

IN THE COURT OF APPEALS OF IOWA

No. 3-481 / 12-2029
Filed July 24, 2013

NOEL CHRISTOPHER KURT,
Petitioner-Appellant,

vs.

**IOWA DEPARTMENT OF INSPECTIONS
AND APPEALS and IOWA DEPARTMENT
OF HUMAN SERVICES,**
Respondents-Appellees.

Appeal from the Iowa District Court for Buchanan County, Bradley J. Harris, Judge.

Noel Kurt appeals from the district court's affirmance of the Department of Human Services and the Department of Inspections and Appeals (as an agent for the Department of Human Services) finding he engaged in sexual exploitation as a counselor, therapist, or school employee. **REVERSED AND REMANDED.**

John J. Hines and Laura L. Folkerts of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, and Diane M. Stahle, Special Assistant Attorney General, for appellees.

Heard by Potterfield, P.J., and Danilson and Mullins, JJ.

POTTERFIELD, P.J.

Noel Kurt appeals from the district court's affirmance of the Department of Human Services and Department of Inspections and Appeals (as an agent for the Department of Human Services) finding he engaged in sexual exploitation as a counselor, therapist, or school employee. Kurt argues substantial evidence does not support the finding of the agency and adoption by the district court.

We reverse finding the decision of the administrative law judge is not supported by substantial evidence when the record is viewed as a whole. See Iowa Code § 17A.19(10)(f) (2009).

I. Facts and Proceedings.

This case turns on two different versions of events occurring in a therapist's office at the Independence Mental Health Institute (MHI) between the middle of January and March 6, 2009: one reported by A.V., an adolescent patient at MHI; the other recounted by Noel Kurt, a psychologist who worked at MHI for fifteen years. A.V.'s version of events, which accused Kurt of inappropriate sexual behavior, was admitted at the administrative hearing through nine different recorded statements, including a discovery deposition transcript and trial transcript from the trial of criminal charges based on A.V.'s allegations. Kurt's version, which denied the allegations made by A.V., was submitted through his live testimony at the administrative hearing.

MHI is operated by the Iowa Department of Human Services (DHS) and has three programs for children. The Cromwell Child's Center (Cromwell) is a unit for children ages seven through eighth grade who are in acute psychiatric distress and who pose an imminent danger to themselves or others. The

Adolescent Unit is for high school-aged children in the same psychiatric category. The Psychiatric Medical Institution for Children (PMIC) is a step-down unit for children in the other two units. It serves as a bridge between acute care and placement back in the community.

At the time A.V. made the allegations, Kurt was a fifteen-year employee of MHI as a psychologist for and administrator of Cromwell. Kurt consistently received favorable performance reviews, was generally well-liked by the staff and the students, and was regarded as a good psychologist. Kurt was known as a “very hard worker,” was “always eager to help out,” and had never been in trouble at work or in the community prior to A.V.’s report during his tenure at MHI.

As a psychologist at Cromwell, Kurt had one-on-one therapy sessions with patients. A large part of his work as a therapist dealt with incentivizing his patients to improve their behavior by giving them something to work for. This technique was known as “behavior contracting” or “behavior modification therapy.” For example, if Kurt determined that a patient desired to play basketball, Kurt would give the patient that opportunity as a reward for certain behavior. Kurt also used tangible items like pop and candy as rewards if he determined that it was something that a patient would work toward. Often Kurt had to purchase these tangible incentives himself because there was no money for it in the MHI budget. Sometimes Kurt purchased individualized items that a particular patient stated a preference for, such as cologne, mini-skateboards, or matchbox cars. At one point he created a puppet as a reward that a particular patient could work towards. In general, he would do what he thought would

motivate the children to improve their behavior. These formal treatment plans would be written down and progress would be recorded.

Cromwell and PMIC both had level systems that worked in conjunction with the treatment plans. Patients were placed on a level between one and four depending on their behavior and if they were meeting their goals. Patients were better rewarded for reaching higher levels. For example, Kurt might develop a plan that a patient would earn a can of pop if that patient reached and maintained level three by the following week. Kurt had a lot of success with this reward-based therapy. The notes in eleven of his fifteen yearly performance reviews mention that Kurt either did a good job or an excellent job implementing his behavior modification programs.

A.V. was admitted to the Cromwell Unit on May 15, 2008, when she was almost fourteen years old. A.V. had an extensive history of behavioral problems; she had been diagnosed with oppositional defiance disorder, parent-child relational disorder, and mood disorder. She had a record of self-injury, sexually acting out, disregarding boundaries, poor judgment, impulsivity, physical aggressiveness, and cruelty to animals. One of A.V.'s goals at the Cromwell Unit was to refrain from sexually inappropriate comments or sexually inappropriate behavior.

Kurt was A.V.'s therapist during her time at Cromwell. Kurt used a behavior modification plan to help A.V. improve her behavior. A.V.'s behavior improved; however, she continued to act out sexually by kissing, inappropriately touching, and asking out other female Cromwell patients. After her behavior improved, A.V. was transferred from Cromwell to PMIC on November 17, 2008.

Kurt was no longer A.V.'s assigned therapist, but his office was in the same building as the classroom where A.V. went to school. Maureen Janssen was A.V.'s new assigned therapist in PMIC.

In early January 2009, Kurt participated in a staff meeting initiated by MHI management. In the meeting, according to Kurt, staff members were advised that the institution was in grave financial straits. Management explained that, in part, this was because Cromwell was full and PMIC had open beds. PMIC was the only profit generating branch for MHI; so they advised the Cromwell staff to refer children from Cromwell to PMIC as soon as possible and to help maintain an increased number of children in PMIC. Management told the staff that they were to be supportive of children who moved to PMIC.

After this meeting, Kurt began to see children that were enrolled in PMIC. Between the middle of January and March 6, 2009, Kurt saw roughly thirteen PMIC children between one and twenty times each. He would only meet with a PMIC child if the child had requested to meet with him, either in person or by giving Kurt a note. When requested, Kurt would sit down and talk with the child in his office. He was not acting as a therapist—the children already had an assigned PMIC therapist. He was acting more like an informal school counselor. Kurt was not the only Cromwell staff member that met with PMIC children after the January staff meeting. Sue Woods, a social worker at Cromwell, acted in a similar manner, although not as frequently. The PMIC children typically would ask to meet with the Cromwell staff they knew from their previous time in Cromwell. The meetings with Kurt usually lasted for about twenty minutes. Kurt did not document the informal visits. PMIC teachers, therapists, and other staff

were aware that Kurt was having these meetings with the PMIC children; in part because the children sometimes left the classroom for the meetings. The content of the meetings was not generally discussed with the PMIC staff and the meetings were not coordinated with the children's PMIC treatment plans. Kurt always closed his door when he had meetings with children unless they asked him to keep it open. This was the common practice for therapy and counseling sessions at MHI. He had a window on his door and a window in the back of his office facing the parking lot. Oftentimes during the meetings, another staff member (Debbie Ehlers) would look in the window, see Kurt with a child, and—as long as the child was not crying or upset—walk in and have Kurt sign paperwork.

In mid-January 2009, after she was transferred to PMIC, A.V. approached Kurt and asked him to meet with her. Kurt stated that A.V. approached him because she wanted to work towards a home visit and she believed that his behavior modification program would help her do that. A.V. stated that she approached Kurt so that he would download some music onto an mp3 player that she had received for Christmas because Kurt was the staffer that sometimes did that for children. A.V. continued to request to meet with Kurt, and per his policy he continued to meet with A.V. Kurt met with A.V. more often than he met with any other PMIC child. They met roughly twenty times between the middle of January and March 6. During some weeks they met as often as four times.

In the twenty visits in early 2009, Kurt and A.V. would discuss A.V.'s family issues and behavior problems. Kurt had A.V. on an informal behavior modification program where she could earn different rewards. Kurt based this

program on A.V.'s level in PMIC. A.V. earned candy, a can of pop, an mp3 CD download, and two YouTube video views during her visits with Kurt. All of her rewards, except the candy, were based on her maintaining level two within PMIC.

During the time between the middle of January and the end of February 2009 while she was meeting with Kurt, A.V.'s behavior was improving. A.V. earned a home visit during the end of February. After the home visit, A.V.'s behavior dramatically deteriorated. She attempted to run away from PMIC and had to be held out of school. A.V. was held in the locked adolescent unit the following week. She later explained to Kurt that she was upset because nothing had changed at her home and that her older sister told her to do anything she could to get back home so they could make trouble together again. Some of the staff at MHI conjectured that A.V. had been acting out the week after her home visit with the hope of being kicked out of the institution.

About two weeks before their last visit, A.V. stated that she would like to work towards earning a pair of earrings. Kurt stated that this came about when A.V. heard him on the phone with his wife discussing earrings for their daughter. A.V. stated that she made this request because she only had one earring in and Kurt noticed and asked her about it. A.V. consistently asked about the earrings over a two-week period. On March 6, the day of their last visit, while Kurt was shopping for markers for his son, he came across some inexpensive peace-sign-shaped earrings. The earrings reminded him of A.V. because he recalled that she had used peace signs on a school project while she was at Cromwell. He purchased the earrings, which came in a set of six pairs for a total of five dollars (roughly \$0.80 per pair). Later that day, when A.V. was in his office for a

meeting, she again asked about the earrings. Kurt told her that he had to call Maureen Janssen, A.V.'s PMIC therapist, to make sure that A.V. could have them as a reward, if she earned them.

On March 10, 2009, A.V. reported to the PMIC director that she wanted someone to stop touching her. She told her mother that Kurt was touching her and had the PMIC registered nurse speak with her mother. The mother reported A.V. told her Kurt would touch her side, give her weird massages, and had touched her breast. A written report by A.V. made later on March 10 alleged Kurt had touched her breasts and hips and gave her massages. A.V. reported to a worker on March 11 that she and Kurt met four or five times a week for thirty minutes at a time in Kurt's office, that Kurt's touching "never progressed past touching on the hip, massaging or hugging except one time on [her] breast." A.V. stated she never asked for a hug, and Kurt never asked her to touch him. A.V. also reported Kurt would hold A.V.'s hand when Kurt would put YouTube videos on in his office during their meetings. A.V. stated Kurt purchased A.V. earrings at A.V.'s request as an incentive for A.V. to progress in the PMIC program. A.V. reported fearing Kurt's touching would get worse if A.V. continued to request things from him in exchange for progress. A.V. stated she asked other female patients if Kurt engaged in the same physical behavior with them, the other patients said he did not.

On March 13, 2009, Kurt responded to A.V.'s allegation in a written statement that in the preceding six weeks, he met with A.V. approximately twenty times. These meetings were initiated by A.V. who, in accordance with the Cromwell Unit procedure, would put a note in Kurt's notification envelope when

she felt she needed a meeting. All of these meetings took place with the office door closed. As with the other PMIC children he counseled, Kurt did not make “progress notes” of these meetings.¹ Kurt reflected that he would remove his hand whenever A.V. attempted to hold it during their meetings, and that any contact with A.V.’s chest occurred only when he gave A.V. a hug from behind and she pulled his arms down in front of her.

Kurt was questioned by several members of the MHI faculty regarding A.V.’s report on the same day: March 13, 2009. He reiterated his statements given in the written report, and also related that incentivizing good behavior through gifts is a technique he uses with all his patients. He was again interviewed on April 1, 2009. He stated he hugs patients because it shows support and encouragement, he massages patient’s shoulders when out in the ward, and massaged A.V. twice as she was going out the door. He stated A.V. pulled his arms forward when he was rubbing her shoulders on March 6, 2009.

In a meeting on April 29, 2009, Kurt admitted that he accessed A.V.’s personal email from his home after A.V. supplied him with the account’s password as a behavioral incentive. He reported the contents were mostly junk mail, but that she had received an email from a dating website.

In a written statement to police, A.V. reported that she felt Kurt’s penis press against her once when Kurt hugged her from behind. In an interview at the child protection center, A.V. stated Kurt told her there were forty-year-old guys trying to contact her when he checked her email.

¹ Kurt kept progress notes for every patient from the Cromwell Unit. Maintaining these notes was part of the Cromwell Unit procedure.

Kurt's employment was terminated May 12, 2009, for failing to report the meetings with A.V. and for failing to maintain appropriate boundaries with A.V. A child abuse assessment conducted June 19, 2009, concluded "not confirmed" for abuse. Further investigation was conducted as an addendum to this investigation on June 22, 2009. This investigation showed, among other things, that Kurt's meetings with other PMIC children were far less frequent than those he conducted with A.V. The conclusion of the addendum was to confirm Kurt's actions for sexual exploitation by a counselor and to place Kurt's name on the sex offender registry.

Kurt appealed this conclusion, but a hearing was not held until November of 2010 pending resolution of the related criminal charges. During a deposition for that trial, A.V. stated Kurt touched her breasts "at least two times" and that he touched her chest while they were wrestling on the office floor. At trial, A.V. testified to being touched on her breast at least three or four times. The jury returned verdicts of not guilty of all charges in the criminal proceeding.

A contested case hearing appealing the confirmed child abuse assessment took place November 15–17, 2010, before the Department of Inspections and Appeals. A.V. did not testify at the hearing, however, the following previous statements were admitted: records of her statements during the March eleventh and seventeenth interviews, her hand-written reports, video of her interview with the child protective worker, the transcript of her deposition for the criminal trial, and the transcript of her testimony at the criminal trial. Kurt, the director of PMIC, Kurt's supervisor, the initial abuse investigator, and the investigator who completed the addendum to the abuse report all testified.

These individuals testified regarding their roles in the investigation, the policies of the Cromwell and PMIC units, and their familiarity with Kurt and A.V.

In its decision, the administrative law judge (ALJ) declined Kurt's request to expunge or correct the child abuse report. It acknowledged A.V.'s history of dishonesty, but found her allegations should not be wholly dismissed as a result. It found Kurt's supervisor and the director of PMIC were more credible witnesses than Kurt regarding whether Cromwell staff were instructed to hold more one-on-one therapy with PMIC patients and whether notes should be kept regarding therapy. The ALJ also detailed discrepancies in A.V.'s testimony, but concluded that "A.V. consistently reported Kurt was hugging her, massaging her, and touched her breast on one occasion." It also found Kurt's testimony to not be credible regarding his discussion with A.V. about purchasing the earrings. The ALJ concluded by affirming the founded sexual exploitation report.

Kurt appealed to the district court, which affirmed the agency's decision. He appeals from these proceedings, arguing substantial evidence does not exist to support the decision.

II. Analysis.

A. Standard of Review.

The parties disagree about our standard of review on appeal. Kurt argues the standard should be for the correction of errors at law; the Department argues we should adopt a much more deferential standard as it has been clearly vested with the power to oversee child abuse cases.

Kurt's claim of error in the agency's factual determinations mandates reversal under chapter 17A when the agency decision is "[b]ased upon a

determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. . . .” § 17A.19(10)(f).

DHS is vested with discretion in the area of child abuse and the placement of those who perpetrate abuse on the offender registry. *See Grant v. Iowa Dep’t. of Human Servs.*, 722 N.W.2d 169, 177 (Iowa 2006). The statutory definition of child abuse includes “[t]he commission of a sexual offense with or to a child pursuant to chapter 709 . . . as a result of the acts or omissions of the person responsible for the care of the child.” Iowa Code § 232.68(2)(a)(3).² The same code section defines a “person responsible for the care of a child” as including employees of a facility providing care for a child, including a mental health center. *Id.* § 232.68(7)(c).

“When an allegation of child abuse occurs at a department-operated facility, the allegation shall be referred to the department of inspections and appeals for investigation or assessment.” Iowa Admin. Code r. 441-175.34. The Department of Inspections and Appeals (DIA) is not directly delegated this authority in the statute as enacted by the legislature. The DIA made a proposed decision in this case, which was adopted by DHS as the final decision of the agency after Kurt’s appeal of the proposed decision. DHS made no independent findings of fact.

Our supreme court has concluded the general DIA delegation of authority over health facilities “vests discretion in DIA to make a *factual determination* in a particular class of cases” which here is whether exploitation occurred by a staff

² Kurt was investigated under Iowa Code 709.15 for sexual exploitation.

member in a state-run health care facility. *Mosher v. Dep't of Inspections and Appeals*, 671 N.W.2d 501, 508 (Iowa 2003) (emphasis added).

The legislature has provided that “substantial evidence” means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Id. § 17A.19(10)(f)(1). An agency’s decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence. The adequacy of the evidence must, however, be viewed “in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it.” Iowa Code § 17A.19(10)(f)(3).

Id. at 509 (internal citation and quotation marks omitted). Because all of Kurt’s points of error pertain to the agency’s findings of fact, our review is for substantial evidence. *See id.*

We review to determine whether the evidence in this case “would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1). “In our fairly intensive review, we view the record as a whole, which includes a consideration of evidence supporting the challenged finding as well as evidence detracting from it.” *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 525–26 (Iowa 2012) (internal citations omitted).

Our review of the record as a whole is defined by our legislature as follows:

[T]he adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the

relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer *who personally observed the demeanor of the witnesses* and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Iowa Code § 17A.19(10)(f)(3) (emphasis added); see *Christiansen v. Iowa Bd. Of Educational Examiners*, 831 N.W.2d 179, 192 (Iowa 2013) (“In a substantial-evidence challenge to agency fact-findings, the court must consider any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses.” (internal citations and quotation marks omitted)). Here, the agency did not personally observe A.V. testify, and its credibility determination in her favor suffers from the absence of demeanor evidence.

B. Analysis

The agency found Kurt committed an act of sexual exploitation by a counselor, therapist, or school employee as defined in Iowa Code 709.15(b).

This section provides, in relevant part:

2. Sexual exploitation by a counselor or therapist occurs when any of the following are found: . . .

b. Any sexual conduct, with an emotionally dependent patient or client or emotionally dependent former patient or client for the purpose of arousing or satisfying the sexual desires of the counselor or therapist or the emotionally dependent patient or client or emotionally dependent former patient or client, which includes but is not limited to the following: kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act as defined in section 702.17.

. . .

Sexual exploitation by a counselor or therapist does not include touching which is part of a necessary examination or treatment provided a patient or client by a counselor or therapist acting within the scope of the practice or employment in which the counselor or therapist is engaged.

Iowa Code § 709.15.

Neither party contests Kurt was acting as a counselor, therapist, or school employee. Instead, Kurt argues, the agency improperly found he touched A.V. “for the purpose of arousing or satisfying [Kurt’s] sexual desires.” Kurt contends the agency reached this improper conclusion because it erred in three ways: by finding A.V. credible though A.V.’s allegations were inconsistent and the demeanor evidence important to a credibility determination was not available to the agency, by failing to view the adequacy of the evidence in light of all relevant evidence in the record, and by failing to consider both the evidence that supported the finding along with the evidence that detracted from the finding. We agree with Kurt that the evidence considered as a whole does not support the agency’s findings.

The DIA rested its determination on conclusory findings that A.V. was credible despite the inconsistencies and embellishments in her differing reports and that her reports support the intent element of the crime of exploitation by a therapist. Child protection worker Dupey, who conducted the second investigation, was presented by the DIA to bolster A.V.’s credibility. She testified that the first statements of A.V. could be reliable, but the later testimony given after her investigation contained embellishments. Dupey noted “children who are not telling the truth and/or whose motives may be to get someone in trouble by making allegations will typically embellish their account of what happened.” Dupey did note A.V. changed her story to add that she could feel Kurt’s penis against her after telling her story several times before. When asked, A.V. told Dupey she had not reported that detail previously because she was

embarrassed—even though she previously had no problem discussing sexual things and made detailed reports of three other instances of sexual abuse by others. Yet the agency selected the fifth interview of A.V.—one of a number of increasingly prurient reports on which to base its findings.

Kurt contends A.V. is not credible because she made prior reports that she was repeatedly sexually abused by her mother's boyfriend and a friend's brother. The reports were graphic in nature, involving claims of oral and vaginal sexual intercourse. A.V. did not make a similar claim here. Rather, she claimed Kurt hugged her, massaged her shoulders, touched her breast, and she could feel his penis while he hugged her from behind. A preponderance of the evidence supports the finding Kurt touched A.V.'s breast and she felt his penis during a hug for the purpose of arousing or satisfying the sexual desires of the counselor or therapist or the emotionally dependent patient or client.

We disagree that the evidence in the record substantially supports the agency's findings. After an intensive review of the record as a whole, including evidence supporting and detracting evidence from the agency's finding, and giving weight to the agency's credibility findings regarding those whose testimony it did witness, we find there is insufficient evidence that the events occurred as A.V. described them or that Kurt's intent and purpose was established. Of significance to our determination are A.V.'s apparently reckless embellishment of her allegations, her motivation to fabricate, and the transparency of Kurt's interactions with A.V. in the context of the institution.

A.V. initially reported a single act of hugging from behind and touching on her sides, this report escalated into wrestling on the floor by the time of the criminal trial. The agency found the witnesses noted "A.V. had not embellished her story other than the addition of feeling Kurt's penis press against her buttocks when he hugged her from behind." However, A.V.'s records of testimony show

she initially reported Kurt touched her side once, then that he touched her breast with flat hands, then that she could feel his penis, then during her deposition for the criminal trial that she was touched more than twice—maybe three times, during trial that she was touched three or four times, and finally that she and Kurt would put his hands on her breasts when he was trying to hold her down while wrestling. Many witnesses testified to A.V.'s dishonesty, including her mother regarding allegations made by A.V. of sexual abuse by others which were found to be untrue. The agency noted A.V. was known around the facility as the "toughest of the tough." Kurt reported A.V. once pulled his hands down in front of her chest as he was massaging her shoulders, and that A.V. had at times attempted to hold his hand while he used the computer mouse. A.V.'s history at the facility included problems with intrusiveness and sexual acting out.

Kurt's office was visible to any passerby, and none reported any sort of inappropriate touching, much less any "wrestling" behavior. The agency put emphasis on Kurt's decision to meet alone in his office with his door closed—though the office was fully visible to others through windows and Kurt met with other patients in that setting regularly. The agency also found Kurt was not credible in his testimony regarding a meeting addressing PMIC's economic problems. He understood that he should provide PMIC patients with assistance when they were moved from Cromwell. Others, including one witness which the administrative law judge noted did not like Kurt, understood they should only provide supplemental care for PMIC children for the short term after their transition from Cromwell.

The record shows Kurt met with A.V. more times than other children in her unit, bought her earrings as an incentive, rubbed her shoulders and gave her hugs occasionally, and checked her email as an incentive; he also may have misinterpreted a directive from a staff meeting. These decisions may not have been good professional choices. However, our decision is not whether Kurt followed all of the rules, it is whether he committed sexual exploitation and should be listed on the sex offender registry. We must examine this record for whether the evidence is “sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1).

We find the acceptance of A.V.’s allegations and rejections of Kurt’s denials are not supported by substantial evidence when viewing the record as a whole. We therefore reverse and remand for further proceedings consistent with this disposition.

REVERSED AND REMANDED.