

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF BUNCOMBE

11 DHR 14570

LAUREN STEWART,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF HEALTH SERVICE
REGULATION, HEALTH CARE
PERSONNEL REGISTRY,

**ADMINISTRATIVE LAW
JUDGE DECISION AND STAY**

Respondent

This contested case came on for hearing before the undersigned, Julian Mann III, Chief Administrative Law Judge, on May 7, 2012, in the Haywood County Courthouse, Waynesville, North Carolina. At the call of the contested case at 9:30 a.m., the Petitioner was not present. Upon delay of the commencement of the hearing until 10:30 a.m., and upon motion of Respondent with concurrence of the presiding administrative law judge, the undersigned proceeded to hear the contested case in the absence of the Petitioner as provided for in G.S. 150B-25(a). After the conclusion of the contested case hearing, at approximately 12:30 p.m. an individual who identified himself as Mr. Christopher Phillips, (Mr. Phillips identified himself as Petitioner's "boyfriend,") handed up a faxed document designated as from Ingrid S. Whitworth, Discharge Planner, from Mission Hospital in Asheville, North Carolina, indicating that Petitioner had been hospitalized on May 5, 2012.

APPEARANCES

Petitioner: Absent.

For Respondent: Josephine N. Tetteh
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

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 neglected a resident of Turning Point Services, Inc., in Asheville, NC and entered findings of neglect by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-255
N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23
42 CFR § 488.301
10A N.C.A.C. 13O.0101

EXHIBITS

Respondent's exhibits 1- 18 were admitted into the record.

WITNESSES

Alyce Michelle Kozma (supervisor)
Andrew Thomas (supervisor)
Barbara Powell (HCPR Nurse Investigator)

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. The parties received notice of hearing by certified mail more than fifteen (15) days prior to the hearing. Petitioner did not appear at the hearing.
2. Petitioner, Lauren Stewart, was a Habilitation Technician at Turning Point Services, Inc. ("Turning Point") in Asheville, North Carolina. Turning Point is a healthcare facility and therefore subject to N.C. Gen. Stats. §131E-255 and §131E-256. (T. pp. 10, 40; Resp't Ex. 1)

3. Petitioner was trained on safety. Petitioner was also trained on desired outcomes, services, and the plan for her individual consumer, Resident TL. (T. pp. 14-17, 20-21; Resp't Exs. 2-3)
4. Petitioner's primary job responsibility was to provide for the care of Resident TL. Petitioner was Resident TL's one-to-one staff. As Resident TL's one-to one staff, Petitioner was to monitor, supervise and ensure Resident TL's safety. Petitioner was trained not to leave Resident TL alone. (T. pp. 16, 18-19. 29, 34; Resp't Ex. 4)
5. Resident TL has been a resident of Turning Point. Resident TL's diagnoses included the following: bipolar disorder, oppositional defiant disorder and Intracranial injury with unspecified vision loss. Resident TL required twenty-four (24) hour supervision. (T. pp. 18, 29 ; Resp't Ex. 4)
6. While providing the care for Resident TL on October 5, 2011, Petitioner, for personal reasons, traveled by automobile to Petitioner's bank. At the bank, Petitioner left Resident TL in Petitioner's automobile. Petitioner left the car's engine running. Petitioner then went into the bank. (Resp't Ex. 6)
7. While Petitioner was in the bank, Resident TL attempted to move the car, hitting another car. Resident TL went into the bank to inform Petitioner of what had happened. (Resp't Ex. 6)
8. Petitioner then called her supervisor, Michelle Kozma ("Kozma") to notify her. Kozma was Petitioner's supervisor at Turning Point. (T. pp. 8-9; Resp't Exs. 6-7)
9. Kozma went to the bank and spoke to Petitioner. Kozma also spoke to Resident TL and the police officer who was summoned to the scene. Kozma then notified her supervisor, Andrew Thomas ("Thomas"). Thomas was an employee of Turning Point. (T. pp. 9-12, 31-32; Resp't Exs. 8, 11)
10. Kozma and Turner conducted an investigation. As part of the facility investigation, Kozma and Turner spoke to Petitioner. Petitioner explained to Kozma and Turner that she had gone into the bank to conduct personal business and left Resident TL alone in the automobile, while the engine was running. At the conclusion of the investigation, Turning Point submitted a 24-hour report and 5-day working report to the Health Care Personnel Registry ("HCPR"). The facility also terminated Petitioner. (T. pp. 12-13, 33; Resp't Exs. 9-11)
11. Barbara Powell ("Powell") was a nurse investigator with the HCPR. Investigator Powell is charged with investigating allegations against health care personnel in ten western counties of North Carolina. Accordingly, she received and investigated the allegation that Petitioner had neglected Resident TL at Turning Point. (T. pp. 37-38; Resp't Exs. 9-10, 17)

12. Investigator Powell reviewed facility documents, Resident TL's medical documentation, and interviewed individuals involved with the incident, including Petitioner. Petitioner admitted to Investigator Powell that: 1) she had left Resident TL in the running vehicle; 2) that she knew she should not have left Resident TL alone; 3) and that she had neglected Resident TL. Investigator Powell documented her findings in a report. (T. pp. 40-46; Resp't. Exs. 7, 17)

13. Following the conclusions of her investigation, Investigator Powell notified Petitioner of her decision to substantiate the allegation of neglect. (T. p. 44; Resp't Ex. 18).

14. Neglect is the "failure to provide goods and services necessary to prevent physical harm, mental anguish and mental illness." (T. p. 43; Resp't. Ex. 17)

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. As a habilitation technician working in a health care facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.

4. "Neglect" is defined as "a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness."

5. On or about October 5, 2011, Petitioner Lauren Stewart, a Health Care Personnel, neglected a resident (TL) by leaving her alone in a running vehicle. Petitioner did this act intentionally while Petitioner conducted personal business.

6. Respondent did not act erroneously because there is sufficient evidence to support Respondent's conclusion that Petitioner neglected Resident TL.

7. Pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, Petitioner may apply to the undersigned to take additional evidence. If Petitioner wishes to proceed under Rule 59, Petitioner must file Petitioner's motion no later than 10 days after the entry of this decision. The effective date of this decision shall be stayed for 10 days after entry in order to permit Petitioner to file her motion, if she so desires. In the absence of a timely motion, this decision shall become effective after the expiration of 10

days. If a timely motion is filed, the undersigned will give Respondent the opportunity to respond to Petitioner's motion and, thereafter, the undersigned will either grant or deny Petitioner's motion.

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 neglect by Petitioner's name on the Nurse Aide Registry and 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.

The effective date of this decision shall be stayed until the 18th day of June, 2012 to permit Petitioner to file Petitioner's motion under Rule 59, if she so desires. After this date, if no motion is filed, this decision shall become effective.

IT IS SO ORDERED.

This the 8th day of June, 2012.

Julian Mann III
Chief Administrative Law Judge