

STATE OF NORTH CAROLINA
COUNTY OF ROCKINGHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR07589

IRENE RENEE MCGHEE PETITIONER, V. DEPARTMENT OF HEALTH AND HUMAN SERVICES RESPONDENT.	FINAL DECISION
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THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on June 13, 2013, in High Point, North Carolina.

APPEARANCES

For Petitioner: Nancy P. Quinn, Esq.
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For Respondent: Thomas E. Kelly
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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 Avante in Reidsville, NC 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. 13O.0101

EXHIBITS

Respondent's exhibits 5-16 were admitted into the record.

WITNESSES

Irene Renee McGhee (Petitioner)
Joann Fox (Avante CNA)
Kelli Norman (Avante CNA)
Misty Hackett (Avante Director of Nursing)
Jeanne Goss (HCPR Investigator)

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.

FINDINGS OF FACT

1. At all times relevant to this matter, Irene Renee McGhee ("Petitioner") was a Certified Nursing Assistant ("CNA") at Avante of Reidsville ("Avante") in Reidsville, North Carolina, and therefore subject to N.C. Gen. Stat. § 131E-256. (Tr. pp. 7-8, 20-21)
2. Avante 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.
3. As a CNA, Petitioner's duties primarily involved direct care to residents of Avante, including feeding, bathing, and dressing the residents. (Tr. pp. 7-8)
4. Petitioner completed all required training related to her job responsibilities, including instruction on abuse and neglect. According to this training, it was never acceptable to grab or to ball up a fist at a resident. (Tr. pp. 8, 19-20, 45, 86)
5. P.W. is a resident of Avante. At the time of the incident, P.W. was approximately seventy-one (71) years old and her diagnoses included: dementia, Alzheimer's disease, and a history of seizure disorder. (T. pp. 19, 48-49, 98; Resp. Ex. 14)
6. On March 22, 2012, Petitioner asked Joann Fox ("Fox"), a CNA at Avante, for assistance in bathing and dressing P.W. Petitioner began roughly undressing P.W. This agitated P.W. and she swung her arms at Petitioner. In response, Petitioner raised her fist to P.W.'s face and said, "[y]ou're lucky because you need to stop. You know what you're doing, just like when you call us the 'N' word." (Tr. pp. 49-51; Resp. Ex. 7, 8)

7. During the hearing, Petitioner admitted to grabbing P.W. by the arm on March 22, 2012 and stated that she was aware that it was inappropriate to grab a resident in such a manner. (Tr. pp. 10, 29-30)

8. On March 26, 2012, Fox reported the incident to Kelli Norman ("Norman"), Licensed Practical Nurse (LPN) at Avante. Norman instructed Fox to report the incident to the Director of Nursing, Misty Hackett ("Hackett"). Fox spoke with Hackett and produced a written statement regarding her involvement in the incident with P.W. (Tr. pp. 42, 45, 52, 74-76; Resp. Ex. 7, 8, 9)

9. Fox was given a verbal warning, otherwise known as a "teachable moment," based on her failure to report the incident in a timely manner. (Tr. pp. 53, 85; Resp. Ex. 8)

10. A few days after the incident, Petitioner received a phone call from Hackett and was asked to produce a statement concerning "anything that occurred" on March 22, 2012. (Tr. pp. 76-77)

11. In her initial written statement to Hackett, Petitioner did not acknowledge the incident and stated, "No abuse whatsoever happened." Specifically, Petitioner wrote that "[e]verything went very well on my shift." This statement was not consistent with Fox's statement to Hackett. (Tr. pp. 12-14, 77-78, Resp. Ex. 5)

12. Several days later, Petitioner composed an unsolicited second written statement and placed it on Hackett's desk. This second statement was inconsistent with Petitioner's first written statement to Hackett and it was far more detailed than her initial written statement. The additional detail provided by Petitioner regarding the March 22, 2012 incident was similar, but not identical, to Fox's written statement. (Tr. pp. 78-79; Resp. Ex. 5)

13. Based on Petitioner's inconsistent written statements to Avante, along with Petitioner's impermissible grabbing of P.W. on March 22, 2012, Petitioner was terminated from her employment with Avante. (Tr. p. 80)

14. Hackett submitted 24-Hour and 5-Working Day Reports to the Health Care Personnel Registry ("HCPR"). These reports documented the details of the allegation and the facility response. (Tr. pp. 81-85; Resp. Ex. 10, 11)

15. 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 employed by Universal are covered by the HCPR.

16. At all times relevant to this matter, Jeanne Goss ("Goss") worked as an investigator for the Health Care Personnel Registry. Goss is charged with investigating allegations, including abuse and neglect, against a resident or a facility. Goss is assigned to the

north central region of North Carolina, including Rockingham County. Accordingly, Avante was part of the territory covered by Goss. (Tr. pp. 91-93; Resp. Ex. 10-11)

17. After receipt of the 24-Hour and 5-Working Day Reports from Universal, the case was “screened in” for further investigation by the HCPR on August 8, 2012. (Tr. pp. 92-94)

18. Goss reviewed the facility reports and independently conducted her own investigation. As part of her investigation, Goss visited the Avante, reviewed documents, and conducted interviews with witnesses.

19. Goss interviewed Fox on June 14, 2012. Fox’s statement to Goss was consistent with her statement to Avante, as well as her testimony at trial. (Tr. pp. 101-105; Resp. Ex. 7, 8)

20. A disturbing portion of this statement concerns a phone call that Fox said she received from Petitioner after the incident. In pertinent part Fox stated the following: “After I reported the incident, Irene was suspended. Somehow Irene got my number and called me and told me I had lied on her. She told me I better watch myself, taking away someone’s livelihood.” (Resp. Ex. 8)

21. On June 14, 2012, Goss interviewed Hackett. Hackett’s statement to Goss was consistent with her testimony at trial. (Tr. pp. 105-106; Resp. Ex. 12)

22. Goss interviewed Norman on July 18, 2012. Norman’s statement to Goss was consistent with her testimony at trial. (Tr. pp. 106-107; Resp. Ex. 9)

23. On July 11, 2012, Goss interviewed Petitioner at the Eden Public Library. Petitioner’s account of the incident with P.W. was inconsistent with the testimony of Fox and with Petitioner’s own testimony at trial. At the hearing of this matter, Petitioner stated that she grabbed P.W.’s arm and told her to stop hitting her. Petitioner did not mention grabbing P.W. during her interview with Goss, but instead claimed that she simply raised her arm to block P.W. from striking at her. (Tr. pp. 111-113; Resp. Ex. 6)

24. Portions of Petitioner’s testimony lacked credibility. At the hearing of this matter, Petitioner stated that she was licensed as a CNA for seventeen years. Approximately one year before trial, Petitioner was interviewed by Goss. At that time, Petitioner told Goss that she was licensed as a CNA for fourteen years. According to Petitioner’s personnel file at Avante, she was licensed as a CNA in 2008. (Tr. pp. 7, 118-119; Resp. Ex. 6, 13)

25. Based upon the findings of the HCPR investigation, Goss substantiated the allegation of abuse against Petitioner. (Tr. pp. 94-103, 105-123; Resp. Ex. 5-9, 12-15)

26. Petitioner was notified by letter that a finding of abuse would be listed against her name in the HCPR. Petitioner was further notified of her right to appeal. (Tr. pp. 122-123; Resp. Ex. 16)

27. Petitioner is not disabled and has the ability to work. The listing on the HCPR limits her ability to work in the health care field. Petitioner is still able to work in other fields.

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 nursing 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 a “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.” 10A N.C.A.C. 13O.0101, 42 C.F.R. § 488.301.

5. On or about March 22, 2012, Irene Renee McGhee, a nurse aide, abused Resident P.W. by becoming aggressive while removing the resident’s clothes; grabbing the resident’s arm; balling up her fist at the resident; then putting her finger in the resident’s face and saying, “You know what you are doing,” which resulted in mental anguish to the resident, exhibited by the resident becoming more aggressive.

6. 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 neglect against Petitioner’s name on the Health Care Personnel Registry.

BASED ON 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 abuse by Petitioner’s name on the Nurse Aide Registry and the Health Care Personnel Registry is UPHOLD.

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 03.0102, 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 29th day of August, 2013.

J. Randall May
Administrative Law Judge