

COUNTY OF ROWAN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 DHR 12959

Sandra Ellis  
Petitioner,

V.

Department of Health and Human Services  
Respondent.

## DECISION

THIS MATTER came for hearing before the undersigned, J. Randall May, Administrative Law Judge, on April 25, 2012 in the Washington Courtroom of the High Point Government Complex in High Point, North Carolina.

## APPEARANCES

For Petitioner:           Kirk J. Angel  
The Angel Law Firm  
6471 Morehead Road  
Harrisburg, North Carolina 28075

For Respondent: Thomas E. Kelly  
Associate Attorney  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602

# ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and acted erroneously when Respondent substantiated the allegation that on or about May 11, 2011, Sandra Ellis ("Petitioner"), a Direct Support Associate with RHA Health Services, Inc. ("RHA"), abused a resident ("M.S.") when she instructed the resident to exit a facility vehicle and then drove the vehicle away, resulting in mental anguish.

## 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, 3-5, 7-18, 20-23 were admitted into the record.

## **WITNESSES**

For Respondent: Sandra Ellis  
LaSonya Pemberton  
Carol Goodman  
Stephanie Huntley  
Cynthia Haynes

## **FINDINGS OF FACT**

**The Findings of Fact** are made after careful consideration of the sworn testimony, whether visual and/or audio, of the witnesses presented at the hearing, and the entire record in this proceeding. 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 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 and the admitted evidence, or the lack thereof, the undersigned makes the following:

1. At all times relevant to this action, Petitioner was employed as a Direct Support Associate with RHA in Cleveland, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 11-12; Resp. Ex. 1)

2. Petitioner completed all required training related to her job responsibilities. She also received instruction on abuse, neglect, and exploitation. (T. pp. 12-18; Resp. Exs. 2-5)

3. RHA trained Petitioner on driving safety. This training instructed employees on how to care for residents during transportation away from the facility. Specifically, RHA trained employees to "never leave individuals unattended" at any time during transportation. (T. pp. 17-19; Resp. Ex. 5)

4. At the time of the incident, M.S. was approximately twelve years old and suffered from autism, severe mental retardation, x-chromosome inversion, hyperopia, and astigmatism. In addition, M.S. has a documented history of "leaving the area" and he requires continuous supervision. (T p. 47; Resp. Ex. 20)

5. Petitioner reported to work at RHA on May 11, 2011, the relevant time period for this action. (T. pp. 21)

6. The floors at RHA were being waxed on May 11, 2011. Due to this maintenance, Petitioner and her co-workers, LaSonya Pemberton (“Pemberton”), Sherry Peeler (“Peeler”), and Jessica Mitchell (“Mitchell”), decided to purchase pizza for the residents. (T. p. 22)

7. Petitioner completed the necessary paperwork to secure use of a facility van to pick up the pizza. Petitioner, Pemberton, Mitchell, and Peeler all traveled with five residents to bring the pizza back to RHA. Residents M.S. and Z.F. were both included on the trip. (T. pp. 22-23)

8. After placing an order for pizza, Petitioner drove the van to the residence of Rita Sturdivant (“Sturdivant”). Sturdivant was an employee of RHA who was away from work on medical leave. Petitioner did not indicate on the transportation authorization paperwork that she would stop at Sturdivant’s home while out for pizza. (T. p. 23)

9. Petitioner and her co-workers called Sturdivant’s phone and asked her to come outside. Sturdivant came outside to speak with everyone on the van and then went back into her home. (T. pp. 33-34)

10. Petitioner asked M.S. to exit the van and to knock on Sturdivant’s door. M.S. followed Petitioner’s instructions and as he returned to the van, Petitioner began to drive away. M.S. responded by crying and running after the van. Petitioner eventually stopped, allowed M.S. back onto the van, and then drove everyone back to RHA. (T. p. 148; Resp. Ex. 14)

11. Carol Goodman (“Goodman”) was employed by RHA as House Manager at the time of the incident. In this capacity, she served as a supervisor for Petitioner. (T. pp. 66, 68)

12. Goodman was familiar with the diagnoses of M.S. According to Goodman, M.S. was able to understand and respond when people communicated with him, even if it resulted in a delayed reaction. (T. pp. 68-69)

13. Peeler approached Goodman on May 16, 2011. Peeler told Goodman that M.S. had a traumatic experience on May 11, 2011, when staff and five residents were out picking up pizza. Goodman brought this information to the attention of Ozzie Hill (“Hill”), her supervisor and an administrator at RHA. (T. pp. 89-90; Resp. Ex. 14)

14. Goodman’s report to Hill prompted the RHA investigation into the allegation of abuse against Petitioner. (T. pp. 85-87)

15. On May 17, 2011, Goodman produced a written statement describing her knowledge of the situation involving M.S. and Petitioner. Goodman wrote that her subordinate, Peeler, reported that M.S., at the request of Petitioner, exited the van and knocked on the door of Sturdivant’s residence. As M.S. returned to the van, Petitioner drove away, with “M.S. running after the van, crying.” (Resp. Ex. 14)

16. Petitioner provided a written statement for RHA investigators on May 16, 2011. In her statement, Petitioner indicated, “[w]e got the pizza and came home. We did not go to no one house didn’t nothing else happen.” This statement was inconsistent with the testimony given by Petitioner at trial. (T. pp. 24-25; Resp. Ex. 7)

17. Pemberton spoke with investigators on or around May 15, 2011. Pemberton indicated that Petitioner did not stop by Sturdivant’s house on the night of May 11, 2011. Pemberton was ultimately terminated for her “failure to cooperate fully with the investigation” after credible information surfaced indicating that the van driven by Petitioner did stop at Sturdivant’s residence. (T. pp. 49-52; Resp. Ex. 9)

18. On May 16, 2011, Hill interviewed Z.F., a resident on the van on May 11, 2011. Z.F. stated that M.S. exited the van to knock on Sturdivant’s door. According to Z.F., M.S. was crying when he got back onto the van. (T. p. 120; Resp. Ex. 17)

19. Hill completed a 24-Hour Initial Report and sent it to the Health Care Personnel Registry (“HCPR”). Later, Stephanie Huntley (“Huntley”), Behavioral Analyst at RHA, sent a 5-Working Day Report to the HCPR, documenting the RHA investigation. (T. p. 79-81; Resp. Exs. 15-16)

20. While Hill began the RHA investigation, she was unable to finish due to a family medical situation. As such, Huntley completed the investigation with the staff statements obtained by Hill. Huntley had prior experience reviewing facility investigations for RHA. (T. pp. 94-98)

21. On May 20, 2011, Huntley produced an Incident Response Improvement System (“IRIS”) Report and sent it to Piedmont Behavioral Health, the local management entity (“LME”) for RHA. The IRIS report was also sent to the Department of Social Services (“DSS”) and the HCPR. (T. pp. 114-116; Resp. Ex. 19)

22. Huntley produced an investigation conclusion report, detailing the interviews and written staff statements obtained by Hill. Based upon the findings of the investigation, the allegation of abuse against Petitioner was substantiated. (T. pp. 119-120; Resp. Ex. 17)

23. As a result of the investigation, Petitioner’s employment was terminated by RHA on May 20, 2011. (Resp. Ex. 9)

24. 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 RHA are covered by the HCPR. (T. pp. 128-129, 133-134)

25. At all times relevant to this action, Cynthia Haynes (“Haynes”) was employed as a Nurse Investigator for the HCPR. She was charged with investigating allegations against health care personnel in Iredell, Rowan, and Surry counties. RHA is in Rowan County and is part of the territory covered by Haynes. (T. p. 129)

26. Upon receipt of the 24-Hour, 5-Working Day, and IRIS Reports from RHA, Haynes “screened in” the case further investigation on July 11, 2011. (T. pp. 129-131; Resp. Exs. 15-16, 19)

27. On September 27, 2011, Haynes reviewed Petitioner’s personnel file from RHA to determine if she received the necessary training to perform her job duties. During this review, Haynes also attempted to identify any prior disciplinary actions against Petitioner while with RHA. Haynes found that Petitioner was previously suspended for an allegation, but that the allegation was never substantiated. With respect to training, Haynes determined that Petitioner received all the training necessary to properly perform her job duties. (T. pp. 97-98; Resp. Ex. 23)

28. Haynes reviewed M.S.’s medical records. Haynes confirmed that M.S. suffered from autism, severe mental retardation, x-chromosome inversion, hyperopia, and astigmatism. (T. pp. 137-138; Resp. Ex. 24)

29. Haynes also reviewed M.S.’s Person Centered Plan (“PCP”). She noted that M.S. has a history of leaving the area and that staff were instructed to never leave him unattended. (T. pp. 137-138; Resp. Ex. 20)

30. Haynes spoke with Z.F. on September 27, 2011. Haynes found Z.F. to be alert and able to recall the incident. Z.F. said that M.S. got off the van and went to Sturdivant’s door. As M.S. returned to the van, Petitioner began to drive the van away, causing M.S. to cry and chase the vehicle. According to Z.F., “M.S. thought the van was going without him.” Z.F. also mentioned that Petitioner and the other staff laughed at M.S. during the incident. (T. pp. 139-141; Resp. Ex. 24)

31. Haynes interviewed Huntley on September 27, 2011. Huntley said that Z.F. and Peeler provided information critical to the investigation. Both individuals stated that M.S. exited the van at Sturdivant’s home and knocked on the door. Petitioner then began to drive away from the residence, causing M.S. to cry and run behind the van. Haynes found this to be consistent with the information collected by the HCPR investigation. (T. pp. 147-149; Resp. Ex. 18)

32. On October 4, 2011, Haynes spoke with Pemberton over the phone. Pemberton told Haynes that Petitioner and the other staff did stop by Sturdivant’s residence on the evening of May 11, 2011, but that M.S. did not exit the van. Haynes was aware that Pemberton previously told RHA investigators that the van did not stop by Sturdivant’s residence on the night of the incident. Due to this material change in her recollection, Haynes did not believe that Pemberton was a credible witness. (T. pp. 52,-56; 149-152, 159; Resp. Exs. 9-10)

33. Haynes interviewed Petitioner on September 28, 2011. While Petitioner claimed that no one exited the van, she did admit to stopping by the Sturdivant residence on May 11, 2011. This information was inconsistent with the original statement made by Petitioner to RHA investigators, as Petitioner previously maintained that a stop was not made at Sturdivant's home. Due to this material change in her recollection, Haynes did not believe that Petitioner was a credible witness. (T. pp. 25-27; 153-154, 159; Resp. Exs. 7-8)

34. After hearing the evidence as presented by the witnesses; reviewing hearing notes; and the transcript, the Undersigned concurs with the assessment of credibility as determined by Investigator Haynes.

35. Haynes assessed all the information collected through her investigation, including the written statements collected by RHA investigators, the HCPR interviews, and the documentation provided by RHA. Haynes concluded that on May 11, 2011 Petitioner abused M.S. when she asked him to get off the facility van to knock on Sturdivant's door and then acted as though she was driving away, resulting in M.S. crying and running behind the van. Haynes wrote an investigation conclusion report that documented her findings. (T. pp. 157-160; Resp. Ex. 26)

36. Petitioner was notified by letter that a finding of abuse would be listed against her name in the Health Care Personnel Registry. Petitioner was further notified of her right to appeal. (T. p. 160-161; Resp. Ex. 27)

37. Petitioner is not disabled and has the ability to work. The listing on the Health Care Personnel Registry 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 Direct Support Associate, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. RHA of Cleveland, 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. On May 11, 2011, Petitioner abused a resident (“M.S.”) when she instructed the resident to exit a facility vehicle and then drove the vehicle away, resulting in mental anguish.

7. 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, and did not act erroneously, arbitrarily, or capriciously by placing a substantiated finding of abuse against Petitioner’s name on the Health Care Personnel Registry and the Nurse Aid Registry.

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

### **DECISION**

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, 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 10<sup>th</sup> day of July, 2012.

---

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