

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DHR 04948

<p>Atriech McNair 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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This contested case was heard by Michael C. Byrne, Administrative Law Judge, at the Office of Administrative Hearings in Raleigh, NC on April 18, 2023.

APPEARANCES

Mr. Charles Holton
Mr. Jacob Sugarman (certified law student)
Mr. Thomas Murphy (certified law student)
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EXHIBITS

Admitted For Petitioner:
Exhibits 1-3

Admitted For Respondent:
Exhibits 1-16

Exhibits 1, 3, 4, 5, 12, and 13 admitted without consideration of uncorroborated hearsay within the exhibits not subject to any established exception(s).

WITNESSES

For Petitioner:
Atriech McNair

For Respondent:
Carolie Atherton (remote testimony as permitted by order)
Stanetta Faison
Jeannette Strickland (remote testimony as permitted by order)
Melinda Russo

APPLICABLE STATUTES AND RULES

N.C.G.S. § 131E-256; N.C.G.S. § 150B

ISSUE

Whether Respondent correctly substantiated and entered on the Health Care Personnel Registry an allegation that Petitioner abused “T.S.,” an intellectually disabled resident of a group home, in 2022 while working as health care personnel.

PREHEARING MOTIONS

The Tribunal granted the parties’ joint motion to sequester witnesses and gave appropriate instruction to the witnesses regarding sequestration.

The Tribunal heard arguments on a motion from Petitioner that the burden of proof should be assigned to Respondent pursuant to N.C.G.S. 150B-25.1 on the grounds that Petitioner being placed on the Health Care Personnel Registry was a “fine or civil penalty.” The Tribunal denied the motion and assigned the burden of proof to the Petitioner. N.C.G.S. 15-B-25.1; Naa Ayorkor Abordo v. North Carolina Department of Health and Human Services, Murdoch Developmental Center, 2022 WL 17552038, 22 DHR 01762.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, including documents admitted into evidence, the Tribunal makes the following findings of fact. In making the findings of fact, the Tribunal has weighed all admissible evidence 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 witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in this contested case.

Introduction

1. This contested case arose from Petitioner Atriech McNair's ("Petitioner") appeal of Respondent NC Department of Health and Human Services, Division of Health Service Regulation ("Respondent") substantiating an allegation that Petitioner abused "T.C.," (initials used to protect privacy), a resident at C.R.E.S.T. Group Home #4 ("facility")¹ by engaging in improper sexual fondling of T.C. in May 2022 on multiple occasions while she was under his care as health care personnel (the "Incidents").

Parties and Witnesses

2. Petitioner worked at the facility as health care personnel on a part-time basis as a "Weekend Residential Specialist." (Res. Ex. 7). Petitioner was a credible witness unless otherwise stated.
3. Stanetta Faison ("Faison") is an administrator with "C.R.E.S.T.," ("Crest"), an enterprise which operates residential homes serving clients with various conditions, including persons such as T.S. suffering from cognitive/intellectual disabilities. Faison was generally a credible witness barring some evasive answers regarding matters contained in T.S.'s records regarding T.S. making false statements regarding her peers. (Pet. Ex 1-3, Res. Ex. 13, 16).
4. Carolie Atherton ("Atherton") has 30+ years of experience as a licensed clinical social worker. T.S. has been Atherton's patient since 2018. T.S. first reported her allegations about the Incidents to Atherton during a session with her (Res. Ex. 12). Atherton was a credible witness unless otherwise stated.
5. Jeannette Strickland ("Strickland") is T.S.' legal guardian. T.S. also related her allegations about the Incident to Strickland. Strickland was a credible witness unless otherwise stated.
6. Melinda Russo is a licensed RN-MSN employed by Respondent to conduct investigations of allegations of abuse, neglect, or exploitation by health care personnel. Russo investigated the Incidents for Respondent and substantiated the allegations against Petitioner. Russo was a credible witness unless otherwise stated and presented her testimony in a professional manner.
7. T.S. at the time of the Incidents was a resident of the facility. At the time of the Incidents she was approximately 63 years of age. While T.S. has intellectual disabilities, all of Respondent's witnesses agreed that T.S. was capable of communicating and expressing herself. Specifically, there was nothing about T.S.'s physical or mental impairments that would prevent T.S. from testifying in this case. Despite this, T.S.'s guardian (Strickland) and therapist (Atherton) concluded that it would not be appropriate for T.S. to testify (Strickland testimony).

¹ The facility is listed as "C.R.E.S.T. Group home #3" in Russo's report (Res. Ex. 2). Petitioner stated that he worked in home #4. (*Id.* at p. 2). Resolution of this discrepancy is not necessary to decide this case.

The Incidents

8. The facility had six residents (Petitioner testimony). Two of the residents, including T.S., were female. At some time commensurate to the Incidents the other female appears to have left the facility.
9. T.S. had not previously accused any staff member of improper or abusive conduct. T.S. did have a documented history of making false statements about her peers. (Pet. Ex. 1-3). Elimination of this conduct was listed as a goal for T.S. by facility staff. Id. However, the facility's records indicate that at or around the time of the Incidents T.S. failed to meet this goal on at least one date, indicating she made at least one false statement or accusation regarding a peer. (Res. Ex. 16).
10. Petitioner, in his interviews with Russo, stated that T.S. "lied a lot," and had a history of making false statements against her peers. (Res. Ex. 2, pp. 2-3). However, Petitioner could not provide the dates on which T.S. supposedly made these false accusations. Petitioner also told Russo in his interview that T.S. "was very cognitive to me." Id. Petitioner's testimony regarding T.S. is largely self-serving.
11. Petitioner worked in the facility on weekends. He had worked there for four years at the time of the Incidents. There was no evidence of any other resident or staff member making prior accusations of abuse, neglect, exploitation, or other impropriety against Petitioner, during his employment with the facility or otherwise.
12. Atherton testified that T.S., in a session in late May 2022, told Atherton that Petitioner "had been physically inappropriate with her." (Res. Ex. 12, admitted subject to hearsay exclusion). Atherton documented T.S.'s claims in a letter to facility dated May 26, 2022:

Mr. Leon,² shortly after arriving at the group home, began touching her breasts. She states that she would go to the staff office, and he would approach her and ask to touch her breasts. He would slip his hand under her shirt and bra and fondle her. She says he would ask to kiss them, and he would suck on her nipples. She states it happened several times and she would always feel uncomfortable and would leave the room. ... T.S. reports that Mr. Leon touched her butt cheeks over her clothing a few times as well.

Id. (admitted subject to hearsay exclusion).

13. Atherton informed both the facility and T.S.'s guardian of T.S.'s allegations.
14. The facility management investigated T.S.'s claims and prepared a report. (Res. Ex. 13, admitted subject to hearsay exclusion). The report notes that T.S. was consistent in her recounting of the Incidents and that Petitioner denied any improper actions regarding T.S.

² Petitioner was known by this name or nickname to facility residents.

15. The facility management report states, “There is no history of [T.S.] making false allegations against staff or peers.” Id. This conclusion is inaccurate; T.S.’s records show that elimination of false statements regarding her peers was a formal goal of T.S.’s treatment plan, which she had failed to meet on at least one occasion commensurate with the timeframe of the Incidents. (Pet. Ex. 1-3; Res. Ex. 16). It was on this point that Faison provided evasive answers, prompting further questioning by the Tribunal as authorized by 26 N.C.A.C. 3.0105 (4).
16. The facility report states that while there is a “high probability” T.S.’s claims were founded, “C.R.E.S.T. has insufficient evidence to determine the validity of these allegations.” (Res. Ex. 13).
17. Petitioner was fired as a result of the facility investigation. However, he was not terminated because of T.S.’s allegations, but because he admitted taking some residents by his home while taking the residents on an outing. (Petitioner and Faison testimony).
18. The facility reported Petitioner to Respondent for suspected “sexual abuse of a consumer.” Id.
19. Following this report, Russo screened the allegations against Petitioner and conducted a formal investigation. Russo prepared a report substantiating the allegations of abuse against Petitioner regarding the Incidents. (Res. Ex. 1, admitted subject to hearsay exclusion). Russo testified, and Exhibit 1 reflects, that T.S. made substantially the same allegations regarding Petitioner to Russo as she did to Atherton and her guardian, per their testimony.
20. However, Exhibit 1 contains substantial amounts of hearsay, to which Petitioner objected and for which no exception was established. Thus, while Respondent may have considered such information in the process of reaching its decision, the Tribunal may not do so. “The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall govern in all contested case proceedings, except as provided otherwise in these Rules and G.S. 150B-29; 26 N.C.A.C. 3.0122;” James E Best v. North Carolina State Health Plan, 2018 WL 1234227, 17 INS 01910.
21. That hearsay issue is of critical importance to this case. T.S.’s allegations against Petitioner, as told to Atherton, Strickland, and Russo, and as testified to by them, are hearsay. The Tribunal specifically invited Respondent to establish a hearsay exception for this testimony, to which Petitioner objected. None was forthcoming.
22. T.S. did not testify in this case, either through her own volition or that of those making such decisions on her behalf, even though all the evidence was that she was physically and mentally capable of doing so. No witness testified that they saw any inappropriate interaction – or any interaction at all – between Petitioner and T.S.
23. Petitioner appeared and testified under oath and was subjected to cross-examination by Respondent. Petitioner specifically denied any inappropriate conduct toward, or abuse of,

T.S. Respondent did not, on cross-examination, elicit any information from Petitioner that substantially undermined Petitioner's credibility in the eyes of the Tribunal.

24. Thus, the evidentiary summary of this case is: (a) all evidence supporting T.S.'s allegations against Petitioner was hearsay, for which no exception was established, and (b) Petitioner provided direct testimony, under oath and subject to cross-examination, that he did nothing improper involving T.S.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case. N.C.G.S. § 131E and Article 3 of N.C.G.S. § 150B.
2. All parties have been correctly designated and there is no question of misjoinder or nonjoinder.
3. Notice of Hearing was provided to all parties in accordance with N.C.G.S. § 150B-23(b).
4. The burden of proof is on the Petitioner. N.C.G.S. § 150B-25.1.
5. To the extent that the Findings of Fact contain Conclusions of Law, and *vice versa*, they should be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946). A court or other hearing authority need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).
6. N.C.G.S. § 131E-256(a)(1) requires Respondent to maintain a registry ("health care personnel registry" or "HCPR") containing the names of all unlicensed health care personnel working in health care facilities in North Carolina who have substantiated findings that they abused, neglected, or exploited a resident in those facilities. N.C.G.S. § 131E-256(a)(1); *Gail T Taylor v. Nurse Aid Registry*, 20 DHR 03636 (2020).
7. Petitioner's former employer, Crest, is a "health care facility" for purposes of the HCPR. N.C.G.S. § 131E-256; N.C.G.S. § 122C-3(f).
8. As health care personnel working in a health care facility, Petitioner is subject to N.C.G.S. § 131E-256.
9. The facility's report determining that it was unable to substantiate abuse allegations against Petitioner, while relevant, is not determinative. Nor is Russo's report substantiating abuse determinative of whether Petitioner abused T.S. *Sierra Perry v. Department of Health and Human Services, Division of Health Service Regulation*, 2022 WL 1201804, 21 DHR 03246.

10. 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. Rashawna Williams Health and Human Service Registry v. NC Department of Health & Human Services Division of Health Service Regulation, 2023 WL 2711281, 22 DHR 01747.
11. “Hearsay is ‘a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. The Administrative Procedure Act, N.C.G.S. Chapter 150B, provides that in all contested cases, “[e]xcept as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence shall be admitted.” North Carolina Department of Public Safety v. Ledford, 246 N.C. App. 266, 291 (2016) citing N.C.G.S. § 8C-1, Rule 801 (2015), N.C.G.S. § 150B-29(a).
12. Moreover, it is the Tribunal’s duty to determine the weight and sufficiency of the evidence and the credibility of the witnesses, and also to determine what testimony the Tribunal may and should accept or reject in whole or in part, as well as any inferences to be drawn from the facts. Id. at 299, citing City of Rockingham v. North Carolina Department of Environmental and Natural Resources Division of Water, 224 N.C. App. 228, 239 (2012).
13. N.C.G.S. 150B-29, which is the primary evidentiary statute in appeals brought, as here, under Article 3 of Chapter 150B, contains some “wriggle room” with respect to hearsay issues not present in the North Carolina Rules of Evidence. In pertinent part:
 - (a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, **when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section.**

N.C.G.S. § 150B-29(a) (emphasis supplied).
14. The problem in this case is readily apparent: “when evidence is not reasonably available.” T.S. was reasonably available and was mentally and physically capable of giving testimony about her allegations against Petitioner.

15. However, either T.S. or person(s) making decisions about her welfare decided that T.S. would not testify. There may be perfectly good reasons for this decision based on therapeutic judgments or concerns for T.S.'s state of mind, and the Tribunal will not question those determinations.
16. Conversely, the Tribunal is required, beyond question, to follow the law: hearsay, in the absence of an established exception, is not admissible in North Carolina. All of Respondent's evidence that Petitioner abused T.S. was hearsay testimony, and not admissible. By contrast, Petitioner testified under oath, and subject to cross-examination, that he did nothing inappropriate to T.S.
17. The Tribunal cannot find in Respondent's favor under such circumstances. See Williams, above: "All the findings and conclusions in Ms. Skinner's Investigation Conclusion Report, which even lean toward wrongdoing by Petitioner, are hearsay and, as such are inadmissible."
18. This case certainly raises suspicions about Petitioner's conduct. However, suspicions are just that. Though protecting vulnerable citizens of this State against abuse, neglect, and exploitation is an issue of paramount concern, such conduct cannot be established except under legally admissible evidence.
19. The admissible evidence in this contested case does not support Respondent's conclusion that Petitioner abused T.S. Diane Adams v. North Carolina Department of Health and Human Services, Healthcare Personnel Registry, 11 DHR 02987 (2011).
20. Petitioner satisfied the burden of proving that Respondent substantially prejudiced Petitioner's rights, failed to act as required by law or rule, exceeded its authority and failed to use proper procedure when Respondent substantiated the allegations that Petitioner abused T.S. and entered those findings against Petitioner on the North Carolina Health Care Personnel Registry.
21. Petitioner's name must be removed from the Health Care Personnel Registry. Pamela Byrd v. North Carolina Department of Health and Human Services, 13 DHR 12691 (2013).

FINAL DECISION

The agency action is **REVERSED**. Respondent shall remove Petitioner's name from the North Carolina Health Care Personnel Registry and the records of the North Carolina Health Care Personnel Registry shall reflect that the finding of abuse was not established.

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 21st day of April, 2023.

A handwritten signature in blue ink that reads "Michael C. Byrne". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

Michael C. Byrne
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 21st day of April, 2023.



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