

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF SAMPSON

11 DHR 6488

Mary Ann Barnes,

Petitioner,

v.

North Carolina Department of Health and
Human Services, Division of Health Service
Regulation, Health Care Personnel Registry,

Respondent

DECISION

THIS MATTER came on for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on March 13, 2012, in Elizabethtown, North Carolina.

APPEARANCES

Petitioner: Mary Ann Barnes, *pro se*
P.O. Box 184
Garland, North Carolina 28441

For Respondent: Josephine N. Tetteh
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner neglected a resident of Magnolia in Clinton, NC and entered findings of neglect by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-255
N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23
42 CFR § 488.301
10A N.C.A.C. 13O.0101

EXHIBITS

Respondent's exhibits 1-5, 7, 10-12, 15-18 were admitted into the record.

WITNESSES

Mary Ann Barnes (petitioner)
Laveta Penny (supervisor)
Dawna Parker (supervisor)
Pamela Anderson (HCPR Nurse Investigator)

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the 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 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. From the sworn testimony of witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Mary Ann Barnes, was a housekeeper at The Magnolia (Magnolia) in Clinton, North Carolina. Magnolia is an assisted living facility and therefore subject to N.C. Gen. Stats. §131E-255 and §131E-256. (T pp 8, 49-51)
2. Although Petitioner's primary job was as housekeeper, she was trained on taking care of residents with Alzheimer's; Alzheimer's related care; Dementia; Resident profiles, care plans and Resident Registries; and resident rights. Petitioner had been employed at Magnolia for three (3) years and had received the same training as other staff at Magnolia. (T pp 8-9, 31; R Ex 1)
3. Petitioner was working at Magnolia on September 22, 2010. While working, Petitioner observed two Magnolia residents, Resident EJ and Resident NC, engaged in a fight. Residents NC and EJ are eight-eight (88) years and eighty-one (81) years old respectively. Both residents have dementia. Resident NC has a history of aggressive behavior. (T pp 9, 31-32, 56; R Exs 5, 7)
4. At all times relevant to this proceeding, Laveta Penny ("Penny") was a nurse at Magnolia in Clinton. Penny walked into the hallway and observed Petitioner leaning on a cleaning cart watching the fight between the residents with her elbows resting against the cart. (T pp 16-17, 23, 25-26; R Ex 2)
5. Penny asked Petitioner to go and get help. Penny then intervened with the residents. All staff at Magnolia, including housekeepers, are trained and required to intervene to protect residents. Resident EJ received injuries as a result of the fight. (T pp 12, 20, 36; R Exs 2, 15)

6. At all times relevant to this proceeding, Dawna Parker (“Parker”) was the Executive Director at Magnolia. Following the incident, Petitioner was interviewed by Parker. Petitioner told Parker that she did not intervene because she (Petitioner) did not want to get hurt. After talking to Petitioner, Parker terminated Petitioner. Parker sent the results of her investigation to the Health Care Personnel Registry (HCPR). (T pp 13, 27, 30-31; R Exs 3, 4)

7. In her testimony, Petitioner did not contest the assertions that she was leaning on the cart as the two residents fought or that she did nothing to intervene or try to redirect the residents. She merely asserted that she “did the best [she] could.”

8. At all times relevant to this matter, Pamela Anderson (“Anderson”) was the regional supervisor for the Northeastern and Southeastern regions of the Health Care Personnel Registry (HCPR). Anderson has been a nurse for twenty-eight (28) years. Anderson’s office received and investigated the allegation that Petitioner had neglected Resident EJ at Magnolia. (T pp 49-50; R Ex 17)

9. The HCPR reviewed Petitioner’s personnel file, and interviewed available witnesses. The HCPR also attempted to contact Petitioner for an interview at the address listed in Petitioner’s personnel file and at the phone number listed for Petitioner. None of the HCPR’s attempts at contacting Petitioner were successful. (T pp 51-52; R Exs 10-12)

10. Based on the review of all the information, the HCPR concluded that Petitioner had neglected Resident EJ. (T pp 53-55; R Ex 18)

11. Following the conclusions of the investigation, the HCPR attempted to notify Petitioner of the decision to substantiate the allegation of neglect by letter dated March 31, 2011 at the address on file for Petitioner. (T pp 54-55; R Ex 16)

12. The North Carolina Administrative Code at 10A NCAC 13O .0101 defines “neglect” by adopting the definition from the Code of Federal Regulations at 42 CFR Part 488 Subpart E. “Neglect means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.” 42 C.F.R. § 488.301 (T p 53; R Ex 15)

13. At the conclusion of the thirty-day (30) period for appeal, the HCPR notified Petitioner that the finding would be listed on the HCPR. Petitioner subsequently called the HCPR and provided a current mailing address. (T p 58; R Ex 17)

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

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 correctly designated and there is no question as to misjoinder or non-joinder.

3. As a housekeeper working in a health care facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.

4. “Neglect” is defined as “a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.” 10A NCAC 13O.0101, 42 CFR §488.301

5. On or about 9/22/2010, Mary Ann Barnes, a health care personnel, neglected a resident (EJ) by failing to provide necessary services, thereby resulting in physical harm and injury.

6. Respondent did not act erroneously because there is sufficient evidence to support Respondent’s conclusion that Petitioner neglected Resident EJ.

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 neglect by Petitioner’s name on the Health Care Personnel Registry should be **UPHELD**.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Resources, Division of Health Service Regulation.

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties’ attorney of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge’s decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge’s decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 16th day of July, 2012.

Donald W. Overby
Administrative Law Judge