

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 DHR 12594

TIMOTHY JOHN MURRAY,

Petitioner,

v.

NC DEPARTMENT OF HEALTH AND

HUMAN SERVICES, DIVISION OF

HEALTH SERVICE REGULATION,

Respondent.

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**DECISION**

THIS MATTER came for hearing before the undersigned, Joe L. Webster, Administrative Law Judge, on February 23, 2011 in Court Room B of the Office of Administrative Hearings in Raleigh, North Carolina.

**APPEARANCES**

For Petitioner: Timothy John Murray, *Pro se*  
2408 Perennial Street  
Raleigh, North Carolina 27603

For Respondent: Thomas E. Kelly, Esq.  
Associate Attorney  
North Carolina Department of Justice  
9001 Mail Service Center  
Raleigh, North Carolina 27699-9001

**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. 13O.0101

## **EXHIBITS**

Respondent's exhibits 1-25 were admitted into the record.

Petitioner's exhibit 1 was admitted into the record.

## **WITNESSES**

For Respondent: Timothy John Murray  
Nicole Layden  
Sol Weiner

**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 abused Resident J.R. of A Small Miracle, Inc. by slapping J.R. on the face causing pain and mental anguish. (T. pp. 15, ; Resp. Ex. 28)
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 slapped 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; Resp. Exs. 9, 11)

9. 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 struck 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)

10. 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. Resident J.R. said that his face stung and that his left cheek had turned pink/red. Resident J.R. also told Layden that he was scared of Petitioner and no longer wanted to have Petitioner as his job coach. (T. p. 35, 37-38; Resp. Ex. 19-20)

11. 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 hit 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)

12. 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 to slapping 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)

13. 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 slap, Petitioner admitted that his contact with Resident J.R. was "harder" than he expected and was "definitely not appropriate." (Resp. Ex. 9)

14. 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; 14)

15. 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. 77-78)

16. 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)

17. 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)

18. 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. Weiner determined that what was discussed with Layden during his interview was consistent with her investigation into the incident. (T. pp. 86-87; Resp. Ex. 21)

19. Weiner also interviewed Resident J.R. on October 25, 2011. J.R. had trouble forming words and was anxious to discuss the incident. According to J.R., Petitioner frightened him after slapping him on the cheek. J.R. mentioned that upon arriving home on the day in question, Petitioner hit J.R.’s hand while he was attempting to drink lemonade causing some liquid to splash into his eyes. Resident J.R. also told Weiner that Petitioner had previously “dumped” him out of his wheelchair twice. (T. pp. 83-86; Resp. Exs. 22-23)

20. 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)

21. 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)

22. Abuse is defined as the “willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.” Weiner determined Petitioner abused Resident J.R. by deliberately slapping the resident’s face with too much force resulting in pain and fear of the Petitioner. (T. p. 136; Resp. Exh. 28)

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

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

26. Petitioner did not intentionally splash the lemonade into Resident J.R.’s eye, but simply had taken it away from him. When J.R. reached to take the cup back, it splashed in his eyes. (T p 108-109).

27. 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)

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 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. On or about September 15, 2011, Petitioner abused a resident (Resident J.R.) by slapping the resident on the face resulting in pain and mental anguish to the resident.

8. Respondent's decision to substantiate this allegation of abuse against the 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:

### **RECOMMENDED 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 **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 Facility Services.

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 15th day of June, 2012.

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Joe L. Webster  
Administrative Law Judge