

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR01998

<p>Rochelle A Gaddy Petitioner,</p> <p>v.</p> <p>Department of Health and Human Services Division of Health Service Regulation Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER coming on for hearing before the Honorable J. Randall May, Administrative Law Judge Presiding, for a determination of the merits of Petitioner's Contested Case, and, after having been heard, and upon consideration of the evidence presented herein on October 3, 2012 in Charlotte N.C. and concluded in High Point, N.C. on February 27, 2013.

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, 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 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. This is a Contested Case brought by Petitioner pursuant to Chapter 150B challenging the action taken by Respondent pursuant to N.C.G.S. § 131E-256.
2. The Petitioner was present in court and represented by counsel, Andrew J. Epstein and Monica E. Webb.
3. The Respondent was present in court and represented by counsel, Thomas E. Kelly.
4. This action arose out of accusations made against Petitioner for alleged abuse of a resident at the Parc at Sharon Amity, an assisted living facility located in Charlotte, Mecklenburg County, North Carolina.

5. The Petitioner is a Certified Nurse Assistant (CNA) who worked at the Parc at Sharon Amity (the "Parc") from 2010 until January 13, 2012, at which time Petitioner's employment was terminated.

6. By letter, dated February 28, 2012, Respondent notified Petitioner that Respondent had initiated an investigation into allegations that on or about January 2, 2012 and January 3, 2012, Petitioner allegedly abused a resident at the Parc at Sharon Amity. As a result, Petitioner was listed on the Health Care Personnel Registry pursuant to N.C.G.S. § 131-256. Respondent assigned an investigator, Lawrencette McSwain ("Investigator McSwain"), to investigate the allegations of abuse.

7. On March 23, 2012, Petitioner filed a Contested Case Petition against Respondent, denying all allegations of abuse, and challenging the listing in the Health Care Personnel Registry.

8. By letter, dated May 7, 2012, Respondent notified Petitioner that Respondent substantiated allegations of abuse and neglect against Petitioner.

9. On May 14, 2013, Petitioner filed a Prehearing Statement, which encompassed the substantiated allegations of abuse and neglect, including whether Respondent acted erroneously, arbitrarily, and/or capriciously, and failed to use proper procedure when it substantiated findings of abuse and neglect as indicated in its May 2012 letter to Respondent.

10. At the hearing of this matter, Respondent called four witnesses who alleged that on January 2, 2012, Petitioner poured water from a water bottle onto resident R.H., while in the break room of the facility. These witnesses were Sharon Halley, Robin Roach, Chanelle Wallace, and Crystal Sinclair.

11. Sharon Halley was the first and only person to report this incident to anyone at the Parc without being specifically asked about it. During Investigator McSwain's investigation, Sharon Halley signed a statement that she reported this incident to administrator Donna Stallings, in person, immediately after the incident occurred on January 2, 2012.

12. On April 11, 2012, Sharon Halley signed another statement that she reported this incident to Donna Stallings on January 2, 2012.

13. During the investigation at the Parc, Donna Stallings signed a statement that she had taken time off for the New Year's Holiday and was not at the Parc on January 2, 2012.

14. At the hearing of this matter, Sharon Halley testified that she reported the incident on January 3, 2012 and that she changed her story since she had learned that Donna Stallings was not at the Parc on January 2, 2012.

15. Portions of Sharon Halley's testimony about how, when, and why she reported the incident was not credible.

16. Sharon Halley testified that she was not in the room where the incident allegedly occurred on January 2, 2012; was not in a position to see the incident; and testified that she did not see the Petitioner pour any water on any resident. Sharon Halley also testified that she did not speak with anyone else who was in a position to see the incident before reporting it to Donna Stallings.

17. None of the other witnesses relied upon by the Respondent to substantiate the allegations of this incident on January 2, 2012 (Robin Roach, Chanelle Wallace, and Crystal Sinclair) reported anything about this incident to anyone, until specifically asked about it by their supervisors, Donna Stallings and Angela Parks, on January 5, 2012. Robin Roach, Chanelle Wallace, and Crystal Sinclair were aware of the requirement that they immediately report abuse or neglect of a resident, yet none did.

18. The Petitioner testified that on January 2, 2012, she was in the break room and started drinking out of her bottle of water, that the other CNAs in the room, Robin Roach, Chanelle Wallace, and Crystal Sinclair, started laughing and one of them told Petitioner that a resident, R.H., had just drank out of that bottle of water, and that Petitioner reflexively spit the water out of her mouth. Petitioner testified that some of the water fell onto Petitioner's hands and some of the water inadvertently landed on the back of R.H.'s shirt.

19. Although Petitioner was an interested witness, her testimony was credible.

20. Robin Roach testified that she, along with Chanelle Wallace and Crystal Sinclair, were laughing during this incident. Crystal Sinclair testified that she saw R.H. holding the Petitioner's water before Petitioner came into the break room where the incident occurred. This testimony corroborated Petitioner's testimony.

21. Respondent's Investigation Conclusion Report indicates that Petitioner's account of the January 2, 2012 incident changed from what she told the facility during their investigation to what she reported to Respondent's investigator. However, the written statement from the Parc was written by Donna Stallings and the evidence showed that the Petitioner was not given an opportunity to write a statement. Further, there was no credible evidence that Petitioner signed, adopted, accepted, or even saw the statement written by Donna Stallings.

22. It was erroneous for Investigator McSwain to conclude that the Petitioner's account of the January 2, 2012 incident changed.

23. Despite the inconsistencies between Investigator McSwain's interviews of Donna Stallings and Sharon Halley and the fact that the only person to have voluntarily reported this incident at any point before being questioned about it on January 5, 2012 did not actually see the incident or hear anything about it, Investigator McSwain did not attempt to investigate whether there was any retaliation or other motives for these allegations.

24. Investigator McSwain testified that if there was evidence of retaliation against the Petitioner, then that would be important and something that she would need to investigate.

Investigator McSwain also testified that she did not investigate any possible retaliation against the Petitioner in her investigation in this matter.

25. Investigator McSwain testified that during her investigation in this matter and substantiation of the findings against the Petitioner, she did not consider that the allegations could have stemmed from retaliation because she did not think that Sharon Halley would have a reason to retaliate against the Petitioner.

26. The evidence showed that there were occasions on which Sharon Halley had heated words with the Petitioner because the Petitioner criticized Sharon Halley for not taking proper care of the residents at the Parc. Additionally, the evidence showed that in late December, 2011, days before Sharon Halley reported the Petitioner to Donna Stallings, the Petitioner and Sharon Halley had an argument.

27. It was erroneous for Investigator McSwain to assume that Sharon Halley had no reason to retaliate against the Petitioner.

28. Investigator McSwain testified that Petitioner told her during the investigation that she had complained about another staff member sexually harassing her, yet Investigator McSwain did not ask any follow up questions about this to the Petitioner or any other witness.

29. Investigator McSwain testified that she received and reviewed the Petitioner's personnel file, but that there were no documents relating to the Petitioner's sexual harassment complaint in that file. Investigator McSwain further testified that she did not seek any of the documents relating to the sexual harassment complaint from the Parc.

30. The evidence presented at the hearing of this matter showed that on October 7, 2007, the Petitioner reported being sexually harassed and assaulted by another employee of the Parc, Marian Irdela, and that Angela Parks, the Residential Care Coordinator, conducted the investigation about the sexual harassment complaint.

31. A formal corrective action form was issued to Mirian Irdela as a result of this investigation (not signed by Angela Parks) on October 26, 2007.

32. The next day, on October 27, 2007, Kendra Johnson and Angela Parks, both of whom were close with Mirian Irdela, issued a corrective action form to the Petitioner, which is some evidence of potential retaliation.

33. It was arbitrary and erroneous for Investigator McSwain not to have sought the documentation of the sexual harassment complaint omitted from Petitioner's personnel file or investigated potential retaliation.

34. Had Investigator McSwain sought and reviewed the documents relating to the Petitioner's sexual harassment complaint, she would then have been able to recognize the potential retaliation and investigate additional facts and circumstances surrounding the allegations that had been made about the Petitioner.

35. The evidence showed that the Petitioner had reported issues about inadequate patient care at the Parc to the Department of Social Services (DSS) on multiple occasions to try to get better care for the residents at the Parc.

36. The evidence showed that DSS came to the Parc on multiple occasions as a result of the Petitioner's calls to investigate and resolve the issues.

37. DSS investigators came to the Parc to investigate in late November, 2011, just over a month before the allegations against the Petitioner arose. During this visit, DSS investigators interviewed the Petitioner, who told the investigators about numerous issues with resident care, inadequate equipment and supplies, and residents that needed a higher level of care than the Parc could provide.

38. Two of Petitioner's supervisors, Angela Parks (Residential Care Coordinator at the Parc) and Kendra Johnson (Medical Technician) saw Petitioner speaking with the DSS investigators.

39. The evidence also showed that after the Petitioner spoke with the DSS investigators in late November, 2011, Chanelle Wallace, Crystal Sinclair, and Robin Roach asked the Petitioner what she told the investigators and the Petitioner told them exactly what she told the DSS investigators.

40. The evidence showed that as a result of the DSS investigation, DSS moved some residents out of the Parc and into different facilities during the month of December, 2011.

41. There was some evidence that as a result of DSS moving residents out of the Parc, the CNAs hours were getting reduced; Crystal Sinclair, Robin Roach, and Chanelle Wallace stated in late December 2011 and early January 2012 that they were worried about their hours being reduced.

42. At a staff meeting that Donna Stallings held in late December 2011, the CNAs asked about raises. There was evidence that at that staff meeting, Donna Stallings responded that the CNAs would never get raises as long as someone keeps calling DSS.

43. Donna Stallings testified that after Petitioner was fired, some of the CNAs got raises in March 2012.

44. Investigator McSwain did not consider the full ramifications of the pending DSS investigations.

45. Only one witness, Robin Roach, alleged at the hearing of this matter that Petitioner poured hot sauce into cereal and gave it to resident R.H. to eat on January 3, 2012.

46. The evidence showed that Robin Roach did not report this incident at the time that it occurred, but instead reported it only after being questioned by the facility administrators on January 5, 2012 about the water incident. Robin Roach was aware of the requirement that she

immediately report abuse or neglect of a resident, but she testified that she did not do anything to stop it at the time or report it afterwards.

47. Robin Roach testified that there were numerous other CNAs that Investigator McSwain did not interview who were in a position to see this incident on January 3, 2012.

48. There was no other evidence supporting the allegations relating to the January 3, 2012 incident.

49. The Petitioner told Investigator McSwain during an interview that she had no knowledge of any incident with R.H. on January 3, 2012, cereal, or hot sauce, and that the allegation was untrue. Petitioner's testimony at the hearing was consistent with this, and credible.

50. Investigator McSwain testified that she only interviewed witnesses specifically identified to her by Donna Stallings and Angela Parks at the Parc and that she did not interview any other witnesses.

51. Julia Cowan Sanders, a CNA at the Parc, testified that Investigator McSwain did interview her during her investigation in this matter and that she told Investigator McSwain that the Petitioner was a good nurse, and that she does not believe that the Petitioner would even attempt to abuse a resident.

52. Investigator McSwain did not include any information from her interview of Julia Cowan Sanders in her report or notes.

53. Investigator McSwain's investigation file and report only included documents and interviews that supported the allegations against the Petitioner, instead of all documents and information received in the investigation.

54. By omitting the interview with Julia Cowan Sanders, Investigator McSwain specifically excluded information that tended to show that the Petitioner was not the type of person to abuse or neglect a resident.

55. No evidence was presented that tended to show that R.H. was neglected by anyone on January 2 or January 3, 2012.

56. Respondent interviewed Petitioner on April 12, 2012, without addressing any allegations of neglect. Investigator McSwain made no effort to inform Petitioner of the full extent of the investigation, nor did Investigator McSwain make any effort to elicit relevant and material information from Petitioner regarding the issue of neglect.

57. Respondent's investigation uncovered no evidence to substantiate the allegations of neglect.

58. Investigator McSwain defined “neglect” in her Investigation Conclusion Report to mean “the failure to provide goods or services necessary to avoid physical harm, mental anguish or mental illness.” However, Investigator McSwain testified that she substantiated the finding of neglect against the Petitioner for the January 2, 2012 incident because, “if [pouring the water] was her attempt to get the resident out of the room there was a better, more approved way and a more appropriate way to get that resident to leave that break room.” Investigator McSwain testified similarly that she substantiated the finding of neglect against the Petitioner for the January 3, 2012 incident because, “if Ms. Gaddy was going to try to get RH out of the staff break room, it was not proper for her to do that by giving her hot sauce in cereal. There was a more appropriate way to get RH to leave the break room.”

59. The evidence showed that the Respondent arbitrarily substantiated both findings of neglect based on an unknown and unidentified definition of neglect that was different from the Respondent’s own stated definition of neglect.

BASED UPON the foregoing FINDINGS OF FACT, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

1. This matter is properly before the undersigned for determination on the merits with due and proper notice to all parties.

2. It was erroneous for Investigator McSwain to conclude that the Petitioner’s account of the January 2, 2012 incident changed.

3. It was erroneous, arbitrary, capricious, and improper procedure for Investigator McSwain not to investigate the motives, biases, and credibility of the employees making the allegations and their strained relationships with the Petitioner.

4. It was erroneous for Investigator McSwain to assume that Sharon Halley had no reason to retaliate against the Petitioner.

5. It was erroneous, arbitrary, and improper procedure for Investigator McSwain not to have sought and reviewed the documents relating to the sexual harassment complaint that the Petitioner specifically informed her about.

6. It was erroneous, arbitrary, capricious, and improper procedure for Investigator McSwain not to have investigated potential retaliation based on the DSS investigation within a month before the allegations were made.

7. In light of the differing accounts provided by witnesses and the known sexual harassment complaint, it was erroneous, arbitrary, and improper procedure for Investigator McSwain not to investigate possible retaliation against the Petitioner.

8. There was insufficient evidence to substantiate a finding of abuse or neglect relating to the alleged incident on January 3, 2012.

9. It was erroneous, arbitrary, and improper procedure for Investigator McSwain to exclude from her report and notes information that she received from a witness (Julia Cowan Sanders) supporting the Petitioner's account, and not consider it when determining whether to substantiate the findings of abuse and neglect.

10. The Respondent's evidence does not support either finding of neglect (January 2, 2012 and January 3, 2012) and it was erroneous to substantiate them based on a definition other than the definition specified in Investigator McSwain's report.

11. Respondent erred in its findings that Petitioner abused and neglected a resident of the Parc at Sharon Amity.

12. The Respondent has substantially prejudiced the Petitioner's rights by substantiating the findings of abuse and neglect and by listing Petitioner's name on the Health Care Personnel Registry.

FINAL DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned ORDERS that the findings made by Respondent, as reported in its letter of March 23, 2012 to Petitioner, be dismissed and that Petitioner's name shall be removed from the Health Care Personnel Registry.

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 3rd day of June, 2013.

J. Randall May
Administrative Law Judge