STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-21-12

FLORA MUGENI,

Petitioner

v.

ORDER

MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondent

Before the court is a motion by respondent Department of Health and Human Services to seal the record. This motion is opposed by Petitioner Flora Mugeni.

The basis of the motion is 22 M.R.S. § 3474(1) which provides that records containing personally identifying information created in connection with the department's adult protective activities and activities related to an adult while under the jurisdiction of the department are confidential.

Under § 3474(3)(B), however, the department

> shall disclose relevant information to the court on its finding that access to those records may be necessary for the determination of any issue before the court. Access must be limited to in camera inspection unless the court determines that disclosure of the information is necessary for the resolution of an issue pending before it.

In this case DHHS skipped the steps of having the court determine that access may be necessary for the determination of an issue before the court and of submitting records for in camera inspection. Instead, it simply filed the administrative record. With some exceptions, the administrative record identifies the individual in question as "Mr. F" or redacts his name with the exception of the first letter of his last name. *See. e.g.,* R. 192. There

are, however, a few apparently inadvertent references in the administrative record where the full name is disclosed.

To cut to the chase, the court determines that disclosure of the information in the administrative record – with the exception of Ms. F's full last name – is necessary to the resolution of the appeal under 22 M.R.S. § 3474(3)(B). That means the administrative record shall not be sealed; the court is unwilling to make decisions on a secret record. The principle that court proceedings are open to the public is a fundamental tenet of our judicial system, protected by both the common law and the First Amendment. *Nixon v. Warner Communications.*, 435 U.S 589, 597 (1978); *FTC v. Standard Financial Management*, 830 F.2d 404, 408 & n.4 (1st Cir. 1987).

The court does not, however, see any reason why the full name of the individual in question needs to be disclosed or why he cannot be described as "Mr. F". or "the resident."[1] Because § 3474 aims to protect identifying information of adults under DHHS jurisdiction, the Department shall be allowed, if it chooses, to replace unabbreviated uses of Mr. F.'s last name with the abbreviated version. In that case the Department shall be allowed to reclaim the administrative record, substitute the necessary pages, provide copies of the substituted pages to counsel for petitioner, and refile the record.

Ms. Mugeni's filings to date demonstrate that the full name is not necessary for her to litigate the case. In briefing the appeal, therefore, both parties shall refer to the individual as "Mr. F" or " the resident." This is consistent with the identification of the individual throughout most of the administrative record

[1] Ms. Mugeni's motion to take additional evidence does not identify the individual by name but refers to him as "the resident." Her complaint refers to him as "John Doe."

The entry shall be:

Respondent's motion to seal the record is denied except that, as set forth above, respondent shall be permitted, if it chooses, to redact any references in the administrative record that identify the full name of the individual in question. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: January 19, 2022

Thomas D. Warren
Justice, Superior Court

Entered on the Docket: 01/21/22

Petitioner-Ronald Schneider, Esq.
Respondent DHHS-Shannon Collins, AAG
Intervenor Disability Rights Maine-Staci Converse, Esq. and Lauren Wille, Esq.

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ORDER

MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondent

Before the court is petitioner Flora Mugeni's motion to take additional evidence pursuant to Rule 80C(e).

This is an appeal pursuant to M.R.Civ.P. 80C and 5 M.R.S. §§ 11001-07 challenging an April 28, 2021 decision by the Chief Hearing Officer of Department of Health and Human Services (DHHS) finding that DHHS had correctly substantiated petitioner Flora Mugeni for abuse and neglect of a person with a disability – a client identified in the record as "Mr. F" and referred to in some of the filings as "John Doe."

The record indicates that Mr. F was a person diagnosed as having intellectual disability and diabetes mellitus. Certified Record (hereafter R.) 38. He died of hyperglycemia with ketoacidosis due to his diabetes on August 27, 2019. CR 48. The substantiation of Ms. Mugeni for abuse and neglect of Mr. F is a Level I substantiation, which is reported to registries maintained by the state and federal authorities. to Rule 80C(e).

The motion to take additional evidence is opposed by DHHS and by Intervenor Disability Rights Maine. Under Rule 80C(e), a motion to take additional evidence must be filed within 10 days of the filing of the record. Although DHHS and Intervenor argue that Ms.

Mugeni's motion was untimely, the court file reflects that the record was filed on August 30 and Ms. Mugeni's motion was timely filed 10 days later.[1]

The additional evidence that Ms. Mugeni seeks to add consists of the following: (1) a June 10, 2021 decision by the Board of Nursing, issued after the Chief Administrative Hearing Officer's decision in this case, and (2) evidence of and the rationale for the decisions by DHHS with respect to other individuals involved in the events leading to Ms. Mugeni's Level I substantiation. Several individuals received no sanction; one other individual received a Level II substantiation.

Ordinarily judicial review under Rule 80C and 5 M.R.S. §§ 11001-07 is confined to the record before the agency. 5 M.R.S. § 11006(1). However, additional evidence may be added to the record if the additional evidence

> is material to the issues presented for review and could not have been presented or was erroneously disallowed in proceedings before the agency.

5 M.R.S. § 11006(1)(B).

Nursing Board Dismissal

In this case the subsequent decision by the Board of Nursing could not have been presented to the agency, and the dispute is whether or not that decision is material to the issue presented for review. According to Ms. Mugeni, the Board of Nursing dismissed a complaint against Ms. Mugeni based on the events that led to the Level I substantiation, finding that there had been no violation of the laws regulating the practice of nursing.[2] Ms.

[1] Intervenor argues that the motion should be denied because no Rule 7(b)(1) (A) notice was included but if a 21 day notice is not included, the result is that opposing parties may be heard even if timely opposition is not filed. In this case both the opposing parties filed memoranda, and the court has considered them even though the DHHS opposition was not filed within 21 days.

[2] From Ms. Mugeni's submission, it does not appear that the Board of Nursing engaged in any discussion or analysis of the complaint or set forth any reasons for its dismissal.

Mugeni argues that DHHS based its Level I substantiation largely on Ms. Mugeni's status as a registered nurse and that, as a result, the Nursing Board's dismissal is material.

The problem with this argument is that, even if the alleged failures on which DHHS based its Level I substantiation would also arguably constitute violations of laws regulating the practice of nursing – which is not clear from Ms. Mugeni's motion –there is no requirement of which the court is aware that DHHS decisions have to be consistent with Nursing Board decisions. The motion to supplement the record by adding the Board of Nursing's dismissal is denied.

Evidence as to Substantiation or Non-Substantiation of Other Individuals

Evidence with respect to the sanctions or lack thereof imposed by DHHS on other individuals involved in the events that led to Mr. F.'s death was offered and disallowed by the Administrative Hearing Officer. Ms. Mugeni argues that this evidence was material and was erroneously disallowed. *See* 5 M.R.S. § 1106(1)(B).

This proceeding originated with an appeal by Ms. Mugeni from a decision by DHHS Adult Protective Services that it intended to impose a Level I substantiation. Final decisionmaking authority on Ms. Mugeni's appeal was delegated to the Chief Administrative Hearing Officer, Joseph Pickering (R. 159), and the appeal was referred to Administrative Hearing Officer Tamra Longanecker to hold a hearing, to make findings of fact, and to issue a recommended decision. R. 160-61. The substantiation or non-substantiation of other individuals in the events that lead to Mr. F's death was determined to be irrelevant by Hearing Officer Longanecker. R. 63. When Ms. Mugeni appealed to Chief Administrative Officer Pickering and raised that issue (R. 22, 23-24), Pickering ruled that

> whether other persons have or have not been substantiated has no bearing on whether Ms. Mugeni should be substantiated.

R. 3.

In the court's view, it is at least conceivable that the imposition of a sanction on Ms. Mugeni and no sanction or a lesser sanction on other individuals – if the others bore considerably more responsibility for Mr. F.'s death and if the disparity was sufficiently egregious – could support an argument that the agency's decision was arbitrary or capricious.[3] Ms. Mugeni already has set forth the Level II substantiation for one individual and the absence of any substantiation for others. (*See* R. 22, 23). As far as the court can tell, that is not disputed by the agency and the court will take that information as true. The record also details the actions and inactions of all of the involved individuals, including the persons who Ms. Mugeni contends should have been sanctioned in lieu of or in addition to Ms. Mugeni.

Accordingly, the court will accept additional evidence limited to the following: that Ms. Best and Messrs. Bourque and Robbins were not substantiated and that Ms. Yombe was issued only a Level II substantiation – points that Ms. Mugeni is already making. However, Ms. Mugeni is not simply seeking to limit her argument to what she contends is the arbitrariness of Ms. Mugeni's Level I substantiation compared to the actions of others. She is seeking to take evidence as to the basis for the DHHS decisions as to those other individuals. That would violate the general rule that inquiry into the mental processes of the agency decision makers is not permitted. *See Carl L. Cutler Co. v. State Purchasing Agent,* 472 A.2d 913, 918 (Me. 1984). To overcome that rule, a party challenging agency action must at least make a prima facie showing of bad faith or other improper behavior. Ms. Mugeni has made no such showing in this case. Ms. Mugeni has not filed a detailed statement in the nature of an offer of proof, and her suggestion that the taking of additional evidence might uncover some bias is the kind of fishing expedition that is precluded under *Cutler.*

[3] DHHS argues, inter alia, that the other individuals cited by Ms. Mugeni had different roles and responsibilities which explains any difference in treatment. The court believes the relevance of their roles and any differences between their roles and that of Ms. Mugeni goes to the merits of the appeal and cannot be decided on this preliminary motion.

The entry shall be:

Petitioner's motion to take additional evidence is denied except to the limited extent set forth above. The court specifies the further course of proceedings as follows: petitioner shall file her brief within 40 days of the date of this order, and respondent and intervenor shall file their briefs 30 days after service of petitioner's brief. Petitioner shall have 14 days after service of the last brief of any other party in which to file a reply brief. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: January 19, 2022

Thomas D. Warren
Justice, Superior Court

Entered on the Docket: 01/21/22

Petitioner–Ronald Schneider, Esq.
Respondent DHHS–Shannon Collins, AAG
Intervenor Disability Rights Maine–Staci Converse, Esq. and Lauren Wille, Esq.