

STATE OF NORTH CAROLINA  
COUNTY OF ORANGE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12 DHR 01138

DANIEL W. HARRIS, JR.,  
Petitioner,

v.

NC DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION,  
Respondent.

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**FINAL DECISION**

THIS MATTER came for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on August 2, 2012 in Courtroom A of the Office of Administrative Hearings in Raleigh, North Carolina.

**APPEARANCES**

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

For Petitioner: *Pro se*

**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 Britthaven of Chapel Hill in Chapel Hill, North Carolina and entered a finding of abuse by Petitioner's name in the Health Care Personnel Registry and the Nurse Aide Registry.

**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. 13O.0101

**EXHIBITS**

Respondent's exhibits 1 – 15, 17 – 21, and 23 – 27 were admitted into the record.

### **WITNESSES**

For Respondent: Daniel W. Harris, Jr.  
Cheryl Nabors  
Sylvia Little  
Pansy Grimes  
Sherry Comstock  
Reginald Fadden  
Judy Jackson

**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 and conclusions of law. 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 witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witnesses 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 Nurse Assistant I ("CNA") with Britthaven of Chapel Hill ("Britthaven") in Chapel Hill, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (Tr. p. 10; Resp. Ex. 5)
2. As a CNA, Petitioner's duties primarily involved providing direct care to patients at Britthaven, including assistance with personal hygiene and feeding. (Tr. pp. 12-13)
3. Britthaven provides rehabilitation and nursing care for individuals. Britthaven is a health care facility as defined by NC. Gen. Stat. § 131E-256; therefore, its employees can be placed on the Health Care Personnel Registry and the Nurse Aide Registry.
4. Petitioner contends that much of the documentation about his training during orientation only amounted to him signing the paperwork to acknowledge that he had been given the documents and not that he had been trained. However, Petitioner has been a CNA since 1999 and admits that he has completed all required training related to his job responsibilities, including instruction on abuse, neglect, residents' rights, and working with dementia residents, and that training and requirements are almost identical no matter where you may work in this field. (Tr. pp. 13-20, 149-150; Resp. Ex. 1, 2, 3, 4, 13)
5. Petitioner reported to work and was on duty at Britthaven on January 19, 2012,

during the relevant times for this action. Petitioner was assigned to one-on-one duty with J.H. on that day. (Tr. p. 21) Petitioner had not worked with J.H. prior to that day. He was not aware of J.H.'s medical needs not his plan of care. J.H. occasionally exhibited violent tendencies.

6. During the relevant time period, Petitioner was only assigned to light duty due to a back injury. Petitioner was not assigned to any hands-on care tasks, but was only asked to supervise or take weight and blood pressure measurements for residents. (Tr. pp. 20-21)

7. J.H. is a resident living in the Dementia Unit of Britthaven. At the time of the incident, J.H. was approximately seventy (70) years old and required the use of a walker to move throughout the facility. J.H. suffered from dementia, HTN, Huntington's disease, GERD, anxiety, and major depressive disorder. (Tr. p. 133; Resp. Ex. 25)

8. Cheryl Nabors ("Nabors"), a CNA with Britthaven, was assigned to the Dementia Unit on January 19, 2012, working on the opposite side of the hall from J.H.'s room. (Tr. p. 43) She has been a CNA since 2000 and with Britthaven since September 2011. She has worked with Petitioner before and gets along well with him. She has worked with J.H. previously, and she acknowledges that J.H. has a tendency to violence and that he has even struck her before.

9. Nabors heard a commotion emanating from J.H.'s room and walked down the hall to investigate. Nabors knocked on the door, entered the room, and observed Petitioner striking J.H. in the abdomen with his right fist. J.H. was fully clothed and lying on the bed. Petitioner stood over J.H. with his left knee on the bed while holding J.H.'s leg with his left hand. (Tr. pp. 44-48)

10. After she opened the door, Nabors had an unobstructed view of J.H.'s entire room. Petitioner did not recognize that Nabors was in the room and he continued to strike J.H. until Nabors called out to him, asking him to stop. (Tr. pp. 52-53; Resp. Ex. 21)

11. Nabors asked Petitioner to leave the room and she began walking J.H. toward the nurses' station. Petitioner followed J.H. and Nabors. (Tr. pp. 49-51)

12. At the end of the hall, Petitioner leaned over to pull up J.H.'s pants, which were falling down toward his ankles as he walked. As Petitioner bent down, J.H. struck Petitioner on the face. (Tr. pp. 49-51)

13. Sometime after the incident, Nabors asked Alicia Williams ("Williams") to assist her with J.H.'s daily care. As Nabors and Williams undressed J.H., Nabors noticed redness across J.H.'s abdomen in the shape of three fingerprints. (Tr. pp. 51-52, 72; Resp. Ex. 15) Petitioner is a large man, and it would seem inconsistent for a man of his size to have struck J.H. with his fists repeatedly and leave only three rather small red marks.

14. Nabors reported the incident and the redness on J.H.'s abdomen to Sylvia Little ("Little"), Licensed Practical Nurse ("LPN") with Britthaven. Little has been an LPN for thirty eight years. Little instructed Nabors to record her observations on an official witness statement form. (Tr. pp. 56-59; Resp. Ex. 7)

15. As Nabors produced her statement, Little reported the incident to the facility Administrator, Reginald Fadden (“Fadden”). Fadden asked Grimes and Comstock to inspect J.H. for injuries. (Tr. pp. 117-118)

16. Little and Pansy Grimes (“Grimes”), Registered Nurse (“RN”) and Facility Wound Consultant, inspected J.H. for injuries. Little stated that she did not see anything, but observed that if there was any redness, it was faint. She asked J.H. if he was hurting, and J.H. responded by pointing toward his stomach. In her written statement, Little noted that J.H. denied any discomfort and that there were no bruises on his stomach. Little went on to explain that she was examining J.H. approximately thirty minutes after the incident and that bruises do not show up immediately, although it would have been red.

17. Grimes had been a RN for thirty two years at the time of the incident. She noted that J.H. was “almost fearful” of their inspection and appeared to have “red splotchy areas all over the mid-part of his torso.” Both Little and Grimes produced statements describing their observations. (Tr. pp. 81-82, 85, 91-95; Resp. Ex. 8, 9, 17)

18. Sherry Comstock (“Comstock”) is a Registered Nurse (“RN”) and Director of Nursing for Britthaven. She has been a RN for fifteen years and has been DON at three separate facilities for Britthaven. She was instructed by Fadden to collect a statement from Petitioner. The statement given by Petitioner was noticeably inconsistent with Nabors’ account of the incident. (Tr. pp.105-107; Resp. Ex. 6)

19. Comstock inspected J.H. for injury and found an area on his abdomen that was not red but that she described as “bright pink...almost like a deep blush.” (Tr. p. 111)

20. Fadden conducted an investigation into the incident and collected statements from Petitioner, Nabors, Grimes, and Little. (Resp. Ex. 6, 7, 8, 9)

21. On January 19, 2012, Fadden submitted a 24-Hour Report to the Health Care Personnel Registry (“HCPR”), documenting the type of incident reported and the individuals involved. (Tr. pp. 118-120; Resp. Ex. 10)

22. As part of Britthaven investigation procedure, Petitioner was suspended from work for the duration of the investigation. (Tr. p. 117)

23. Fadden substantiated the allegation of abuse and terminated Petitioner. In addition, Fadden submitted the 5-Working Day Report to the HCPR. This report included information on the allegation, the facility response, and details pertaining to J.H.’s mental and physical health. Fadden also attached an addendum, included with the 5-Working Day Report, further detailing Britthaven’s response to the incident. (Tr. pp. 121-124; Resp. Ex. 11, 12)

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 Britthaven are covered by the HCPR.

25. At all times relevant to this action, Judy Jackson (“Jackson”) was employed as a Nurse Investigator with the HCPR. Jackson was charged with investigating allegations against health care personnel in the Orange and Alamance counties. Britthaven was part of the territory covered by Jackson. (Tr. p. 129)

26. Upon receipt of the 24-Hour and 5-Working Day Reports from Britthaven, Jackson “screened in” the case for further investigation. (Tr. pp. 129-130; Resp. Ex. 10, 11)

27. Jackson conducted her investigation on-site at Britthaven on April 17-18, 2012. (Tr. p. 131) She conducted telephone interviews for those personnel who were not present on the day she conducted the on-site investigation.

28. Jackson reviewed Petitioner’s Britthaven personnel file and concluded that Petitioner received all the training necessary to properly perform his duties. While Petitioner does not agree that he was particularly trained by Britthaven, it is found that he has received the appropriate and necessary training. Jackson also analyzed Petitioner’s discipline record and found no prior issues. (Tr. p. 134-135; Resp. Ex. 23)

29. Jackson reviewed J.H.’s care plan and met with him for observation. She determined that J.H. was not capable of being interviewed due to his various diagnoses and that he is not very verbal. (Tr. pp. 132-133; Resp. Ex. 24, 25)

30. On July 6, 2011, Jackson interviewed Nabors. The statement obtained through this interview was consistent with Nabors’ previous statements to Britthaven, as well as her testimony at trial. In addition to the transcript of the interview, Nabors diagramed the location of J.H.’s injury, depicting redness in the shape of three finger-shaped lines on his abdomen. (Tr. pp. 59-61, 135-136; Resp. Ex. 17)

31. Little provided a statement to Jackson over the telephone. The statement obtained through this interview was consistent with Little’s testimony at trial. (Tr. pp. 83-87, 136-137; Resp. Ex. 17)

32. Jackson also spoke with Grimes over the telephone. The statement obtained through this interview was consistent with Grimes’ testimony at trial. In addition, Grimes produced a diagram of J.H.’s injury and indicated that his entire abdomen was “red and splotchy.” (Tr. p. 92, 95-96, 137; Resp. Ex. 18)

33. Jackson spoke with Comstock on April 18, 2012. Comstock detailed the inconsistencies of Petitioner’s recount of the incident as compared to the statements given by Nabors and other Britthaven staff. Comstock also verified the Incident Site Sketch drawn by Jackson. (Tr. pp. 107-109, 137-138; Resp. Ex. 19, 21)

34. Jackson spoke with Fadden on April 17, 2012. Fadden’s statement was consistent

with his documentation from the Britthaven investigation, as well as with his testimony at trial. (Tr. pp. 124-125, 138-139; Resp. Ex. 20)

35. Jackson interviewed Petitioner on April 18, 2012. Petitioner's account of the incident was inconsistent with that of Nabors, Little, Grimes, Comstock, and Fadden. (Tr. pp. 26-29, 139-140; Resp. Ex. 13)

36. Jackson assessed all the information obtained through her investigation, including the written statements collected by Fadden, the HCPR interviews, and the documentation of J.H.'s injury. Jackson concluded "that on or about January 19, 2012, [Petitioner] abused a resident (J.H.) by hitting the resident causing physical harm, pain, and mental anguish." Jackson wrote an investigation conclusion report that documented her determination. (Tr. pp. 140-143; Resp. Ex. 26)

37. Petitioner was notified by letter that a finding of abuse would be listed against his name in the HCPR. Petitioner was further notified of his right to appeal. (Tr. pp. 145-146; Resp. Ex. 27)

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

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. §§ 131E and 150B *et seq.*

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 Nurse Assistant I, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. Britthaven of Chapel Hill in Chapel Hill, 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 or about January 19, 2012, Petitioner abused a resident (J.H.) by hitting the resident causing physical harm, pain, and mental anguish.

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 and the Nurse Aide Registry.

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

### **FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to place Petitioner's name on the Health Care Personnel Registry and the Nurse Aide Registry with a finding of abuse should be **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 19<sup>th</sup> day of October, 2012.

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Donald W. Overby  
Administrative Law Judge