

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 00459

FINAL DECISION

APPEARANCES

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

ISSUES

The Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that:

(1) The employment and personal history of the health care personnel does not reflect a pattern of abusive behavior or neglect;

(2) The neglect involved in the original finding was a singular occurrence; and

(3) The petition for removal is submitted after the expiration of the one year period which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section.

2. Whether or not the Petitioner's name should be removed from the Health Care Personnel Registry pursuant to N.C. Gen. Stat. § 131E-256(i).

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256

N.C. Gen. Stat. §150B-23

42 C.F.R. § 488.301

10 N.C.A.C. 130.0101

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's exhibit 1 and Respondent's exhibits 1 through 14.

FINDINGS OF FACT

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:

1. N.C. Gen. Stat. § 131E-256(a)(1)(a) requires the Health Care Personnel Registry ("HCPR") to maintain a registry containing the names of all health care personnel working in health care facilities in North Carolina who have been subject to findings of neglect of a resident.

2. Neglect is defined in 42 CFR Part 488.301 as the failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. It is the obligation of the HCPR to protect the health and safety of residents. In so doing, the HCPR must ensure that unlicensed staff in health care facilities have the ability to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.

3. A petitioner may request removal of a listing of neglect from the HCPR. In order to remove a finding of neglect against a name, the petitioner is required to do so pursuant to the provisions of N.C. Gen. Stat. § 131E-256(i) which provides:

In the case of a finding of **neglect** under subdivision (1) of subsection (a) of this section, the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that:

(1) The employment and personal history of the health care personnel does not reflect a **pattern of abusive behavior or neglect**;

(2) The neglect involved in the original finding was a **singular occurrence**; and

(3) The petition for removal is submitted after the expiration of the **one-year period** which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section.

N.C. Gen. Stat. § 131E-256(i) (2011) (emphasis added)

4. The HCPR established a policy and procedure to permit a health care personnel with a finding of neglect to petition to have his or her name removed from the registry. The policy and procedure contained the following requirement:

5. An **individual with a neglect finding who has received disciplinary action/warning for abusive behavior or neglect in his/her employment history other than the incident that resulted in the neglect finding will not be eligible for removal of the listed neglect finding.**

(T. pp. 28-29, Resp't. Ex. 2) (emphasis added)

5. Petitioner's name was placed on the HCPR on December 22, 2005. The nature of the allegation for the entry of finding into the HCPR states:

On or about 1/1/05, James Taylor, a Health Care Personnel, neglected a resident (LW) by failing to provide supervision as indicated in the resident's Habilitation Plan, exposing the resident to the potential for harm and the resident eloped from the group home.

(T. p., Resp't. Ex. 3)

6. By letter dated June 27, 2011, Petitioner requested that his name be removed from the Health Care Personnel Registry. (T. p. 30; Resp't. Ex. 4)

7. At all times relevant to this matter, Debra T. Hockaday ("Hockaday") was employed as an investigator for the Health Care Personnel Registry ("HCPR") and specifically conducted the request for neglect removal investigation. (T. p. 30; Resp't Exs. 5, 7, 9,-15)

8. By letter dated June 28, 2011, the HCPR notified Petitioner of the statutory requirements which must be met in order to have Petitioner's name removed from the Registry, and what documentation would be required. (T. pp. 30-31; Resp't. Ex. 5)

9. A second letter dated October 4, 2011 notified Petitioner that he had not fulfilled the statutory requirements for the requested documentation and needed to provide a current statewide criminal record check. (T. p. 31; Resp't. Ex. 7)

10. Hockaday eventually obtained the necessary documentation from Petitioner, and reviewed such documentation once all the correct information was received by the Health Care Personnel Registry. (T. pp. 32-34)

11. While working at O'Berry in 2009, Petitioner received a disciplinary action for failing to inform his supervisor of a potential medication error by a nurse. When asked about the incident, Petitioner stated that he was under the impression the medication error had happened, and that he had not informed his supervisor. As a result, petitioner received a written warning for unsatisfactory job performance. (Resp't. Exs. 11, 12)

12. In June 2011, Petitioner received another disciplinary action for a number of actions constituting a failure to provide acceptable supervision at O'Berry. Specifically, Petitioner left the group home he was supposed to be supervising without informing the remaining group manager who took over from him that the unit was understaffed. (T. p. 40; Resp't. Exs. 11, 12)

13. Petitioner received and signed written warnings for both incidents. Both incidents happened after Petitioner was originally listed on the HCPR. (T. pp. 37, 40; Resp't. Exs. 12)

14. In previous investigations, the HCPR has considered a pattern to be something that has occurred more than once therefore, three would be a pattern. (*Winter McCotter v. NCDHHS, DFS, HCPR, 07 DHR 0167; Crystal Eason v. NCDHHS, DHSR, HCPR, 11 DHR 4473*) This interpretation is also consistent with the HCPR's application and interpretation of its policies and procedures. (T. pp. 39, 41)

15. The two additional incidents at O'Berry following Petitioner's listing on the HCPR involved neglect and demonstrated a pattern of neglect by showing Petitioner ignored his responsibility to supervise and ensure the safety of clients. The HCPR considers a pattern to be something that has occurred more than once therefore, three times would be a pattern. The act which would be considered is the failure to provide goods and services to avoid physical harm, mental anguish or mental illness. This act fits the statutory definition of neglect used by the

HCPR. (Resp't. Ex. 14)

16. On January 6, 2012, Hockaday summarized her review of the documentation for the Health Care Personnel Registry in a document entitled "Neglect Review of Request to Remove Neglect Finding from the HCPR." (T. p. 38; Resp't. Ex. 13)

17. By letter dated January 6, 2012, the HCPR notified Petitioner that he had not met the State's requirements allowing for removal of the neglect finding. (T. p. 42; Resp't. Ex. 14)

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

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 Health Care Personnel working in a residential care facility at the time the incident occurred, Petitioner was subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. Pursuant to N.C. Gen. Stat. § 131E-256(d) and (d1), Health Care Personnel who wish to contest findings under N.C. Gen. Stat. § 131E-256(a)(1) can appeal by filing a petition for a contested case hearing within 30 days of the mailing of the written notice of the HCPR's intent to place the findings in the registry.

5. Pursuant to N.C. Gen. Stat. § 131E-256, after an entry of finding is entered on the Health Care Personnel Registry, only a finding of neglect can be removed by petitioning the Department.

6. In order to remove a finding of neglect against a name, Petitioner is required to do so pursuant to the provisions of N.C. Gen. Stat. § 131E-256(i) which provides:

In the case of a finding of **neglect** under subdivision (1) of subsection (a) of this section, the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that:

(1) The employment and personal history of the health care personnel does not reflect a **pattern of abusive behavior or neglect**;

(2) The neglect involved in the original finding was a **singular occurrence**; and

(3) The petition for removal is submitted after the expiration of the **one-year period** which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section.

N.C. Gen. Stat. § 131E-256(i) (2011) (emphasis added)

7. N.C. Gen. Stat. § 131E-256(i)(1) only allows an entry of neglect to be removed if, “the employment and personal history of the health care personnel does not reflect a pattern of abusive behavior or neglect.”

8. Black’s Law Dictionary defines a “pattern” as a series of acts that are recognizably consistent. Webster’s Dictionary defines a “series” as a number of things or events of the same kind occurring in a row or following one after the other in succession. Webster’s II Dictionary (2nd Edition 1999)

9. The HCPR established a policy and procedure to permit a health care personnel with a finding of neglect to petition to have his or her name removed from the registry. (Resp’t. Ex. 2) The policy and procedure contained the following requirement:

5. An individual with a neglect finding **who has received disciplinary action/warning for abusive behavior or neglect in his/her employment history other than the incident that resulted in the neglect finding will not be eligible for removal** of the listed neglect finding.

(Resp’t. Ex. 2) (emphasis added)

10. Respondent has established and used proper procedures for the removal of a finding of neglect. In this case, Respondent acted in accordance with those procedures, and acted as required by law under the provisions of N.C. Gen. Stat. § 131E-256(i). This procedure and decision is in compliance with N.C. Gen. Stat. § 131E-256(i) which prohibits the removal of a finding of neglect if the employment history of the health care personnel reflects a pattern of neglect.

12. Petitioner has displayed a pattern of neglectful behavior which does not ensure the ability to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. The request for removal does not meet the eligibility requirements of the HCPR’s policy and procedures. Therefore, the HCPR must deny Petitioner’s request for the removal of neglect finding.

13. Based on the foregoing, Petitioner’s name cannot be removed for the following reason:

- (a) Petitioner's employment history reflects a pattern of neglect.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent's refusal to remove a finding of neglect at Petitioner's name on the Health Care Personnel Registry is UPHELD.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' Rule 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 20th day of July, 2012.

Melissa Owens Lassiter
Administrative Law Judge