

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 12594

Timothy John Murray Petitioner vs Department of Health and Human Services Division of Health Service Regulation Respondent	DECISION
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THIS MATTER came for hearing on remand from Superior Court before the undersigned, Craig Croom, Administrative Law Judge, on October 17, 2014 in Court Room A of the Office of Administrative Hearings in Raleigh, North Carolina. This matter was originally heard before, J. Webster, Administrative Law Judge, on February 29, 2012 in the Office of Administrative Hearings. On June 15, 2014 Judge Webster upheld the Health Care Personnel's decision to substantiate the allegation of neglect, and place Petitioner's name on the Health Care Personnel Registry. On August 17, 2012 Director of the Division of Health Service Regulation issued The Final Agency Decision whereby he adopted the findings of fact and conclusions of law issued by ALJ Webster in the June 15, 2012 decision. On March 11-12, 2014 this matter came before Superior Court Judge Robert H. Hobgood on a Petition for Judicial Review. On April 17, 2014 Judge Hobgood remanded the case to the Office of Administrative Hearings to allow for additional testimony from J.R., the parents of J.R., and Vernita Dotson.

APPEARANCES

For Respondent: Candace Hoffman
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For Petitioner: Gregory Conner
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PROCEDURAL BACKGROUND

1. On or about October 17, 2011, the Petitioner herein filed a Petition for Contested Case Hearing in the Office of Administrative Hearings alleging he had been falsely accused of

physically abusing a client by the name of J.R. at his place of employment, A Small Miracle. Petitioner was notified of the entry of his name by certified mail on or about September 27, 2011. The Petition was timely.

2. A Notice of Contested Case and Assignment pursuant to N.C. Gen. Stat. §150B-23, 33(b)(4) was entered on October 26, 2011 by the Honorable Julian Mann, III, Chief Administrative Law Judge. An Order for Prehearing Statement and a Scheduling Order were also entered on this date.

3. Notice of Hearing was filed on or about January 25, 2012 giving notice that the instant case was set for hearing on February 29, 2012 at 1:30 p.m. at the Office of Administrative Hearings, Raleigh, North Carolina. During the hearing, Petitioner and Respondent presented to the Court testimony of witnesses and exhibits.

4. On June 15th, 2012 Judge Webster issued an Order upholding the Respondent's decision to place a finding of abuse at Petitioner's name on the Health Care Personnel Registry.

5. On September 17, 2012, Petitioner appealed by filing a Petition for Judicial Review and Injunctive Relief with the Wake County Clerk of Superior Court pursuant to N.C. GEN. STAT. §150B-43; and an amended petition was filed on or about September 18, 2012.

6. Notice of Hearing was filed on or about December 10, 2013 giving notice that the instant case was set for hearing in Superior Court on March 11, 2014 in the Wake County Superior Court, Raleigh, North Carolina. During the hearing before Judge Hobgood, Petitioner and Respondent presented to the Court testimony of witnesses and exhibits.

7. On April 17, 2014 Judge Hobgood ordered in Petitioner's favor and ordered the case sent back to Judge Webster for additional findings of fact pursuant to N.C. GEN. STAT. §150B-49 related to inadmissible hearsay and "[a] significant and material issue of fact that has not been resolved is the strength of the touching of J.R.'s face: To wit, did it leave a red or pink mark?"

8. Notice of Hearing was filed on or about September 23, 2014 giving notice that the instant case was set for hearing on October 17, 2014 at the Office of Administrative Hearings, Raleigh, North Carolina. During the hearing, Petitioner and Respondent presented to the Court additional testimony of witnesses and exhibits.

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and acted erroneously when Respondent substantiated the allegation that on or about September 15, 2011, Timothy John Murray, a Health Care Personnel, abused a resident (J.R.) by slapping the resident's face resulting in physical injury to the resident?

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. 130.010

EXHIBITS

Respondent's exhibits 1-25 were admitted into the record.
Petitioner's exhibit I was admitted into the record.

WITNESSES

For Respondent: Timothy John Murray
Nicole Layden
Sol Weiner
For Petitioner: Joseph Rothengast

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, Timothy John Murray, was employed as a Habilitation Technician working for A Small Miracle, Inc. in Raleigh, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 8-9; Resp. Ex. 3)
2. Petitioner completed all required training related to his job responsibilities. He received instruction on recipient's rights and specific training for Resident J.R. (T. pp. 20-27; Resp. Exs. 1, 2, 4, 6, 7, 8)
3. Petitioner initialed and signed the employer's Abuse, Neglect, Exploitation and Rights Restriction Policy. Petitioner knows that A Small Miracle, Inc. has a zero tolerance policy for abuse and that slapping a resident is abuse. (T. pp. 23-26; Resp. Exs. 5-6, 17)
4. On or about September 15, 2011, Petitioner slapped Resident J.R. of A Small Miracle, Inc. across his face. (T. p. 15; Resp. Ex. 24)
5. Resident J.R. was 35 years old at the time of the incident. He is a white male with mild mental retardation, cerebral palsy, seizure disorder and depression. (Resp. Exs. 15-16)

6. Petitioner was with Resident J.R. on September 15, 2011 at A Small Miracle, Inc. Resident J.R. worked at A Small Miracle performing tasks such as taking out the trash, wiping tables and doorknobs with sanitizing clothes, and cleaning the bathroom. (T. pp. 11-12; Resp. Ex. 11)

7. After Resident J.R. displayed a bad attitude at work, Petitioner drove J.R. home early on September 15, 2011. Petitioner's supervisors previously instructed him that he should no longer accept a bad attitude from J.R. while at work. (T. pp. 11-12; Resp. Ex. 11)

8. During the drive home, Resident J.R. was unresponsive as Petitioner attempted to discuss J.R.'s behavior while at work. Petitioner became angry with Resident J.R. and used his hand to make physical contact with J.R. on the cheek. Resident J.R. immediately whipped his head around and glared at the Petitioner. Upon arriving at his home, Resident J.R. refused to speak with Petitioner. (T p. 15, 19; Resp. Exs. 9, 11)

9. The afternoon of September 15, 2011 J.R. called his father Joseph Rothengast ("Rothengast"), and told his father that the Petitioner slapped him in the face. Rothengast testified that he believed that TJ slapped his son, and that he believed the action was inappropriate. (Vol. II. T. pp. 14-16, 24; Pet. Exh. 1)

10. Later on September 15, 2011, Resident J.R. sent an email to Nicole Layden, a Qualified Professional with A Small Miracle, Inc. The email stated that Petitioner had hit J.R. earlier that day on the way home from work. In addition, Resident J.R. claimed that Petitioner dumped him out of his wheelchair twice over the course of the last month. (Resp. Ex. 19-20). The undersigned will consider this email and its content for the limited purpose of effect on Ms. Layden and her subsequent actions.

11. Petitioner did not intentionally dump Resident J.R. from his wheelchair. One instance involved J.R. attempting to strike Petitioner. Resident J.R. attempted to stand in his wheelchair to strike, but fell while doing so. Petitioner claims that J.R. fell out of his wheelchair on a different occasion by moving unexpectedly while being assisted by Petitioner. Petitioner admitted that neither incident was reported to his supervisors. (T. p. 107, 111)

12. Upon receipt of the email from Resident J.R., Nicole Layden ("Layden") began an investigation into the allegation of abuse. She first called Resident J.R. to discuss the allegation against Petitioner in detail. (Vol. II. T. p. 33, 37-38; Resp. Ex. 19-20)

13. Layden also spoke with Petitioner by phone on September 15, 2011. Petitioner told Layden that he tried to get J.R.'s attention in the car and did so by hitting the left side of his face. He admitted that he made contact with J.R. harder and more forcefully than he should have, but did not realize this until after the incident. At this time, Petitioner was informed that he was suspended from his job at A Small Miracle, Inc. until further notice. (T. pp. 39-40; Resp. Ex. 18)

14. On September 19, 2011, Petitioner met with Layden and Beth Gaul ("Gaul"), another employee of A Small Miracle, Inc., to discuss the incident involving Resident J.R. At

this meeting, Petitioner once again admitted that he forcefully touched J.R.'s face. Petitioner was presented with a Termination Notice that outlined the reasons for his termination and cited the applicable policies that were violated. Petitioner signed the Termination Notice. (T. pp. 41-42; Resp. Ex.12, 17)

15. During the September 19, 2011 meeting, Petitioner presented Layden and Gaul with a typed statement entitled "General Observations – J.R.'s Stubborn Streak." Throughout the statement, Petitioner explained the slapping incident in addition to the two separate incidents in which J.R. fell out of his wheelchair. With respect to the incident, Petitioner admitted that his contact with Resident J.R. was "harder" than he expected and was "definitely not appropriate." (Resp. Ex. 9)

16. On September 16, 2011, Layden filled out the Employee Corrective Action Report. She sent the 24-Hour Initial Report and the 5-Working Day Report to the Health Care Personnel Registry ("HCPR") documenting the investigation. (T. p. 63; Resp. Exs. 11-12; 41-44)

17. The HCPR investigates allegations of abuse, neglect and other allegations against health care personnel in health care facilities. If an allegation is substantiated, the employee will be listed in the Registry. The HCPR covers most licensed facility in North Carolina that provides patient care. Accordingly, health care personnel at A Small Miracle, Inc. are covered by the Registry. (T. pp. 77-79)

18. At all times relevant to this incident, Sol Weiner ("Weiner") was employed as an investigator for the HCPR. He was charged with investigating allegations against health care personnel in the central region of North Carolina. Accordingly, A Small Miracle, Inc. was in his region and he received the complaint that Petitioner abused Resident J.R. (T. p. 80)

19. After the complaint against Petitioner was received, Weiner determined it needed further investigation. As part of the investigation, Weiner interviewed Petitioner, Layden, and Resident J.R. He also reviewed the resident's records and the internal investigation conducted by the facility. (T. p. 82; Resp. Exs. 9, 10, 12, 15, 16, 18, 19, 20)

20. On October 25, 2011, Weiner interviewed Layden. She stated she was first made aware of the incident by the September 15, 2011 email from Resident J.R. claiming that he was struck by Petitioner. Layden indicated that she believed that Petitioner was too forceful when he "tapped" the face of J.R. (T. pp. 86-87; Resp. Ex. 21)

21. Weiner also interviewed Resident J.R. on October 25, 2011. J.R. had trouble forming words and was anxious to discuss the incident. (T. pp. 83-86; Resp. Exs. 22-23)

22. On November 10, 2011, Weiner interviewed Petitioner. Petitioner indicated that on September 15, 2011, Resident J.R. had gotten "under his skin" and that "in that split second I decided it was time for [Resident J.R.] to pay attention to me." After admitting to making contact with Resident J.R.'s face, Petitioner described his action as "one of those stupidest things that I've ever done." (T. pp. 87-89; Resp. Ex. 11)

23. Weiner took Petitioner's statement into consideration and viewed all the information together including the facility statements, the HCPR statements, and the documentation. Weiner concluded that Petitioner abused Resident J.R. In formulating his conclusion, Weiner strongly considered the Petitioner's typed statement to Layden where he admitted that he was culpable in the "slapping" incident. Weiner wrote an investigation report which documented his conclusion. (T. pp. 90-93 Resp. Exs. 9, 24)

24. Petitioner was notified by letter that a finding of abuse would be listed against his name in the Health Care Personnel Registry. Petitioner was further notified of his right to appeal. (T. pp. 94-95; Resp. Ex. 25)

25. On remand, Resident J.R. was present at the hearing, but he did not testify.

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

5. A Small Miracle, Inc. of Raleigh 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 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. In *Allen v. NC DHHS-Division of Facility Services*, 155 N.C. App. 77, 85, 573 S.E.2d 565, 570 (2002) the court stated:

Our obligation is to protect the health and safety of every resident, including those that 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.

8. Hearsay is a statement, other than one made by a declarant while testifying at a hearing, offered to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801 (c). Hearsay is not admissible unless subject to an exception. N.C. Gen. Stat. § 8C-1, Rule 802.

9. On or about September 15, 2011, Petitioner slapped a resident (Resident J.R.) on the face. The undersigned cannot consider inadmissible hearsay from Resident J.R. concerning “resulting physical harm, pain, or mental anguish”. Therefore, “resulting physical harm, pain, or mental anguish” has not been shown.

10. Respondent's decision to substantiate this allegation of abuse against the Petitioner is not supported by a preponderance of the evidence. Therefore, Respondent did 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.

11. Petitioner has the burden of proving Respondent failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner abused resident JR at A Small Miracle of Raleigh and entered a finding of neglect by Petitioner's name in the Health Care Personnel Registry. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704 (2006). Petitioner has met his 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 at Petitioner's name on 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. 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 19th day of December, 2014.

Craig Croom
Administrative Law Judge