

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 11069

V.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF HEALTH SERVICE
REGULATION, HEALTH CARE
PERSONNEL REGISTRY,
Respondent.

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DECISION

APPEARANCES

For Petitioner: Marcel A. McCrea
Phillips and McCrea, LLP
210 East Innes Street
Salisbury, NC 28144

ISSUE

APPLICABLE STATUTES AND RULES

N.C. GENERAL STATUTE §131E-255

N.C. GENERAL STATUTE §131E-256

N.C. GENERAL STATUTE §150B-23
42 CFR §488.301
10A N.C.A.C. 130.0101

EXHIBITS

Respondent's Exhibits 1 through 26, 30, 31, 33 through 36 were entered.

WITNESSES

Diane Smith
Atonya Staley
Crystal Wilson
Gaynell Ledwell
Ronita Stewart
Lisa Reeves
Linda Langley
Robin Leto
Teresa Burke
Linda Stout

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, Dianne Smith was a Certified Nurse Assistant at Siler City Care and Rehab in Siler City, North Carolina. Siler City Care and Rehab is a residential care facility and therefore subject to North Carolina General Statutes §§131E-255 and 131E-256.

2. Dianne Smith had been a Certified Nurse Assistant (hereinafter referred to as CNA) for over 25 years and had been employed at Siler City Rehab for nearly 25 years. Her dates of employ had been from on or about September 19, 1986 until on or about May 24, 2011. (T. pp. 9-10; Respondent's Exhibits 2, 4, and 33)

3. In her position as a CNA, Dianne was responsible for assisting patients with basic needs and functions such as feeding, bathing, dressing, walking, helping the patient with transfers to and from activities, etc. and other activities customarily associated with the normal job functions of a CNA. (T. p10; Respondent's Exhibit 3)

3. During her 24-plus years of employment at Siler City Care and Rehab, Dianne received just one written disciplinary action. (T. p 32; Respondent's exhibits 5 and 33)

4. During her employment, Dianne was rated 3 (meets expectations) or 4 (exceeds expectations) in all areas of performance evaluations. (T. pp. 33-34; Respondents exhibit 33)

5. During her employment, Dianne received several accolades and awards including being awarded CNA of the Month several times, CNA of the Year, and Caregiver of the Year. (T. p 34.)

6. Dianne was held in high regard by her peers and superiors alike. She was described as a good CNA, who took care of her patients, a good employee, and one who was always at work. (T. pp104, 142, 248, Respondent's Exhibit 14, page 2)

7. On May 11, 2011, Dianne was working on the 300 hall of Siler City Care and Rehab and was assigned to care for a resident referred to throughout these proceedings as CH. CH was afflicted with Alzheimer's Disease, had no little or no short term memory and was unable to effectively communicate. Dianne did not actually provide his care on May 11, 2011, as some high school students cared for him that day. (T. p15, 121)

8. On May 11, 2011, at least 5 people other than Dianne provided care for CH, not including the high school students. In fact on each of three daily shifts, one CNA and one nurse are assigned to provide care to each patient. That is, at least six people care for CH within a 24-hour period at Siler City Care and Rehab. (T. pp. 154-155)

9. On May 12, 2011, just prior to giving CH a bath, Dianne noticed bruising on his chest. (T. pp. 18-19)

10. On May 12, 2011, after noticing the bruising, Dianne immediately informed Teresa Burke, LPN (licensed practical nurse) who was working in a supervisory position to Dianne. Dianne followed the proper protocol by notifying her supervisor of the bruise. (T. pp. 19, 229-231; Respondent's Exhibits, 6, 7, and 12)

11. On May 12, 2011, Teresa Burke informed Crystal Wilson of CH's bruise. Crystal Wilson was then employed as a RN supervisor and worked in a supervisory capacity to Teresa Burke. Crystal Wilson did not go to CH to personally observe the bruising. Nothing further was done by Siler City Care and Rehab personnel about CH's bruising at this time. (T pp. 99-100, 229-232)

12. On May 17, 2011, Dianne was accused of abusing CH by Atonya Staley. After this accusation was lodged Dianne Smith was suspended from work on May 17, 2011.

13. Atonya Staley was employed as a CNA at Siler City Care and Rehab from April 11, 2011 until July 20, 2011 (T. pp. 55, 92)

14. Atonya Staley's short term of employment ended with Siler City Care and Rehab when she was terminated for stealing a cell phone. (T. pp. 87, 113-114, 151-152)

15. Atonya Staley alleged that she saw Dianne abuse CH on May 11, 2011. (T. pp. 57-95; Respondents Exhibits 9 and 10)

16. Atonya Staley did not report this alleged abuse to anyone until May 17, 2011. (T. pp. 62-63, 69, 71-72, 74-87, 131, 147-148 ; Respondent's Exhibit 9)

17. Atonya Staley was the only person who allegedly witnessed Dianne abuse CH.

18. Atonya Staley initially reported the alleged abuse on May 17, 2011 to Ronita Stewart, RN (Respondent's Exhibit 9). Lesa Reeves, Regional Human Resources Director interviewed Atonya on June 2, 2011. Linda Langley, Regional Director of Clinical Operations for North Carolina, was present for that interview on June 2, 2011. (T. pp. 166-167, 181-182; Respondent's Exhibit 20). Atonya Staley was interviewed again on July 6, 2011 by Robin Leto, then investigator with the Health Care Personnel Registry. (Respondent's Exhibit 10) Atonya Staley also gave testimony about the alleged abuse during this proceeding. Each time she gave testimony, her account of the abuse she allegedly witnessed varied widely.

19. When Ronita Stewart testified in this proceeding she acknowledged that Atonya Staley's testimony in court was quite different from the information she provided when Ronita Stewart interviewed Atonya on May 17, 2011. (T pp. 147-149)

20. When Lesa Reeves testified in this proceeding she acknowledged that Atonya Staley's testimony in court was quite different from the information she provided when Lesa Reeves interviewed Atonya on June 2, 2011. (T pp. 174-175)

21. When Linda Langley testified in this proceeding she acknowledged that Atonya Staley's testimony in court was quite different from the information she provided when Lesa Reeves interviewed Atonya in Linda Langley's presence on June 2, 2011. (T pp. 185-187)

22. When Robin Leto testified in this proceeding she acknowledged that Atonya Staley's testimony in court was quite different from the information she provided when Robin Leto interviewed Atonya on July 6, 2011. (T pp. 219-221)

23. Atonya Staley completely lacks credibility. Her testimony was confusing, contradictory, misleading, and filled with ambiguity. The undersigned finds that Atonya Staley's testimony under oath at the hearing, compared with the other credible evidence in the record, was not trustworthy. Examples of Ms. Staley's testimony that bear on her lack of credibility are as follows:

a. Ms. Staley testified that she didn't tell anybody on May 11, 2011 because "I was crying. I was cussing. Nurses was getting me in hall, pulling in me in the room so everybody won't hear it. I didn't know what to do at the time because when my nurse, that supposed to be the nurse in charge on that hall, act like she didn't see a incident, I didn't know what to do that day." On July 6, 2011, Ms. Staley stated Petitioner's May 11, 2011 alleged conduct was bad enough to call 911, yet she didn't tell anyone until May 17, 2011. (T. p. 70). In other testimony by Ms. Staley she asserts she didn't tell anyone because she didn't want to be treated badly or that she was afraid of being fired. (T. pp. 68-69). These assertions are contradicted by Ms. Staley's own testimony when she admits that she trusted Priscilla Spivey. Ms. Staley testified, "I trusted her because her family member was my sister's care giver at the cancer center, so that was the only nurse she trust (sic)." (T. 63). Ms.

Staley's testimony that she could didn't trust anyone at the facility to tell them about the alleged assault prior to May 17, is not worthy of belief.

b. All of the evidence of record indicates Ms. Staley is the only one who states she witnessed or heard anything in resident CH's room. A post hearing visit by the undersigned and counsel by Petitioner and Respondent to CH's room and vicinity near his room at the Siler City Care and Rehab, including the in charge nursing station, revealed the close proximity of CH's room and the in charge nursing station. I take official notice that if there had been any loud noises or voices emanating from CH's room, it is highly likely it would have been heard by someone at the in charge nurse station or others working in the vicinity. The sworn testimony and other evidence of record proves by a preponderance of the evidence that no one other than Ms. Staley alleges that any loud or unusual conduct emanating from CH's room. Nurse Director, Ronita Stewart's unequivocal testimony was that she did not hear anything that day. (T. p. 260).

c. When Ms. Staley was asked on cross examination why she had used the word resident rather than CH when she stated in Respondent's Exhibit 10 that she heard Petitioner talking ugly to residents, Ms. Staley responded, "At that time, I was mad because of what I seen in my eyes and what I'll never forget, and I probably would have told anything then." Thus Ms. Staley's own admission under oath brings into question the veracity of her earlier statements of what she alleges she witnessed involving CH and Petitioner.

d. The undersigned finds as a matter of fact that Ms. Staley's testimony concerning her involvement with an outside CAN's cell phone was not truthful.

e. Ms. Staley testified at the hearing that she saw Petitioner choking CH. (T. p. 74). Never before had Ms. Staley stated to anyone in the investigation that she had observed Petitioner choking CH.

24. Linda Stout was a CNA at Siler City Care and Rehab and worked with Dianne Smith for three and a half years and had never heard Dianne curse or anything. She had never witnessed nor heard about Dianne treating a resident roughly or being unkind to a resident. She had never heard of nor seen any negative job performance from Dianne. (T. pp. 248-249 Respondent's Exhibit 8)

25. Teresa Burke had worked with Dianne since January 2002. She stated that Dianne's job performance was excellent. She opined that you could not ask for a better CNA than Dianne. She stated that Dianne always took very good care of her residents. Teresa stated that she never witnessed nor heard about Dianne treating a resident roughly nor being unkind to a resident. Teresa further stated that she would trust her family member or herself in the care of Dianne. (T. pp. 227, 239-240; Respondent's Exhibit 12)

26. Crystal Wilson had worked with Dianne for six years and stated that Dianne was a good CNA. She said that Dianne always took care of her patients, was dependable, always at work, and always on time. She further stated that she never witnessed nor heard about Dianne treating a resident roughly or being unkind to a resident. (T. pp. 104, 106-107; Respondent's Exhibit 14)

27. After Atonya Staley lodged the allegations against Dianne Smith, Ronnie Stewart conducted an investigation on behalf of Siler City Care and Rehab. Her investigation consisted of observing the bruising and interviewing Dianne Smith, Atonya Staley, Crystal Wilson, Linda Stout, Teresa Burke, CH, and Gaynell Ledwell, CH's daughter. CH was nonresponsive. Atonya Staley was the only person claiming to have first hand knowledge of the alleged abuse. (T pp. 132-158; Respondent Exhibits 6, 9, 11, 13, 17 and 24.)

28. After Ronnie Stewart's investigation was completed Dianne Smith was terminated on May 24, 2011.

29. Crystal Wilson sent a 5-day working report of the alleged incident to the Health Care Personnel Registry Section on or about May 24, 2011. Crystal Wilson acknowledged having no first hand knowledge as to any of the information provided in the report. (T. p 103, 108-111; Respondent's Exhibit 19)

30. The 5-day report triggered an investigation that was performed by Robin Leto on behalf of the Health Care Personnel Registry.

31. Robin Leto's investigation consisted of reviewing the interviews previously conducted and re-interviewing some of the parties. Again, Atonya Staley was the only person claiming to have first hand knowledge of the alleged abuse. Following Robin Leto's investigation, she substantiated the allegations and a finding of abuse was placed in the Nurse Aide Registry and Health Care Personnel Registry against Dianne Smith. (Respondent's Exhibits 7, 8, 10, 12, 14-16, 18, 21, 35)

32. Dianne Smith timely and properly filed a petition for a contested case hearing to have the findings of abuse removed.

BASED ON THE FOREGOING FINDINGS OF FACT, THE UNDERSIGNED ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. §§ 131E and 150B *et seq.*

2. All parties have been correctly designated 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 they abused a resident in a health care facility or who have been accused of abusing a resident if the Department has screened the allegation and determined that an investigation is warranted.

4. As a Certified Nursing Assistant, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. Siler City Care and Rehabilitation of Siler City, North Carolina is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).

6. "Abuse" is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." 10A N.C.A.C. 130.0101, 42 CFR § 488.301.

7. Respondent's decision to substantiate this allegation of abuse against Petitioner is not supported by a preponderance of the evidence. Therefore, Respondent substantially prejudiced Petitioner's rights, acted erroneously, arbitrarily or capriciously by placing a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry and the Nurse Aide Registry.

8. There is insufficient evidence to find Petitioner abused CH on May 11, 2011 or any other date relevant to this proceeding. The undersigned finds as a fact and a matter of law that the statements given by the sole eye witness regarding an alleged assault by Petitioner against CH as a part of the facilities and Respondent's investigation and under oath at the hearing are not sufficiently reliable to meet due process standards of fairness and of proof by a preponderance of the evidence.

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 by Petitioner's name on the Nurse Aid Registry and the Health Care Personnel Registry should be **REVERSED**.

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. North Carolina General Statute §350B-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 North Carolina General Statute §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 or 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 _____ day of August, 2012.

JOE L. WEBSTER
Administrative Law Judge

A copy of the foregoing was mailed to:

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