

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11DHR14885

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| Andrea D Pritchett<br>Petitioner,<br><br>v.<br><br>NC DHHS Healthcare Personnel Registry<br>Section<br>Respondent. | <b>DECISION</b> |
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THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on June 29, 2012, in High Point, North Carolina.

**APPEARANCES**

For Petitioner: Lee Andrews  
P.O. Box 21472  
Greensboro, NC 27420

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 abused a resident of Guilford Health Care in Greensboro, North Carolina and entered findings of abuse 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. 130.0101

## **EXHIBITS**

Respondent's exhibits 1-9, 14, 16, 18-20, 22 were admitted into the record. Exhibits 17 and 21 were admitted after redaction.

## **WITNESSES**

Andrea Pritchett (Petitioner)  
Kelly Moton (co-worker and friend of Petitioner)  
Donita Odom (Unit Manager)  
Jenny Baxter (HCPR Nurse Investigator)

## **CONTESTED CASE PROCEEDURAL HISTORY**

This contested case was initially filed in an incomplete fashion with the Office of Administrative Hearings (herein after OAH) on December 23, 2011, by the Petitioner. Further information was requested of Petitioner and complied with, contemporaneously with Administrative Law Judge Augustus B. Elkins II being assigned to the case. Subsequent to this, Greensboro attorney Lee Andrews made an appearance for the Petitioner and on January 13, 2012 filed a signed Hearing Assistant Request form with OAH. After the filing of several pleadings the case was reassigned to Administrative Law Judge J. Randall May on February 28, 2012. Numerous other filings were recorded by the parties and the case was then duly noticed for hearing in the Guilford County Courthouse, High Point Division on June 29, 2012. At the hearing both parties were present and represented by counsel, as appears above.

At the conclusion of the contested case hearing the parties were asked to submit proposed decisions within thirty days of receipt of the transcript, which was to be ordered by the Respondent. Of record, both counsel acknowledged the undersigned's requests for proposed decisions. The hearing transcript was received by the OAH High Point office on July 25, 2012 and subsequently Respondent's proposal was timely filed; however, no proposal was filed by the Petitioner.

When the time for submission of proposals had passed, the Undersigned ordered Counselor Andrews to again submit his proposal by October 1, 2012. This was mailed to Counselor Andrews' regular mailing address. On September 25 the above Order was returned to the undersigned stating that he, Andrews, had "been ill for two months now and hospitalized since 9/1/12". He further advised that he would keep the Court informed of his status. A follow-up letter was posted to Counselor Andrews by the undersigned requesting further information from him on September 2, 2012 -- this correspondence was neither returned nor answered, and no information has been subsequently received from Andrews giving any hint of his status.

A Notice of Post Hearing Matters was filed and mailed to the parties on October 31, 2012. However, Counselor Andrews' (for Petitioner) Notice was returned by USPS, unclaimed, on November 6, 2012. This notice was posted by certified mail to Andrews' address of record. Also, a copy was mailed to Petitioner.

It should be noted that throughout these entire proceedings Assistant Attorney General Josephine Tetteh has always fulfilled her duty to be responsible to this Court.

On November 29, 2012 this matter had been duly noticed for hearing of the Post-Hearing Matter (of Petitioner's failed proposed decision submission). With this background, and with the requirement to conclude this case in a timely fashion, and after having made diligent efforts to hear from the Petitioner, the undersigned rules accordingly.

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 and the evidence, the Undersigned makes the following:

#### **FINDINGS OF FACT**

1. At all times relevant to this matter Petitioner, Andrea Pritchett, was a certified nursing assistant at Guilford Health Care Center (GHC) in Greensboro, North Carolina. GHC is a residential care facility. It is therefore subject to N.C. Gen. Stats. § 131E-255 and § 131E-256. (T. pp. 8, 72-73; Resp't Ex. 1).
2. Petitioner was trained for her position at GHC. Petitioner's training included care of the cognitively-impaired, and residents' rights including abuse. (T. pp. 14-15, 18-19; Resp't Exs. 2-4).
3. Petitioner's job responsibilities included providing gentle, direct assistance to residents. (Resp't Ex. 2).
4. Petitioner was working at GHC on August 5, 2011. Petitioner was to perform showers for residents of the 200 hall, including Resident MR. (T. p. 15; Resp't Ex. 6).
5. At all times relevant to this proceeding, Resident MR was a resident of GHC. Resident MR's diagnoses include Alzheimer's and Chronic Renal Insufficiency. According to Resident MR's care plan, she was at risk for abuse related to her combative behavior. Petitioner had worked with Resident MR previously and in her experience Resident MR "would always fight." (T. p. 9; Resp't Exs. 17-18, 20).
6. According to Petitioner's testimony, Resident MR was fighting on August 5, 2011 and Petitioner asked her co-worker, Kelly Moton ("Moton"), to help her with Resident MR. Maria Vilnor ("Vilnor") came into the shower room while Petitioner and Resident MR were there. Vilnor stood in front of Petitioner, Moton, and Resident MR while Petitioner and Moton were

dressings Resident MR. Vilnor put Resident MR's pants on after Moton and Petitioner had put Resident MR's blouse on. Following Resident MR's shower on August 5, 2011, Petitioner was accused of hitting Resident MR during the shower by Maria Vilnor. At all times relevant to this proceeding, Vilnor was a new employee at GHC and **did not offer testimony** at the contested case hearing. (T. pp. 9, 11, 13, 15-17, 61; Resp't Ex. 14).

7. It has reported by Donita Odom, ("Odom") that Vilnor reported her observations to Odom. At all times relevant to this proceeding, Odom was the unit manager at GHC. (T. pp. 14, 52-53; Resp't Exs. 14, 17).

8. After becoming aware of this information, Odom filed a 24-hour Report with the Health Care Personnel Registry ("HCPR"). The facility expectation for when a Resident becomes combative is that the resident would be left alone, or another staff member would be asked for assistance. (T. pp. 57, 59; Resp't Ex. 14).

9. Odom then conducted a facility investigation. As part of her investigation, Odom spoke to Petitioner, Vilnor, and Resident MR. (T. p. 55; Resp't. Ex. 17)

10. At the conclusion of her investigation, Odom reported her findings on the 5-day Working Report with the HCPR. Odom believed that she had substantiated the allegation of abuse and terminated Petitioner's employment with GHC. (T. p. 59; Resp't Ex.).

11. At all times relevant to this matter, Jenny Baxter ("Nurse Investigator Baxter") was an investigator with the Health Care Personnel Registry. Nurse Investigator Baxter is charged with investigating allegations against health care personnel in Guilford County, North Carolina. Accordingly, she received the allegation that Petitioner had abused Resident MR at GHC. (T. pp. 68-70; Resp't. Ex. 14).

12. Nurse Investigator Baxter independently reviewed the facility documents and conducted her own investigation. As part of her investigation, Nurse Investigator Baxter interviewed people involved with the incident, including Petitioner and Vilnor. Nurse Investigator Baxter also reviewed the facility investigation and statements. At the conclusion of her investigation Nurse Investigator Baxter substantiated the allegation of abuse. (T. pp. 71, 73, 75-76; Resp't. Exs. 19-21).

13. Nowhere during Petitioner's interview with Nurse Investigator Baxter does Petitioner indicate Moton was present. Nowhere during Petitioner's subsequent unsolicited letter to Nurse Investigator Baxter does Petitioner mention that Moton was present. GHC routinely interviews anyone identified as a witness during an investigation and obtains a statement from them. Petitioner also did not mention Moton in her facility statement. Moton was not identified during the facility investigation as a witness or being present. (T. pp. 12-13, 27-28, 30-31, 60-61; Resp't Exs. 7-9).

14. The following testimony was offered by Moton:

- a. Resident MR was holding her hands and her arms close to her body and was kicking on the day in question (T. pp. 34-37). Moton makes no mention of Resident MR swinging her arms on the day in question.
- b. After saying Petitioner had asked her (Moton) for assistance with Resident MR, instead of Vilnor (who was assigned to Resident MR) because Vilnor was unwilling to take care of Resident MR when Resident MR was combative, Moton then stated that Vilnor put on Resident MR's pants by herself. (T. pp. 39-40).
- c. Moton gave conflicting information about her presence in the shower room. After first saying she went to the shower room to specifically help with Resident MR (to whom she was not assigned), Moton then stated Petitioner had asked for Moton's assistance. Finally Moton stated that she had gone to the shower room to pick up her resident. (T. pp. 38, 43).
- d. Moton offered contradictory statements about Vilnor's role that day. Moton first said Vilnor was unwilling to take care of Resident MR because Resident MR was combative, then stated Vilnor did nothing while Moton and Petitioner were taking care of Resident MR. Finally, Moton stated that Vilnor put Resident MR's pants on. (T. pp. 37, 39, 44).
- e. Moton's statement that Vilnor put on Resident MR's pants when Resident MR was kicking is contrary to her testimony during the hearing that she (Moton) had been asked by Petitioner to assist with Resident MR because Vilnor did not want to take care of Resident MR when Resident MR was being combative.

15. Nurse Investigator Baxter did not interview Moton because neither Vilnor nor Petitioner indicated that Moton was present on August 5, 2011. (T. p. 78).

16. According to Petitioner's testimony, Resident MR was "swinging and fighting, and maybe that's how [Vilnor] thought that I was fighting her because she was swinging as we were trying to get her dressed." (T. pp. 12-13).

16. According to Petitioner, there is no reason why Vilnor would want to make up an allegation of abuse against Petitioner. (T. pp. 29-30).

17. Following the conclusions of her investigation, Nurse Investigator Baxter notified Petitioner of her decision to substantiate the allegation of abuse. (T. p. 79; Resp't Ex. 22).

19. "Abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." (T. p. 78; Resp't. Ex. 21).

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 certified nursing assistant working in a residential treatment and group home facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.

4. “Abuse” is defined as the “willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.”

5. However, in this case there are only three witnesses to the alleged abuse: MR, who did not offer testimony; the Petitioner, who has offered testimony in court, subject to cross-examination, denying the abuse; and Vilnor, the new employee who was the only eyewitness making this allegation, and who did not offer admissible testimony to this tribunal.

6. The conundrum presented by the evidence, or **lack thereof**, is that this case originated and was, in pertinent part, based on the allegation of the Respondent’s sole eye witness, Vilnor. Respondent’s entire investigation has been based on this allegation. Great efforts were taken by the Respondent to properly and thoroughly investigate this case. However, in keeping with the Respondent’s notice of an alleged substantiated finding of abuse, Petitioner was given notice of her right to appeal this finding before an impartial administrative law judge.

7. Petitioner elected to exercise her right to such an appeal and to challenge the case that Respondent had made against her. Thus, she acquired counsel and proceeded to have the case proved against her. The right of such a fair and impartial hearing, with the right to cross-examine witnesses for the Respondent, is afforded to petitioners to enable them to hear and contest the evidence against them. (N.C.G.S. § 150B-40[a]). Herein lays the missing link to the Respondent’s case; for without the testimony of its sole witness to the abuse which allegedly occurred, the case simply cannot be bootstrapped upon hearsay to prove the heart of the allegation. Parties cannot control the appearance or the testimony of their witnesses; however, without the required proof of the abuse, Respondent’s case must fail.

6. Respondent was unable to prove that it did not act capriciously, substantially prejudicing the rights of Petitioner, as there was insufficient admissible evidence to support Respondent’s conclusion that Petitioner abused Resident MR.

### **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.

### **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 by Petitioner's name on the Nurse Aide Registry and 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 Services, Division of Health Service Regulation.

The Agency is required to give each party an opportunity to file exceptions to the 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' attorneys 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 10th day of May, 2013.

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J. Randall May  
Administrative Law Judge