

OFFICE OF
ADMINISTRATIVE HEARINGS

Aug 02 2012

STATE OF NORTH CAROLINA
COUNTY OF RANDOLPH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 11867

Lorrie Ann Varner
Petitioner,

v.

North Carolina Department of Health and
Human Service Regulation Health Care
Personnel Registry Section
Respondent.

DECISION

THIS MATTER came for hearing before the undersigned, J. Randall May, Administrative Law Judge, on May 2, 2012 in Courtroom #4A of the High Point Government Complex in High Point, North Carolina.

APPEARANCES

For Petitioner: Liana K. Rebollo, Esq.
Stuart L. Pratt, Esq.
Thomas P. Holderness, Esq.
Robinson, Bradshaw & Hinson, P.A.
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Charlotte, North Carolina 28246

For Respondent: Thomas E. Kelly
Associate Attorney General
North Carolina Department of Justice
P.O. Box 629
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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 abused a resident of Monarch – Vocational Opportunities in Asheboro, North Carolina and entered a finding of abuse by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. § 150B-2
42 CFR § 488.301
10A N.C.A.C. 130.0101

EXHIBITS

Respondent's Exhibits 1 – 19, 22 – 26, and 28 – 32 were admitted into the record.

WITNESSES

For Petitioner: Lorrie Ann Varner
Karen Hunsucker
Gail Cooper
Faye Hall
Cathy Herrera

For Respondent: Lorrie Ann Varner
Donna Wright
Zackery Colbert
Faye Gaster
Bunny Schoolcraft
Amanda Turner
Linda Waugh

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 and conclusions of law. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof, 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 witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witnesses 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 action, Petitioner was employed as a Developmental Specialist with Monarch – Vocational Opportunities (“Monarch”) in Asheboro, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (Tr. pp. 15-16, 48; Resp. Ex. 2)

2. As a Developmental Specialist, Petitioner's duties primarily involved providing direct care to patients at Monarch, including assistance with personal hygiene and managing patient behaviors. (Resp. Ex. 2)

3. Monarch provides vocational training and care for individuals with intellectual and developmental disabilities. Monarch is a health care facility as defined by NC. Gen. Stat. § 131E-256; therefore, its employees can be placed on the Health Care Personnel Registry.

4. Petitioner completed all required training related to her job responsibilities, including instruction on abuse, neglect, client rights, and exploitation prevention. (Tr. pp. 50-56; Resp. Ex. 1, 3-5)

5. Monarch offers employee training called "Getting It Right." This training instructs staff to use a hands-off approach when dealing with residents. Petitioner received "Getting It Right" training on December 19, 2006. (Tr. p. 81; Resp. Ex. 5)

6. D.M. is a nonverbal resident of Monarch. At the time of the incident, D.M. was approximately forty-seven (47) years old and suffered from autism, profound mental retardation, seizures, urinary incontinence, and frequent headaches. (Tr. pp. 17, 56-57, 98, 108; Resp. Ex. 28)

7. Petitioner was familiar with D.M.'s Behavioral Support Plan ("Support Plan") and helped to create D.M.'s Person Centered Plan ("PCP"). (Tr. pp. 60, 62; Resp. Ex. 28-29)

8. The Support Plan provides, in relevant part: "[i]f D.M. does not redirect back to his task...allow him to leave his work area and move around, going for a walk with him outside if needed...Be sure not to crowd him when he is agitated." Further, "if D.M. is trying to scratch, pinch, or twist your arm, then it is time to give him more space to avoid D.M. from feeling trapped or caged in." (Tr. pp. 58-60; Resp. Ex. 28)

9. Neither the Support Plan nor the PCP included any instruction for a care provider to touch or rub D.M.'s ear as a method of redirection. (Tr. pp. 62-63, 65; Resp. Ex. 28-29)

10. Petitioner reported to work at Monarch on May 31, 2011, the relevant time period for this action. That morning, Petitioner worked with D.M. in the vocational section of Monarch. (Tr. p. 21)

11. Donna Wright ("Wright"), Zackery Colbert ("Colbert"), Ocie G. Andrews ("Andrews"), and Faye Gaster ("Gaster") were in the vocational room of Monarch working with residents on the date of the incident. Each of the aforementioned individuals had an unobstructed view of D.M. and Petitioner. (Tr. pp. 76-77, 89-90, 105-108)

12. Wright noticed D.M. attempting to leave his work area in the Monarch vocational room. According to Wright, Petitioner first struggled to keep D.M. at his work area by pushing

D.M. against the wall. Eventually, Wright witnessed Petitioner pull D.M.'s ear in order to stop him from leaving his work area. (Tr. pp. 77-78)

13. D.M. was neither stumbling nor falling before Petitioner pulled his ear. (Tr. pp 78, 92, 109).

14. As D.M. is a non-verbal resident, he did not shout or cry as his ear was being pulled by Petitioner. (Tr. p. 81)

15. Upon witnessing Petitioner pull D.M.'s ear, Wright stepped outside the vocational room and reported the incident by placing phone calls to Joyce Whelan ("Whelan"), Wright's supervisor, and to Bunny Schoolcraft ("Schoolcraft"). Schoolcraft was Petitioner's supervisor at the time of the incident. (Tr. pp. 79-80, 120-122; Resp. Ex. 22)

16. Schoolcraft contacted Amanda Turner ("Turner"), Regional Director for Monarch, and informed her that several Monarch staff members witnessed Petitioner pull D.M.'s ear in the vocational room. (Tr. p. 120-122; 131)

17. On May 31, 2011, Petitioner was suspended by Monarch pending an investigation into the allegation that Petitioner abused D.M. (Tr. p. 70; Resp. Ex. 25)

18. Turner began an investigation on behalf of Monarch into the allegation of abuse on May 31, 2011. As part of her investigation, Turner collected written statements from Wright, Colbert, Gaster, Andrews, and Petitioner. In addition, Turner individually interviewed the witnesses that provided statements. (Tr. p. 131; Resp. Ex. 8, 11, 14, 17, 19)

19. Wright saw Petitioner shove D.M. and pull his ear on the morning of May 31, 2011. (Tr. pp. 82-84, 131-132; Resp. Ex. 10-11)

20. Colbert witnessed Petitioner pull D.M.'s ear on the morning of May 31, 2011. In response, Colbert intervened and escorted D.M. out of the building to take a walk. (Tr. pp. 91, 95-96; Resp. Ex. 13-14) As Colbert walked out of the vocational room with D.M., Petitioner told D.M., "I don't care what you do." (Tr. p. 95; Resp. Ex. 13)

21. Gaster also saw Petitioner pull D.M.'s ear. After the incident, Gaster observed D.M.'s ear and noted that it appeared pink or red from the altercation with Petitioner. (Tr. pp. 108-113, 133-134; Resp. Ex. 16-17)

22. Andrews saw Petitioner and D.M. pushing and shoving one another and then saw Petitioner pull D.M.'s ear. (Tr. 133-135; Resp. Ex. 19)

23. Turner produced an Investigation Summary, which substantiated a finding of abuse against Petitioner and made a recommendation for termination. The conclusion was based on the information collected over the course of her investigation, including the written statements and interviews with staff at Monarch. (Tr. pp. 136-138; Resp. Ex. 24)

24. On June 28, 2011, Turner produced an Incident Response Improvement System (“IRIS”) report and sent it to Sandhills Center, the local management entity (“LME”) for Monarch. The IRIS report was also sent to the Department of Social Services (“DSS”) and the Health Care Personnel Registry (“HCPR”). The report documented the facility investigation and the subsequent finding of abuse against Petitioner. (Tr. pp. 138-139; Resp. Ex. 23)

25. The HCPR investigates allegations of abuse, neglect, exploitation, and misappropriation of resident property involving health care personnel that are employed by health care facilities. If an allegation is substantiated, the employee will be listed in the HCPR. The HCPR covers most licensed facilities that provide patient care in North Carolina. Accordingly, health care personnel at Monarch are covered by the HCPR.

26. At all times relevant to this action, Linda Waugh (“Waugh”) was employed as a Nurse Investigator for the HCPR. She was charged with investigating allegations against health care personnel in the north central region of the state. Monarch was part of the territory covered by Waugh. (Tr. p. 129)

27. Upon receipt of the IRIS report from Monarch, Waugh “screened in” the case for further investigation. (Tr. pp. 146-147)

28. Waugh reviewed Petitioner’s Monarch personnel file and determined that Petitioner received all the training necessary to properly perform her job duties. (Tr. pp. 148-149; Resp. Ex. 30)

29. On August 30, 2011, Waugh interviewed Wright as part of her HCPR investigation. The statement obtained through this interview was consistent with Wright’s previous statement to the Monarch, as well as her testimony at trial. (Tr. pp. 84, 152-154; Resp. Ex. 12)

30. Waugh also collected Colbert’s statement as a part of her HCPR investigation. This statement was consistent with Colbert’s statements to the facility, as well as his testimony at trial. (Tr. pp. 96-97, 154-155; Resp. Ex. 15)

31. Gaster also provided a statement to Waugh as part of the HCPR investigation. According to Gaster, she never saw anyone rub or touch D.M.’s ear to calm him down in the past. Her statement to Waugh was consistent with her statements to Monarch, as well as her testimony at trial. (Tr. pp. 113-114, 156; Resp. Ex. 18)

32. Waugh spoke with Schoolcraft on August 30, 2011. Schoolcraft indicated that she had never seen anyone touch or rub D.M.’s ear to calm him down. She also reiterated that any such contact was not described as an approved practice in his PCP. (Tr. pp. 122-123, 128; Rep. Ex. 22)

33. Waugh collected Andrews' statement as part of the HCPR investigation on August 30, 2011. This statement was consistent with her interview recorded during the Monarch investigation. (Tr. pp. 156-158; Resp. Ex. 19)

34. Waugh interviewed Turner and collected her statement as part of the HCPR investigation. Turner described the Monarch investigation and detailed her findings and decision to substantiate the allegation of abuse against Petitioner. (Tr. p. 140, 158; Resp. Ex. 26)

35. On August 30, 2011, Waugh spoke with Petitioner. Waugh collected Petitioner's statement as a part of her HCPR investigation. According to Petitioner, D.M. took her hands and put them on his face. Petitioner stated that along with rubbing his ears, rubbing D.M.'s face was a technique used to calm D.M. when he was agitated. Waugh found Petitioner's statement to be inconsistent with those obtained from Gaster, Wright, Andrews, and Colbert. (Tr. pp. 70-72, 149-151; Resp. Ex. 9)

36. Waugh reviewed D.M.'s medical records, Support Plan, and PCP. Waugh found D.M. to be non-verbal and confirmed that he suffered from autism, profound mental retardation, seizures, urinary incontinence, and frequent headaches. However, Waugh noted that the PCP included no instructions involving rubbing D.M.'s ears to redirect him during moments of agitation or anxiety. (Tr. pp. 151-152, 158-159; Resp. Ex. 29, 31)

37. Waugh assessed all the information obtained through her investigation, including the written statements collected by Turner, the HCPR interviews, and the documentation provided by Monarch. Waugh concluded that on May 31, 2011 Petitioner abused D.M. when she pushed D.M., pulled his ear, and restrained him. Waugh wrote an investigation conclusion report that documented her determination. (Tr. pp. 161-162; Resp. Ex. 31)

38. Petitioner was notified by letter that a finding of abuse would be listed against her name in the HCPR. Petitioner was further notified of her right to appeal. (Tr. pp. 162-163; Resp. Ex. 32)

39. Petitioner is not disabled and has the ability to work. The listing on the HCPR limits her ability to work in the health care field. Petitioner is still able to work in other fields.

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

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §§131E and 150B-23 *et seq.* All necessary parties have been joined and have received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of law are Findings of Fact, they should be so considered without regard to the given labels.

2. 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.

3. As a Developmental Specialist, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. Monarch of Asheboro, 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).

5. “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.

6. The definition of the term “willful” within the context of “abuse” has been analyzed by the North Carolina Court of Appeals. In reviewing a substantiated finding of abuse by the Health Care Personnel Registry, the Court of Appeals explained that “while petitioner’s behavior might not be the most egregious instance of abuse ... we believe that in the context of this extremely regulated profession and the patient’s dependency on a person in a trusted position of nurse aide, “the definition of ‘abuse’ ... may fairly be understood to reach behavior short of more flagrant forms dealt with in other settings.” *Allen v. N.C. Dep’t of Health and Human Servs.*, 155 N.C. App. 77, 85, 573 S.E.2d 565, 570 (2002).

7. The *Allen* decision rested on an opinion from the District of Columbia Court of Appeals. In that decision, the Court of Appeals held that “[p]etitioner argues that she did not intentionally (“willfully”) abuse the resident, but the regulation cannot reasonably be understood to mean that she must have acted with a “bad purpose” (*i.e.*, to abuse); rather, “willful” in this regulatory context denotes a conscious decision to do the act which the law forbids.” *Hearns v. District of Columbia Dep’t of Consumer & Regulatory Affairs*, 704 A.2d 1181, 1183 (1997).

8. On May 31, 2011, Petitioner abused a resident (“D.M.”) when she pulled D.M. by the ear, pushed D.M., and restrained D.M. resulting in physical harm and pain.

9. Respondent's decision to substantiate this allegation of abuse against Petitioner is supported by a preponderance of the evidence. Therefore, Respondent did not substantially prejudice Petitioner’s rights, act erroneously, arbitrarily, or capriciously, by placing a substantiated finding of abuse against Petitioner’s name on the Health Care Personnel Registry.

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

DECISION

The undersigned hereby determines that Petitioner has not successfully carried her burden and that Respondent's decision to place a finding of abuse at 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 Services, 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 1st day of August, 2012.

J. Randall May
Administrative Law Judge
Fax: (919) 431-3100