

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-049

OCTOBER TERM, 2005

Lyndia Cobbett	}	APPEALED FROM:
	}	
	}	
v.	}	Human Services Board
	}	
Department of Aging & Independent Living	}	DOCKET NO. FH # 18,879

In the above-entitled cause, the Clerk will enter:

Appellant Lyndia Cobbett appeals from a Human Services Board decision upholding a ruling of the Department of Aging and Independent Living requiring that Cobbett undergo a mental health assessment in order to continue to receive vocational services. Cobbett contends: (1) the Department lacked authority to require a mental health assessment; and (2) she was denied due process when her fair hearing was conducted by an independent hearing officer rather than a member of the Board. We affirm.

Cobbett qualified for vocational services in 1997 and received some assistance from the Department in connection with several jobs which did not last. In December 1999, the Department=s regional manager notified Cobbett that, to obtain additional services to help her obtain employment, she would need to obtain a mental health status examination from a competent psychologist and follow the recommendations of the therapist, or the case would be closed. Although Cobbett did not undergo the evaluation, the Department did not close the case, but rather placed it on suspended status. Thereafter, in response to an inquiry from Cobbett in January 2004, the Department sent her another letter, explaining that her troubled relationships with employers, employees, and the public had interfered with her ability to maintain employment, and that a mental health examination was necessary for the Department to be able to provide additional services to help her achieve her employment goals. Cobbett appealed the Department=s decision, which resulted in a fair hearing before a hearing officer in July 2004. Cobbett represented herself at the hearing

The Department=s regional manager testified about complaints from Cobbett=s former employers concerning her use of profanity, angry outbursts, and abusive behavior toward other employees, as well as anger and profanity directed toward departmental staff. He underscored the Department=s view that, in light of her employment history, it was essential for Cobbett to undergo a mental health assessment as a prerequisite to the receipt of additional services designed to achieve her employment goals. Cobbett testified in her own behalf, denying the allegations, rejecting the necessity of a mental health assessment, and claiming that she had been the victim of racial discrimination and sexual harassment in her former jobs.

The hearing officer issued a written report in August 2004, finding that the Department was justified in concluding that Cobbett may have psychological problems that inhibited her ability to maintain employment, and that the requirement of a psychological assessment was reasonable. The finding was based on testimony that employers had reported Aincidents of out-of-control anger punctuated with swearing and profanity@ by Cobbett. The hearing officer also cited testimony that department staff had experienced similar behavior. While noting Cobbett=s testimony

disputing the claims and attributing her employment difficulties to racial stereotypes and harassment, the hearing officer found the employers' reports to be credible, based in part on Cobbett's demeanor at the hearing which included lengthy diatribes and claims that others were attempting to persecute her. Cobbett appealed the decision to the Board, which issued a written decision in December 2004, largely adopting the findings of the hearing officer and affirming the decision. This appeal followed.

We will uphold the Board's decision if the record contains any credible evidence that fairly and reasonably supports its findings, In re Potter, 2003 VT 101, & 10, 176 Vt. 574 (mem.), and will not disturb its interpretations of governing state statutes and regulations absent compelling indication of error. Jacobus v. Dep't of PATH, 2004 VT 70, & 23. Cobbett advances several arguments in support of her claim that the Department lacked authority to require a mental health assessment. None is persuasive. First, she contends the mental health assessment was unauthorized under federal regulations, noting that her employment goal of self-employment had already been established in the Individual Plan for Employment (IPE) developed in conjunction with the Department and signed by herself and her department counselor. She argues that a mental health assessment was not listed in the IPE as a service necessary to achieve her goal. The record shows, however, that a condition to which Cobbett and her counselor had expressly agreed in the IPE was to A[h]elp to obtain M[ental] H[ealth] counseling, @ a condition consistent with an earlier rehabilitation plan in which Cobbett had agreed that mental health counseling was a necessary service to achieve her objectives. Although Cobbett attempts to avoid this provision of the IPE by arguing that its meaning is unclear, or that it was coerced or uninformed, the provision states clearly Cas a condition to employment services Cthe Department's agreement to obtain mental health counseling for Cobbett and, by implication, Cobbett's agreement to participate in such counseling. Furthermore, nothing in the record credibly supports her allegation that the provision was coerced or involuntary. The provision for mental health counseling in the IPE also negates Cobbett's claim that the mental health examination was an additional requirement that triggered the need under federal regulations for a comprehensive reassessment or amendment of the IPE by the Department.

Cobbett further claims that the mental health assessment was unauthorized because it was unrelated to her stated goal of self-employment and unsupported by the evidence. The claim is undermined by the fact, as noted, that Cobbett had expressly agreed to mental health counseling as a condition of assistance in the IPE. Furthermore, the hearing officer and the Board found that the requirement was reasonable based on testimony that Cobbett had obtained several jobs with departmental assistance as a means to achieving her ultimate goal, but was unable to maintain employment because of disruptive behavior that included angry outbursts, the use of profanity, and abusive behavior. The hearing officer and Board also expressly found this testimony to be credible, despite Cobbett's denials and claims of harassment. See Havill v. Woodstock Soapstone Co., 2004 VT 73, & 21 (fact-finder's determination of credibility is based on its observation of the witnesses and is entitled to A great deference @). The fact-finder's conclusions in this regard are further bolstered by undisputed testimony of hostility and profanity directed toward department staff by Cobbett apparently unconnected to any allegations of sexual or racial discrimination. The record evidence was thus sufficient to support the Board's finding that a mental health assessment was a reasonable requirement for the provision of future services to help Cobbett achieve her employment goal.

Cobbett also maintains that federal law and her right to due process were violated when Cas authorized under Vermont law Ca hearing officer appointed by the Board, rather than a member of the Board itself, conducted her fair hearing. See 3 V.S.A. ' 3091(b) (A The hearing shall be conducted by the board or by a hearing officer appointed by the board. @). The claim was not raised below, and therefore was not preserved for review on appeal. USGen New England, Inc. v. Town of Rockingham, 2003 VT 102, & 39, 176 Vt. 104. Although Cobbett asserts in her reply brief that the argument relates to the Board's subject matter jurisdiction, and therefore may be raised for the first time on appeal, the claim is limited to the Board's authority to appoint a hearing officer; it does not concern the Board's jurisdiction or statutory authority to decide the matter under review. Accordingly, we conclude that the claim was waived.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice