut his face on one of the desks as they went down to the floor. Mr. Carter held P.P. on the floor until he calmed down. P.P. got up and sat in a chair. Mr. Carter sat with him.

16. At some point during the melee, Ms. Mayweather-Gamble called the Ocoee Police Department.^{1/} When the police arrived, Mr. Carter and P.P. were sitting in the chairs. The police asked Mr. Carter what happened, and he told them that P.P. was a client of his group home and had been acting up in the EduMatics center. He told the police that he had held P.P. down as he had been trained to do. He told the police that P.P. is diagnosed with schizophrenia and medically non-compliant.

17. While Mr. Carter spoke to the police, P.P. began to become agitated again, saying, "Well, I'm getting out of this fucking house today. I don't care what I have to say to get out of it." The police officers saw that P.P. was becoming angry and asked Mr. Carter to wait outside. Mr. Carter testified that he spoke no more to the police that day.

18. P.P. complained that his chest hurt. He was taken to the hospital by the fire department, which was also dispatched

to EduMatics. Mr. Carter picked him up a little while later and took him back to ECO Home.

19. Officer Sara Swarthout of the Ocoee Police Department completed the "Offense Report" on this incident. No charges were filed; the face of the report states that it is "for informational purposes only." Officer Swarthout's report states as follows, in relevant part:

On 7/20/17, I responded to edumatics at 2715 Old Winter Garden Rd. in reference a mentally ill person causing a disturbance. Upon arrival there was no longer a disturbance. I met with Sherman Carter, who stated he was able to de-escalate the situation. When Carter arrived he observed a male known to him as [P.P.], throwing chairs and yelling. Carter is the group home director where [P.P.] resides. When [P.P.] saw Carter he charged towards him and threw a chair in his direction. Carter sprayed pepper spray on [P.P.'s] face and held him down to calm him down

20. Officer Swarthout confirmed in her testimony that she believed Mr. Carter told her that he pepper sprayed P.P. Officer Swarthout did not witness the alleged pepper spraying. P.P.'s only complaint was chest pain. He said nothing to Officer Swarthout about his eyes and she made no observation of any ocular distress.

21. Ms. Mayweather-Gamble did not see Mr. Carter pepper spray P.P. She saw Mr. Carter take P.P. to the ground and subdue him, then she ran out to direct the police to the room.

Ms. Mayweather-Gamble's testimony means that any pepper spraying had to have occurred after Mr. Carter subdued P.P., when there would have been no reasonable need to employ pepper spray.

22. Mr. Carter adamantly and credibly denied pepper spraying P.P. He denied telling Officer Swarthout that he had pepper sprayed P.P. Mr. Carter's reasonable suspicion was that P.P. had told Officer Swarthout that he had been pepper sprayed. After watching "Cops," P.P. frequently told Mr. Carter that he knew just what he would tell the police when he called them to take him away from ECO Home.

23. Susan Carrington, a behavioral assistant who was frequently at ECO Home working with R.P., the other resident of the home, was at the EduMatics center on July 20, 2017, and witnessed the incident. She saw Mr. Carter take P.P. down to the floor. She saw Mr. Carter's bloody face and arm. Ms. Carrington testified that Mr. Carter never used pepper spray. She said that P.P. never rubbed his eyes or indicated any form of distress consistent with having been pepper sprayed. She testified that she could hear Mr. Carter speaking with Officer Swarthout and that she heard nothing about pepper spray.

24. Ms. Carrington testified that P.P. habitually complains that "my heart is hurting me" when he becomes upset and agitated. He gets attention by complaining of chest pain

and asking to go to the hospital. Ms. Mayweather-Gamble confirmed that P.P. likes to go to the hospital.

25. Finally, a Confidential Investigative Summary written by DCF adult protective investigator Jessica Moreira reported that P.P. himself denied to Ms. Moreira that he had been pepper sprayed on July 20, 2017.

26. APD has failed to present evidence sufficient to establish Count I of the Administrative Complaint. No one witnessed the alleged pepper spraying. Eyewitnesses saw no pepper spray and saw P.P. display no aftereffects of having been pepper sprayed. Officer Swarthout's report is the sole evidence supporting the charge, and it appears likely that Officer Swarthout inadvertently misattributed a statement of P.P.'s to Mr. Carter.

27. Count II of the Administrative Complaint alleges that Mr. Carter pepper sprayed P.P. on or about September 25, 2017, at the ECO Home group home.

28. The basis for this charge is Ms. Moreira's Confidential Investigative Summary. On or about September 26, 2017, the Florida Abuse Hotline received a report that Mr. Carter had pepper sprayed P.P. on two occasions. The first occasion was the July 2017 incident referenced in Count I of the Administrative Complaint. The second was alleged to have

occurred in January 2017, when Mr. Carter "was observed spraying pepper spray in [P.P.'s] eyes."^{2/}

29. Ms. Moreira testified that she investigated both alleged pepper spraying incidents. She spoke by phone to a man named Cole who claimed to be a neighbor of Mr. Carter's and to have been training to work at ECO Home when he witnessed Mr. Carter pepper spray P.P. Mr. Cole told her that P.P. was cursing and approaching Mr. Carter aggressively when Mr. Carter pepper sprayed him. Mr. Cole stated that they wiped P.P.'s eyes with a wet cloth. Mr. Cole, the sole purported eyewitness, could not tell Ms. Moreira the date on which the pepper spraying occurred.

30. Ms. Moreira conceded that she was taking Mr. Cole entirely at his word. She never met him in person and had no way of knowing if he actually trained at ECO Home.

31. Ms. Moreira interviewed P.P., who denied having been pepper sprayed by Mr. Carter. She interviewed Mr. Carter, who denied ever using pepper spray on P.P. or anyone else. She interviewed P.P.'s mother, who had no first-hand knowledge but believed that Mr. Carter pepper sprayed her son.

32. After conducting her interviews, Ms. Moreira reviewed Officer Swarthout's report of the July 17, 2017, incident at EduMatics. She accepted the report's statement that Mr. Carter admitted using pepper spray.

33. Ms. Moreira testified that she made verified findings of physical injury to P.P. Her findings were based on the eyewitness statement of Mr. Cole and Officer Swarthout's report, which in tandem she found to constitute a preponderance of the credible evidence. She testified that she "balanced" Mr. Carter's statement that he did not pepper spray P.P. against the mother's statement that Mr. Carter did use pepper spray, despite the admitted fact that P.P.'s mother had no first-hand knowledge. Ms. Moreira apparently gave no weight to P.P.'s denial that he had been pepper sprayed.

34. On cross-examination, Ms. Moreira noted that she had attempted to interview Coy Patterson, an employee of ECO Home, but had been unable to reach him. When asked if it would have been important to interview Mr. Patterson, Ms. Moreira answered, "It'd depend on what he had to say." She testified that it would not have been important to her if Mr. Patterson disputed her conclusions, because she had the statement of Mr. Cole.

35. Coy Patterson, who worked at ECO Home from December 2016 through February 2018, testified at the final hearing and stated that he never saw Mr. Carter use pepper spray or any method other than redirection on P.P. Mr. Patterson testified that residents of the home were never "disciplined" by staff. He dealt with P.P. frequently and never had a problem with him. P.P. would be agitated when he came back from a visit

with his mother, but was not aggressive and was readily redirected.

36. Most significantly, Mr. Patterson denied knowing anyone named Cole and denied that anyone had been trained at ECO Home during his two years working there.

37. Ms. Carrington, the behavioral assistant, worked 10-hour weekend shifts at ECO Home for over a year and never saw pepper spray being used. She never saw anyone in the home being disciplined by staff.

38. Mr. Carter testified that he never pepper sprayed P.P. in the home or anywhere else. He had no clue who Mr. Cole was, though he later discovered that someone named Cole lived across the street from P.P.'s mother. Mr. Carter believed that P.P.'s mother called the Florida Abuse Hotline on the day after he told her that she could not address his employees as "these bitches."

39. APD has failed to present evidence sufficient to establish Count II of the Administrative Complaint. There is an absolute failure to prove that the alleged pepper spraying occurred "on or about September 25, 2017." The Florida Abuse Hotline report that initiated the investigation of this charge alleged the pepper spraying occurred in January 2017. The sole witness to the alleged pepper spraying was someone named "Mr. Cole," who could not provide the investigator a date on which the pepper spraying occurred. The DCF investigator did

not meet Mr. Cole in person. Mr. Cole did not testify at the final hearing. Mr. Carter and Mr. Patterson denied knowing Mr. Cole and denied that anyone had been in training at ECO Home. Ms. Moreira downplayed Mr. Carter's denial and testified that Mr. Patterson's statement would have made no difference in light of the statement she obtained from the phantom Mr. Cole.

40. The only other evidence offered by APD was Officer Swarthout's report regarding the events of July 20, 2017, which is obviously insufficient to establish the charge that Mr. Carter pepper sprayed P.P. "on or about September 25, 2017."

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the parties and subject matter of this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

42. Petitioner is responsible for regulating the licensing and operation of group home facilities pursuant to section 20.197 and chapter 393, Florida Statutes.

43. Petitioner seeks to take action against Respondent's group home license pursuant to section 393.0673. In a proceeding to impose discipline against a license, APD bears the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. § 120.57(1)(k), Fla. Stat.; Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

44. The clear and convincing standard requires that:

[T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

45. The Administrative Complaint cites section 393.0673, which at the time of the alleged offenses, provided, in relevant part:

(1) The agency may revoke or suspend a license or impose an administrative fine, not to exceed \$1,000 per violation per day, if:

(a) The licensee has:

1. Falsely represented or omitted a material fact in its license application submitted under s. 393.067;

2. Had prior action taken against it under the Medicaid or Medicare program; or

3. Failed to comply with the applicable requirements of this chapter or rules applicable to the licensee; or

(b) The Department of Children and Families has verified that the licensee is responsible for the abuse, neglect, or abandonment of a child or the abuse,

neglect, or exploitation of a vulnerable adult.

46. The Administrative Complaint is entirely premised on the allegation that Mr. Carter twice pepper sprayed his client, P.P. The only direct evidence that either event occurred was a police officer's report that Mr. Carter told her he did it and the hearsay statement of Mr. Cole, a witness APD could not produce or even identify by first name. Mr. Carter credibly denied that he ever pepper sprayed P.P. Eyewitnesses denied that the events occurred. The alleged victim, P.P., told the DCF investigator that he was not pepper sprayed. This case would have failed to meet a far lesser standard than that of clear and convincing evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Agency for Persons with Disabilities issue a final order dismissing the Administrative Complaint in this case.

DONE AND ENTERED this 19th day of October, 2018, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2018.

ENDNOTES

^{1/} Ms. Mayweather-Gamble testified that Mr. Carter told her to call 911. Mr. Carter testified that he did not know who called the police. This was the only significant point on which their testimony did not agree.

^{2/} It is apparent at the outset that Count II of the Administrative Complaint did not give Mr. Carter adequate notice of the charge. Count II alleges that the pepper spraying occurred "[o]n or about September 25, 2017." In fact, the incident is alleged to have occurred sometime in January 2017. The only significance of September 25, 2017, in Ms. Moreira's report is that the caller to the Florida Abuse Hotline alleged that "the owner denied everything" on that date.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.