

STATE OF NORTH CAROLINA
COUNTY OF RANDOLPH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DHR 00937

<p>Aaliyah McQueen Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services Division of Health Service Regulation Respondent.</p>	<p>FINAL DECISION</p>
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BACKGROUND

This matter was heard before the Honorable Selina Malherbe, Administrative Law Judge, on November 9, 2022, in the Office of Administrative Hearings in High Point, North Carolina.

APPEARANCES

For Petitioner: Jesse Hamilton McCoy II
Ali Rosenblatt (certified law student)
Sam Wolter (certified law student)
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For Respondent: William F. Maddrey
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APPLICABLE STATUTES AND RULES

N.C.G.S. § 131E-256, §150B-1, *et seq.*, 10A N.C.A.C. 13O .0101(1), and 42 C.F.R. § 488.301.

STIPULATED PROTECTIVE ORDER

A Stipulated Protective Order was entered in this matter on August 18, 2022.

ISSUE

Whether Respondent deprived Petitioner of property or otherwise substantially prejudiced Petitioner’s rights *and* exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it substantiated an allegation that, on or about November 16, 2021, Petitioner abused a resident at Elmcroft in Asheboro, North Carolina, by teasing the resident and squirting the resident with hand sanitizer until the resident suffered mental anguish, causing the resident to become upset and repeatedly asking Petitioner to stop.

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner’s Exhibit 1 was admitted into evidence.

Respondent’s Exhibits D, F, and G were admitted into evidence.

WITNESSES

For Petitioner: Petitioner

For Respondent: Jennifer Baxter

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (“ALJ”) makes the following Findings of Fact.

In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

Parties/Witnesses

1. Petitioner, at all times relevant to this matter, was employed as a Personal Care Aide at Elmcroft (the “facility”), an assisted living and memory care home in Asheboro, North Carolina that was subject to the provisions of N.C.G.S. § 131E-256. *See* N.C.G.S. § 131E-256(b). Petitioner testified on her own behalf.

2. Respondent, the Division of Health Service Regulation (“Agency” or “Division”), is a division of the North Carolina Department of Health and Human Services and an

administrative agency of North Carolina state government operating under the laws of North Carolina. The Agency is statutorily required to maintain the health care personnel registry (“Registry” or “HCPR”), which contains “the names of all health care personnel working in health care facilities in North Carolina” against whom the Agency has substantiated neglect, abuse, misappropriation, diversion of drugs, or fraud. N.C.G.S. § 131E-256(a)(1).

3. At all times relevant to this matter, Jennifer Baxter was a Nurse Consultant for Respondent and performed health care personnel investigations for the State and testified on behalf of Respondent.

Background and Incident Involving Petitioner and Resident M.A.

1. Petitioner was hired by the facility as a personal care aide on September 9, 2021. (Resp’t Ex. G)

2. Petitioner received training from the facility on both abuse and neglect. (Resp’t Ex. G)

3. Resident M.A. is a ninety-one-year-old resident at the facility. M.A. is only oriented to herself and has medical problems that include vascular dementia, anxiety, arthritis, depression, and hypertension. (Resp’t Ex. G)

4. On November 16, 2021, an incident was reported to the facility, alleging that Petitioner and another employee, Candis Cassidy, were: pulling, poking, and “knit picking” resident M.A. in the memory care unit of the facility; squirting hand sanitizer on resident M.A. while laughing at resident M.A.; that Resident M.A. became angry and asked Petitioner and Ms. Cassidy to stop; and that it was only after Petitioner noticed that other staff members were watching that Petitioner stopped and instructed Ms. Cassidy to “chill out.” (Resp’t Ex. D)

5. The facility investigated the incident and submitted a 5-Day Working Report to Respondent. (Resp’t Ex. D)

6. The facility terminated both Petitioner and Ms. Cassidy at the conclusion of their investigation of the incident. (Resp’t Ex. D)

7. Petitioner was specifically terminated for “taunting memory care resident by squirting hand sanitizer on the resident.” (Resp’t Ex. D)

8. As part of the facility investigation documents submitted to Respondent, the facility included the statements of three employees: Kimberly Frost, Latisha Wynn, and Suzanne Ojeda. (Resp’t Ex. D)

9. Ms. Frost stated that she observed Petitioner aggravating M.A. by squirting hand sanitizer on her, pulling at M.A. and “knit picking” her until M.A. became “very agitated and angry.” (Resp’t Ex. D)

10. Ms. Wynn stated that she saw Petitioner “poking” M.A. and “squirting hand sanitizer” on her while resident was asking them to “stop”. Petitioner did not stop until she noticed other employees were watching. (Resp’t Ex. D)

11. Ms. Ojeda stated she noticed M.A. was upset and could hear M.A. asking Petitioner and Ms. Cassidy to stop. Ms. Ojeda further stated that, once M.A. was calmed down and in her room, Petitioner entered M.A.’s room, “turned on the light and shook her and told the resident that she was going home.” (Resp’t Ex. D)

Registry Investigation

12. After reviewing investigation documents submitted by the facility, Respondent screened in the allegation of abuse against Petitioner for investigation. (Resp’t Ex. G)

13. As part of her investigation, Ms. Baxter interviewed Petitioner and the staff members of the facility. Ms. Baxter also reviewed Petitioner’s personnel file, resident M.A.’s medical records, and the facility investigation documentation. (Resp’t Ex. G)

14. Ms. Baxter interviewed Petitioner as part of her investigation. (Pet’r Ex. 1)

15. In her interview with Petitioner, Ms. Baxter confronted Petitioner about the allegations against her. (Pet’r Ex. 1)

16. Petitioner denied mistreating M.A. and squirting hand sanitizer on her. (Pet’r Ex. 1)

17. Petitioner informed Ms. Baxter that these allegations were due to Ms. Frost and Petitioner having an argument a couple days before because Ms. Frost thought Petitioner was talking about her. (Pet’r Ex. 1)

18. Petitioner specifically stated that Ms. Frost was the only employee who had a problem with her. (Pet’r Ex. 1)

19. In her interview with Ms. Baxter, Petitioner blamed Ms. Cassidy for the incident and stated that it was Ms. Cassidy who was talking and saying things that were agitating M.A. (Pet’r Ex. 1)

20. When Ms. Baxter asked if Petitioner thought other people could have thought she was teasing M.A., Petitioner stated, “No. No one else was around to see what went on. The other people who were working were sitting in the dining room on their phones.” (Pet’r Ex. 1)

21. As part of her investigation, Ms. Baxter also interviewed Ms. Frost, Ms. Wynn, and Ms. Cassidy. Ms. Baxter was unable to interview Ms. Ojeda. (Resp’t Ex. G)

22. Both Ms. Wynn and Ms. Frost stated they observed Petitioner squirting hand sanitizer on M.A. and M.A. getting upset. (Resp’t Ex. G)

23. Ms. Cassidy stated that M.A. and Petitioner were arguing over the bottle of hand sanitizer, and in trying to get the bottle away from M.A., some hand sanitizer got on M.A.'s pants. (Resp't Ex. G)

24. Abuse is the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain, or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm." 10A N.C.A.C. 130.0101(1), 42 CFR § 488.301. (Resp't Ex. G)

25. After her investigation, Ms. Baxter determined that Petitioner's actions met the statutory definition of abuse. (Testimony of Ms. Baxter 1:09:05-12)

26. On March 1, 2022, Respondent sent Petitioner a letter informing her of its decision to substantiate the allegation of abuse against Petitioner. (Resp't Ex. F)

Contested Case Proceedings and Hearing Testimony

27. Petitioner filed a Petition for a Contested Case Hearing on April 18, 2022, challenging Respondent's substantiation of abuse on the ground that the decision is "[b]ased on false allegations towards me I have been accused of abuse against me and I am now on the registry list based on lies." In her Prehearing Statement, Petitioner stated that the allegations against her were false.

28. Ms. Baxter's decision to substantiate the allegation against Petitioner was based on the information provided by the other staff members whose accounts were consistent with one another. Conversely, the statements from Petitioner and Ms. Cassidy were inconsistent and did not match. (Testimony of Ms. Baxter 55:40-56:55)

29. The undersigned finds the testimony of Ms. Baxter to be more credible and to carry greater weight.

30. Petitioner testified that her word was worth more than her coworkers. Petitioner did not provide any basis for why she should be considered more truthful than her coworkers. (Testimony of Petitioner 36:20-26)

31. The undersigned finds the testimony of Petitioner to be less credible and to carry lesser weight.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 131E and 150B of the North Carolina General Statutes.

2. All parties have been designated correctly, and there is no question as to misjoinder or nonjoinder.

3. The North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a Registry that contains the names of all health care personnel and nurse aides working in health care facilities who are subject to a finding by the Department that he or she abused a resident in a health care facility.

4. As health care personnel working in a health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. Elmcroft is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b).

6. “Abuse is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain, or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.” 10A N.C.A.C. 130.0101(1), 42 CFR § 488.301.

7. The exercise of the Agency’s discretion is entitled to great deference by the court, which should not substitute its interpretation of the law which the Agency is charged with enforcing, so long as “the Agency’s interpretation is reasonable and based on a permissible construction of the statute.” *Craven Reg’l Med. Auth.*, 176 N.C. App. at 58, 625 S.E. 2d at 844; and accord, *Good Hope Health Sys., LLC v. N.C. HHS*, 189 N.C. App. 534, 544, 659 S.E. 2d 456, 463 (N.C. Ct. App. 2008), *aff’d sub nom.*, *Good Hope Health Sys., LLC v. N.C. HHS*, 362 N.C. 504, 666 S.E. 2d 749 (2008).

8. N.C. Gen. Stat. § 150B-34(a) states, “The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.”

9. “Because Respondent is the agency charged with carrying out the provisions of the Registry statute, due regard is given in these proceedings to Respondent’s interpretation.” *Sauls v. NC DHHS*, 18 DHR 05219, 2019 NC OAH LEXIS 279, *12.

10. “Our obligation is to protect the health and safety of every resident, including those who are incapable of perception or are unable to express themselves. **This presumes that instances of abuse of any resident, whether cognizant or not, cause physical harm, pain or mental anguish.**” *Allen v. Department of Health and Human Services*, 155 N.C. App. 77, 85, 573 S.E. 2d 565, 570 (2002) (emphasis in original).

11. Taunting a resident and squirting hand sanitizer on a resident after a resident asks you to stop constitutes an act of abuse.

12. Residents residing in adult care homes are some of the most vulnerable citizens. They are dependent on the staff for total care and are unable to provide for themselves without help from the staff at the homes.

13. Petitioner did not present any evidence regarding why the credibility of Ms. Frost, Ms. Wynn, or Ms. Ojeda should be questioned.

14. At hearing, Petitioner specifically alleged that the witnesses that Respondent relied on in its investigation were either wrong or untrustworthy.

15. Respondent completed a fair and impartial investigation. Respondent’s investigation included interviews with other staff members and Petitioner. Respondent gave equal weight to both Petitioner and the other employees it interviewed.

16. The burden rests with Petitioner to demonstrate how Respondent erred in making its decision.

17. Petitioner had the burden to show by a preponderance of the evidence that Respondent deprived her of property or otherwise substantially prejudiced her rights *and* failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it substantiated one allegation of abuse against Petitioner. N.C. Gen. Stat. § 150B-29(a). Petitioner did not meet her burden.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent’s decision to place a finding of abuse next to Petitioner’s name on the Health Care Personnel Registry should be **AFFIRMED**.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision

resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 9th day of January, 2023.



Selina Malherbe

Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 9th day of January, 2023.



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