



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Eau Claire Academy

ORDER

ML-09-0074

DISCUSSION

The Department seeks to assess a forfeiture against the Eau Claire Academy because the Eau Claire Department of Human Services substantiated an allegation of abuse as a result of sexual contact by an Academy employee against one of its residents. The Academy seeks to bar admission of the substantiated finding because it contends that it improperly relies upon a polygraph report.

The Eau Claire Academy is a licensed residential care facility. One of its residents alleged that an employee had sexual contact with her. The employee initially denied the allegations, but after being given a polygraph test, and told he failed it, he apparently admitted the allegations. His actual admission is not in the record. Nor is any evidence concerning whether he voluntarily took the polygraph test. He has not appealed the finding of abuse as allowed by the Child Abuse Prevention and Treatment Act (CAPTA). 42 USC §5106a.

Although the rules of evidence do not generally apply to administrative hearings, the hearing officer must "give effect to the rules of privilege recognized by law." Wis. Stat. § 227.45(1). The privilege to prevent the admission of an honesty testing device is found at Wis. Stat. § 905.065. It states:

- (1) **Definition.** In this section, "honesty testing device" means a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty.
- (2) **General rule of the privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.
- (3) **Who may claim privilege.** The privilege may be claimed by the person, by the person's guardian or conservator or by the person's personal representative, if the person is deceased.
- (4) **Exception.** There is no privilege under this section if there is a valid and voluntary written agreement between the test subject and the person administering the test.

Under § 905.065 the right to claim any privilege regarding the employee's polygraph test rests solely with him and not with the Eau Claire Academy. Because he has not asserted the privilege, there is no valid claim to bar the admission of the test, and the Academy cannot assert it on his behalf. Thus, I cannot keep the substantiated finding of abuse out of the evidence merely because it is based upon an admission that would not have occurred without a polygraph examination. Section 227.45(1) requires me to admit that finding if it has reasonable probative value. The finding was based not only on the petitioner's polygraph

test but also his later admission, and he has never appealed that admission. Based upon this, I find that the finding has some probative value and will admit it.

Nothing in this ruling affects the Academy's right under Wis. Stat. § 227.45(2), to be "afforded adequate opportunity to rebut or offer countervailing evidence." This right to rebut extends to all evidence, including records and documents, and thus to the finding of abuse. The Department appears to believe that the finding cannot be challenged. Although it is true that the Academy's worker cannot challenge the finding if he at some point seeks a foster care license and it is raised there, the finding has no special status in these proceedings that make it unassailable. It does not pertain specifically to the Academy and the Academy has never had an opportunity to challenge it. I will give the finding whatever weight it is entitled to after all of the evidence is in the record.

Although the Academy can submit rebuttal or countervailing evidence, that evidence must still be relevant and have probative value. The Academy requests in its reply brief that the Department make the county official who substantiated the abuse available, but at this point it has not sufficiently shown that that testimony would be relevant. If the Academy seeks to show that its own employee did not abuse a resident, the testimony of the employee himself could better establish that point. If its purpose is to expose the county worker's investigative techniques without showing that its own employee never abused the resident, the county employee's testimony would be irrelevant in the current proceedings because whether he was treated fairly is not at issue. Regardless, I do not understand why the Department must make the county worker (or anyone else) available when the Academy has its own subpoena power.

Finally, the Academy raises the argument that it is not strictly liable for the actions of its employee. I agree, but this is a different issue than the one it raises in this motion. In the current motion, the Academy in essence is arguing that the evidence that one of its employee abused one of its residents lacks sufficient credibility to be considered. Questions concerning strict liability do not come into play until the Department establishes or the Academy concedes that the abuse actually occurred. If the Department establishes that abuse occurred, the Academy will be given every legitimate opportunity at the hearing to prove that it is not responsible for that abuse.

NOW, THEREFORE, it is

ORDERED

That the Department may submit evidence of a substantiated allegation of abuse made against the Petitioner's employee at the final hearing in this matter. Nothing in this ruling prevents the petitioner from submitting rebuttal or countervailing evidence as long as that evidence is relevant and probative.

Given under my hand at the City of Eau Claire, Wisconsin, this _____ day of _____, 2010.

Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
921/

cc: Michael F. O'Brien
Debra Bursinger