

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12DHR04834

Emelda Bih Che Petitioner,  v.  Health Care Personnel Registry Case Respondent.	<b>FINAL DECISION</b>
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This case came for hearing before Administrative Law Judge J. Randall May in Charlotte, North Carolina on October 2, 2012.

**APPEARANCES**

For Petitioner:	Kirk Angel, Esq. The Angel Law Firm, PLLC 109 Church Street N Concord, North Carolina 28025
For Respondent:	Thomas Edward Kelly Associate Attorney General North Carolina Department of Justice Post Office Box 629 Raleigh, North Carolina 27602

**WITNESSES**

Emelda Bih Che  
Regina Cameron  
Anticia Gatewood  
Lauren Jennings  
Tamieka Penny-Cooke  
Portia Rezk  
Lawrencette McSwain

## **ISSUE**

Whether Agency substantially prejudiced Petitioner's rights and failed to use proper procedure when it notified Petitioner that the Respondent intended to enter the findings of substantiation in the Health Care Personnel Registry that Petitioner neglected and abused a resident of The Haven in Highland Creek in Charlotte, North Carolina.

## **PETITIONER EXHIBITS**

None

## **RESPONDENT EXHIBITS**

Exhibits 1-9, 11, 12, 14-22, 24, 25

**BASED UPON** consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the Court makes the following Findings of Fact. In making these Findings of Fact, the Court has weighed all 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 witnesses, 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.

## **FINDINGS OF FACT**

1. At all times relevant herein Petitioner Emelda Che was an employee of The Haven in Highland Creek.
2. On April 18, 2012, Regina Cameron, Petitioner's co-worker at The Haven, accused Petitioner of abusing a resident two days prior by placing the resident's nightgown over her mouth.
3. At the request of Respondent and with Petitioner's consent, after being called by Respondent, Regina Cameron provided testimony via telephone at the hearing.
4. Respondent investigated the alleged abuse and the undersigned finds the relevant facts as follows.
5. On April 18, 2012, Regina Cameron reported to her supervisor that on April 16, 2012, at approximately 8:00 pm, she and Petitioner were preparing resident S.C. for bed, by undressing the resident to put her in a nightgown. During this time, S.C. became combative and began to swear and yell. Ms. Cameron further alleged that at this point, Petitioner placed the nightgown over S.C.'s mouth. (Resp. Ex. 11)

6. S.C. is a resident that has Alzheimer's and dementia, and is known to be violent and combative. (Tr. Pgs. 21-22)
7. Nursing staff have a duty to immediately report any incident of resident abuse and neglect. Ms. Cameron was aware of this duty. (Tr. Pg. 74)
8. Ms. Cameron did not report the alleged abuse on April 16, 2012 or April 17, 2012. (Tr. Pg. 61)
9. On April 18, Ms. Cameron, on her next work day, went to speak with Tamioka Penny-Cooke about cutting her work hours back due to her busy school schedule and the fact that she was working too many hours. (Tr. Pg. 73-74)
10. During that conversation, Ms. Cameron also mentioned the incident with Petitioner that had occurred on April 16. (Tr. Pg. 74)
11. During Respondent's investigation, Ms. Cameron, Petitioner's co-worker who was present on the day in question, originally stated that Petitioner placed the nightgown over S.C.'s mouth on April 16, 2012. (Resp. Ex. 11) In a statement provided on June 20, 2011, Ms. Cameron said Petitioner put the nightgown to S.C.'s mouth with such force that it caused the resident's head to go back. (Resp. Ex. 12) During the hearing, Ms. Cameron testified that Petitioner put the nightgown to S.C.'s mouth with such force that it caused the resident's head to go back; at which point, Petitioner hit S.C. in the back of her head. (Tr. Pg. 57)
12. As a part of their investigation, Respondent failed to question Ms. Cameron regarding the conflicting statements she made concerning the April 16 allegation. (Tr. Pg. 183)
13. In a statement provided to Petitioner at termination, Ms. Penny-Cooke stated that it was reported that Petitioner forced her nightgown "into" the resident's mouth. (Tr. Pg. 113) In a statement later provided to the Health Care Registry, Ms. Penny-Cooke alleged that Petitioner put the nightgown "over" the resident's mouth. (Resp. Ex. 16) In a different statement Ms. Penny-Cooke provided to the Health Care Registry, she alleged Petitioner took S.C.'s nightgown and "stuffed it or pushed it into S.C.'s mouth..." (Resp. Ex. 18)
14. As a part of their investigation, Respondent failed to question Ms. Penny-Cooke regarding the conflicting statements she made around the April 16 allegation. (Tr. Pg. 189)
15. During their investigation, Respondent interviewed S.C., who did not give a verbal response to the questions asked. (Tr. Pg. 143)
16. Petitioner testified under oath that on April 16, 2012 she and Ms. Cameron were preparing S.C. for bed when S.C. became combative and began to curse, scream, and spit. At that point, she placed the nightgown over S.C.'s mouth to block her from being able to spit on Petitioner. Petitioner did not touch Petitioner's mouth with the nightgown. Petitioner did not hit S.C. in the back of the head. (Tr. Pgs. 199-200)

17. At the hearing, Ms. Cameron admitted S.C. was spitting on the day in question. (Tr. Pg. 67)
18. Portia Rezk distinctly remembers that when Petitioner was originally questioned regarding the allegation, she stated that she placed the nightgown in front of S.C.'s mouth, not on it; consistent with Petitioner's testimony. (Tr. Pg. 134)
19. Petitioner was trained that when a resident becomes combative, the resident should be left alone. (Tr. Pg. 32)
20. Petitioner testified that when S.C. became combative on April 16, 2012, she stepped to the side, out of sight, to give S.C. time alone to calm down. (Tr. Pgs. 35-36)
21. After reviewing all the other evidence in the record, the undersigned finds the Petitioner's testimony to be credible regarding the fact that she did not touch S.C.'s nightgown to her face, or hit the back of her head on April 16, 2012.
22. The undersigned also finds the Petitioner's testimony to be credible regarding the fact that when S.C. became combative, she stepped to the side, leaving the resident alone to calm down.
23. The undersigned gives little weight to the statements of Petitioner's co-worker, Regina Cameron, due to the fact that her account of what happened on April 16, 2012 has dramatically evolved from the date she initially reported the alleged abuse, to the time she testified at this hearing. This is evident in the original written statement given by Ms. Cameron when she failed to mention the head of S.C. going backward or Petitioner hitting S.C. on the back of the head at the time of the alleged abuse. (Resp. Ex. 11) Additionally, the undersigned is also without the benefit of seeing Ms. Cameron testify under oath, which would assist in judging her credibility.
24. The undersigned also gives little weight to the contradictory statements of Tamioka Penny-Cooke regarding the allegations of what happened on April 16, 2012, which were based on second-hand knowledge.
25. It has not been shown that S.C. suffered mental anguish, nor was she hurt or injured due to the circumstances surrounding this allegation, and did not receive medical treatment of any kind.

### **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. The North Carolina Department of Health and Human Services, Division of Facility Services, 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 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 Direct Support Associate working in a health care facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. The Haven in Highland Creek is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b).

6. “Abuse” is 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. The “term ‘willful’ has multiple meanings in the law – from ‘malicious’ to ‘not accidental’ – depending on the context in which it is used.” Estern Care, DAB No. 1921, at 14. The Board concluded that section 482.13(b) does not require that the purpose of the action be to inflict harm, but rather requires that the action have been undertaken deliberately. Britthaven, Inc., DAB No. CR1259.

7. By way of illustration our criminal statute governing patient abuse states:

It shall be unlawful for any person to physically abuse a patient of a health care facility or a resident of a residential care facility, when the abuse results in death or bodily injury. N.C. Gen. Stat. § 14-32.2.

8. Petitioner did not willfully inflict injury, unreasonable confinement, intimidation, or punishment upon S.C. that resulted in physical harm, pain, or mental anguish; and therefore cannot be found to have “abused” S.C.

9. Respondent’s decision to substantiate this allegation of abuse against Petitioner is not supported by a preponderance of the evidence. Therefore, Respondent substantially prejudiced Petitioner’s rights and acted erroneously by placing a substantiated finding of abuse against Petitioner’s name on the Health Care Personnel Registry.

10. “Neglect” is defined as “a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.” 10A N.C.A.C. 130-0101, 42 CFR § 488.301.

11. Petitioner did not fail to provide goods or services necessary to avoid physical harm, mental anguish, or mental illness, and therefore Petitioner cannot be found to have neglected M.S.

12. The conundrum presented by the evidence in this case is basically a “he said, she said” scenario of the only eye witnesses to offer testimony. To make a credibility finding of “in court” telephone testimony of the Respondent’s primary witness, Regina Cameron *viz-a-viz* the “live”

witness testimony of the Petitioner, the credibility issues weigh in favor of the Petitioner. Based on Ms. Cameron's late report of the allegations, which seemed to be a by-product of her scheduling request and the changing landscape of her description of what happened after her first rendition (Resp. Ex. 11), the undersigned is unable to conclude by the greater weight of the evidence that Respondent has not prejudiced Petitioner's rights by its arbitrary and capricious findings.

12. Respondent's decision to substantiate this allegation of neglect against Petitioner is not supported by a preponderance of the evidence. Therefore, Respondent substantially prejudiced Petitioner's rights and acted erroneously, arbitrarily by placing a substantiated finding of neglect against Petitioner's name on the Health Care Personnel Registry.

13. Petitioner proved by a preponderance of the evidence that she did not abuse or neglect S.C. within the meaning of the Statute, Administrative Code or any other law. Therefore, Respondent substantially prejudiced Petitioner's rights and acted erroneously by placing a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

### **FINAL DECISION**

The undersigned hereby determines that Respondent's decision to place a finding of neglect and abuse at Petitioner's name on the Health Care Personnel Registry should be, and is, **REVERSED**.

### **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.

### **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 10th day of May, 2013.

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J. Randall May  
Administrative Law Judge