

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11DHR13267

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| Shirley Dowdy Petitioner, v. Department of Health and Human Services Division Respondent. | DECISION |
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THIS MATTER came for hearing before the undersigned, J. Randall May, Administrative Law Judge, on October 11, 2012 in the Washington Courtroom of the High Point Government Complex in High Point, North Carolina.

APPEARANCES

For Petitioner: Donald R. Vaughn
Donald R. Vaughn and Associates
612 West Friendly Avenue
Greensboro, North Carolina 27401

For Respondent: Thomas E. Kelly
Assistant Attorney General
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 July 28, 2011, Shirley Dowdy ("Petitioner"), a Medication Technician with Elm Villa Assisted Living Facility, LLC ("Elm Villa"), abused a resident ("G.S.") by threatening to hit G.S. with a chair and calling her husband to the facility to intimidate G.S. after the altercation, resulting in mental anguish to G.S.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-2

EXHIBITS

Respondent's exhibits 1-6, 9-10, 14-17, and 19-22 were admitted into the record.

WITNESSES

For Respondent: Shirley Dowdy
Cathy Gunter
Nadena Clark
Jenny Baxter

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, 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 of witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. At all times relevant to this action, Petitioner was employed as a Medication Technician with Elm Villa in High Point, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (Tr. pp. 10-11; Resp. Ex. 2)
2. Petitioner completed all required training related to her job responsibilities. She also received instruction on abuse, neglect, and exploitation. (Tr. pp. 12-14; Resp. Exs. 1-5, 20)
3. Petitioner received training on combative behaviors from Guilford Center's Geriatric/Adult Specialty Team. This training instructed employees on how to care for residents who exhibited combative behaviors. (Tr. pp. 12-14; Resp. Ex. 1, 20)
4. G.S. is a resident of Elm Villa. At the time of the incident, G.S. suffered from depression, schizophrenia-chronic paranoid type, substance abuse, and hypertension. In addition, G.S. has a history of aggression toward Elm Villa staff members. (Resp. Ex. 21)
5. Petitioner reported to work at Elm Villa on July 28, 2011, the relevant time period for this action. (Tr. pp. 15-16)

6. On July 28, 2011 Elm Villa resident G.S. approached Petitioner while she was outside the facility building on a break and asked to borrow money from her. Petitioner refused to lend G.S. money and told him to “go on.” (Tr. p. 16-17)

7. G.S. walked away, but returned a few minutes later. He approached Petitioner and told her that he did not like the way she was talking to him. G.S. proceeded to push Petitioner out of her chair and hit Petitioner on the head. Petitioner retaliated by threatening to throw a chair. (Tr. pp. 16-17; Ex. 21)

8. The incident was broken up by an Elm Villa staff member. Petitioner returned to the building and called her husband to come to Elm Villa and speak with G.S. about the incident. At trial, Petitioner stated that she wanted G.S. to see her “big” husband in an effort to intimidate G.S. (Tr. p. 2; Ex. 21)

9. Cathy Gunter (“Gunter”) was employed by Elm Villa as an administrative assistant at the time of the incident. In this capacity, she served as a staff member with Petitioner. (Tr. pp. 66, 68)

10. Petitioner’s husband came to Elm Villa. G.S. would not come upstairs to talk to Petitioner’s husband so Gunter escorted Petitioner and Petitioner’s husband to G.S.’s room. (Tr. pp. 43-45). It is recognized that this was a mistake in judgment by Gunter, whether a rule was broken by allowing Petitioner’s husband to confront G.S. or not.

11. Gunter informed Petitioner that it was not a good idea to have her husband speak with the resident. However, Petitioner’s husband did speak with G.S. and told G.S. that he had no right to put his hands on his wife. Gunter saw Petitioner’s husband swing his arm forward and subsequently noticed that G.S. was soaking wet. At this point, Gunter forced Petitioner and Petitioner’s husband to vacate the G.S.’s room. (Tr. p. 43-50; Resp. Ex. 9-10)

12. Nadena Clark (“Clark”) served as Administrator at Elm Villa during the incident and subsequent investigation. Specifically, Clark oversees the facility and all staff that are employed by Elm Villa. (Tr. pp. 58-59)

13. Gunter reported the incident to the Nadena Clark (“Clark”) later that day. On August, 2, 2011, Gunter completed an incident report for the facility. (Tr. pp. 52-53 Ex. 9-10)

14. Clark conducted an internal investigation into the incident. Over the course of Clark’s investigation, she interviewed three residents and two staff members, Le’Nora Donnell (“Donnell”) and Gunter, in addition to G.S. and Petitioner. Clark also submitted incident reports to the Department of Social Services (“DSS”). DSS instructed Clark to complete a 24-Hour Initial Report and a 5-Working Day Report and send them to the Health Care Personnel Registry (“HCPR”). (Tr. pp. 60-65; Resp. Ex. 16-17, 21)

15. Petitioner was suspended from work for five days in which Elm Villa performed a facility investigation into the incident. (Tr. pp. 29-30)

16. Before returning to work, Petitioner signed an Employment Agreement drafted and signed by Clark. The Employment Agreement stipulated that “[Petitioner] called police on resident. She then called her spouse to come to the facility to intimidate the resident, and he did.” Petitioner voluntarily signed this document in the presence of Clark. (Tr. p. 71; Resp. Ex. 4)

17. The Employee Agreement also stated that Petitioner’s suspension was lifted August 6, 2011, pursuant to a 90-day performance review. Further, the Agreement stated that a substantiated finding against Petitioner by the HCPR was grounds for immediate termination. Petitioner was also required to complete a class in anger management within the 90-day probationary period. (Tr. pp. 70-72; Resp. Ex. 4)

18. Clark completed a 24-Hour Initial Report and sent it to the HCPR. Clark also sent a 5-Working Day Report to the HCPR, documenting the Elm Villa investigation. (Tr. p. 72-76; Resp. Exs. 16-17)

19. Clark produced an investigation summary report, detailing the interviews and written staff statements obtained. Based upon the findings of the investigation, the allegation of abuse against Petitioner was neither substantiated nor unsubstantiated by Elm Villa. (Tr. pp. 119-120; Resp. Ex. 14)

20. 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 Elm Villa are covered by the HCPR. (Tr. pp. 81-83)

21. At all times relevant to this action, Jenny Baxter (“Baxter”) was employed as a Nurse Investigator for the HCPR. She was charged with investigating allegations against health care personnel in Guilford County. Elm Villa is in Guilford County and is part of the territory covered by Baxter. (Tr. p. 82)

22. Upon receipt of the 24-Hour and 5-Working Day reports from Elm Villa, Baxter “screened in” the case for further investigation on August 29, 2011. (Tr. p. 83; Resp. Exs. 16-17, 21)

23. Baxter reviewed Petitioner’s personnel file from Elm Villa to determine if she received the necessary training to perform her job duties. During this review, Baxter also attempted to identify any prior disciplinary actions against Petitioner while employed with Elm Villa. Haynes found that on August 24, 2010 Petitioner was involved in a “brawl” with resident C.P., and on November 18, 2009 Petitioner received a verbal warning for arguing with a resident and raising her voice. With respect to training, Haynes determined that Petitioner received all the training necessary to properly perform her job duties. (Tr. pp. 85-86; Resp. Ex. 20)

24. Baxter reviewed G.S.'s medical records. Baxter confirmed that G.S. suffered from depression, schizophrenia-chronic paranoid type, substance abuse, and hypertension. (Tr. pp. 84-85; Resp. Ex. 19)

25. Baxter spoke with G.S. on October 6, 2011. Haynes found G.S. to be alert and calm. Baxter reported that he was initially hesitant to speak with her, but ultimately he was compliant and spoke "openly about the incident." (Tr. pp. 83-85; Resp. Ex. 19)

26. Baxter interviewed Gunter on October 6, 2011. Gunter reiterated that she had not seen the altercation, but did witness Petitioner's disheveled state after the incident. Petitioner told Gunter that she was going to call her husband to come talk to G.S. and Gunter warned her that it was not a good idea. Gunter escorted Petitioner and Petitioner's husband to G.S.'s room and heard Petitioner's husband tell G.S. not to put his hands on Petitioner. Gunter then told Petitioner and Petitioner's husband to leave after Gunter saw Petitioner's husband's arm move forward and noticed G.S. was soaking wet. Baxter found this to be consistent with the information collected by the facility investigation. (Tr. p. 87; Resp. Ex. 10)

27. On October 13, 2011, Baxter interviewed Clark over the phone. Clark discussed her investigation with Baxter. According to Clark, Petitioner intended to intimidate G.S. by calling her husband to the facility. Clark told Baxter that when Clark questioned G.S. about the incident G.S. indicated that he was afraid of Petitioner and her husband. Baxter affirmed that Clark's testimony at trial was consistent with the information Clark provided in the interview. (Tr. p. 87; Resp. Ex. 15, 21)

28. Baxter interviewed Petitioner on October 6, 2011. Petitioner told Baxter that she knew G.S. had been violent with other staff members in the past. Petitioner also told Baxter that she said called her husband to come to Elm Villa to talk with G.S. about not hitting women. At trial, Baxter noted an inconsistency in Petitioner's recollection of her use of the chair during the incident. (Tr. pp. 90-91; Resp. Ex. 6, 21)

29. Baxter assessed all the information collected through her investigation, including the written statements collected by the Elm Villa investigation, the HCPR interviews, and the documentation provided by Elm Villa. Baxter concluded that on July 28, 2011 Petitioner abused G.S. when she threatened to hit him with a chair and called her husband to the facility to intimidate G.S. after the incident, resulting in mental anguish to G.S. Baxter wrote an investigation conclusion report that documented her findings. (Tr. pp. 82-98; Resp. Ex. 21)

30. As a result of the HCPR investigation, Petitioner's employment was terminated by Elm Villa on May 20, 2011. (Resp. Ex. 9)

31. At trial, Baxter explained that the HCPR does not require a policy violation in order to substantiate an allegation. The HCPR simply assesses whether the facility has policies in place to deal with abuse and neglect, and whether there is appropriate training in place for employees of the facility. The lack of an explicit facility policy does not preclude a substantiated finding by the HCPR. (Tr. p. 95)

32. 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. (Tr. p.94; Resp. Ex. 22)

33. 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.

34. This matter came for hearing before the undersigned, on October 11, 2012 in High Point, North Carolina. (Tr. p. 1)

BASED UPON the foregoing Findings of Fact, the undersigned 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 Medication Technician, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. Elm Villa, LLC of High Point, 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. On July 27, 2011, Petitioner abused a resident (“G.S.”) by calling her husband to the facility to intimidate G.S., resulting in mental anguish to G.S.

8. 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.

9. The correct method for addressing an incident such as this is never to allow intimidation of a resident.

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**.

ACKNOWLEDGMENT

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

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 5th day of June, 2013.

J. Randall May
Administrative Law Judge