

STATE OF NORTH CAROLINA
COUNTY OF ROCKINGHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR09022

<p>ANN-CATHERINE BAKER Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH & HUMAN RELATIONS HEALTH CARE PERSONNEL REGISTRY Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on May 23, 2013 in High Point, North Carolina.

APPEARANCES

For Petitioner: Selena D. Lackey
Attorney at Law
2807 Earlham Place
High Point, NC 27263

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

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 client of Lindley Habilitation Services in Greensboro, NC and entered a finding of abuse by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

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 1-8, 11-16, 20-21 were admitted into the record.

Petitioner's exhibits 1-2 were admitted into the record.

WITNESSES

Ann-Catherine Baker (petitioner)
BD (client)
ND (client's sister)
Shelley Diaz (client's mother)
Negat Gabrielle Negussie Retta (Clinical Supervisor, Lindley Habilitation Services)
Latoya Chancey (Enhanced Services Specialist, Lindley Habilitation Services)
Jenny Baxter (HCPR Nurse 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. From the sworn testimony of witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. At all times relevant to this proceeding, Petitioner, Ann-Catherine Baker, was a Habilitation Technician at Lindley Habilitation Services ("Lindley Habilitation") in Greensboro, North Carolina. Lindley Habilitation is a health care facility and therefore subject to N.C. Gen. Stats. §131E-256. (T pp 8, 10-11, 84; R Exs 1, 8, 20)
2. Petitioner was trained on her duties, which included dressing BD, and appropriate communication techniques for BD. Petitioner received clients' rights training on abuse; working with individuals with developmental disabilities; as well as communicating positively and effectively with BD. Petitioner was also trained on corporal punishment being a prohibited intervention. (T pp 14-15, 18-22, 78-80; R Exs 1-5, 20)
3. Petitioner was assigned to work with BD on June 12, 2012. During the shift, Petitioner went into BD's bathroom to provide care. (T p 11; R Ex 20)
4. At all times relevant to this proceeding, BD has been a client of Lindley Habilitation in Greensboro, North Carolina. BD has been diagnosed with Autistic Disorder and Attention Deficit Hyperactivity Disorder. BD is oriented to person, place, and time. BD is subject to emotional outbursts. In response to BD's behavior concerns, staff is to

redirect her without agitating her. BD requires verbal prompting during dressing activities and responds well to positive reinforcement. (T pp 8-10, 22, 62, 72-73; R Exs 5, 14, 18, 20)

5. While Petitioner was with BD in the bathroom on June 12, 2012, BD refused to put on her clothes. As a response to this refusal, Petitioner made a clapping noise and then spanked BD two times on the butt. BD cried after the spanking and told Petitioner she was going to tell her mother. (T pp 12-13, 17, 23-24, 26, 49-50, 52, 57, 61; R Exs 7, 9, 20)
6. Prior to her testimony and because of her age (10), a *voir dire* was conducted of ND's competency during the proceeding pursuant to *State v. Higginbottom*, 312 NC 760 (1985). After the examination, the undersigned found that ND was able to understand her obligations under oath; knew the difference in right and wrong; what it meant to tell the truth; had sufficient intelligence to give evidence which would assist the fact finder in rendering a decision; and that there was no showing to the contrary that ND was not competent to testify in this case. (T pp 44-46, 66-67)
7. ND told her mother, Shelley Diaz, and subsequently Jenny Baxter, the investigator, that she was standing outside the bathroom door and heard what she thought at first was BD Clapping her hands. ND then stated that she opened the door a little bit and looked into the bathroom where BD was with Petitioner and she saw Petitioner spank BD two times.
8. ND also testified "...I didn't know if it hurt her or not..." (Tp54)
9. ND's testimony was credible, but left the finder of fact confused at times as to her ability to articulate what she witnessed. She testified that she did not know if the Petitioner spanked BD two times or if it was three times. She further testified that she did not know if the spanking was hard or if it was a tap. Even further she testified that she was unable to tell if the alleged spanking hurt or had any effect on BD.
10. ND entered the bathroom while Petitioner was with BD and saw Petitioner spank BD twice. ND reported the incident to her mother immediately after. BD confirmed the information ND provided to Ms. Diaz. (T pp 38, 49-50, 58-59, 61; R Exs 11-12, 20)
11. Ms. Diaz subsequently communicated the information to Lindley Habilitation by contacting Negat Negussie Retta ("Negussie Retta") and documenting the information. At all times relevant to this proceeding, Negussie Retta was the Clinical Supervisor at Lindley and reported the incident to the Health Care Personnel Registry. (T pp 59, 68-71; R Exs 11-12, 15)
12. In the two years that Petitioner has taken care of BD, Petitioner has not known BD to tell lies. During the time that Petitioner has taken care of BD, she has not known ND to tell lies. Petitioner also did not know of any reason why BD or ND would lie about Petitioner's actions on June 12, 2012. ND is not given to exaggerations. (T pp 17-18, 65-66; R Ex 20)

13. Lindley Habilitation Services conducted an investigation and was unable to substantiate a claim of abuse, but terminated Petitioner's employment with Lindley Habilitation Services for failing to adhere to an appropriate method of redirection by patting BD on the bottom and calling her a "silly goose."
14. At all times relevant to this matter, Jenny Baxter ("Nurse Investigator Baxter") has been a nurse investigator with the Health Care Personnel Registry. Nurse Investigator Baxter is a nurse with twenty years' experience and is charged with investigating allegations against health care personnel. Accordingly, she received and investigated the allegation that Petitioner had abused BD at Lindley Habilitation. (T pp 83-86; R Ex 20)
15. Nurse Investigator Baxter has had many cases in front of the undersigned and she has always presented as an experienced and credible witness.
16. Nurse Investigator Baxter reviewed the facility documents and conducted her own investigation which included interviewing Petitioner, BD, and ND. Nurse Investigator Baxter spoke with BD's father and brother. Both individuals indicated they had not seen what transpired in the bathroom and they were not interviewed further.
17. At the hearing, Nurse Investigator Baxter, testified under oath that she did not question BD's father because he spoke Spanish and did not speak English well.
18. BD's mother testified under oath that BD's father was present the day Nurse Investigator Baxter came to the home to conduct an investigation. Ms. Diaz further indicated that she is fluent in Spanish and could have interpreted for BD's father.
19. The undersigned gives little weight to the statements of the sole witness, ND, due to the fact that she was conflicted as to what she had actually seen. She testified that she did not know if the Petitioner spanked BD two times or if it was three times. She further testified that she did not know if the spanking was hard or if it was a tap. Even further, she testified that she was unable to tell if the alleged spanking hurt or had any effect on BD.
20. Following the conclusions of her investigation, Nurse Investigator Baxter notified Petitioner of her decision to substantiate the allegation of abuse. (T p 88; R Ex 21)
21. Abuse is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." (T p 87; R Ex 20)
22. This was the third year that Petitioner had worked with the Diaz family and Ms. Diaz testified under oath that she had not had any prior complaints about Petitioner and that she considered her like family.
23. After reviewing all the other evidence in the record, the undersigned finds Petitioner's testimony to be credible regarding the fact that on June 12, 2012, when the alleged abuse

occurred, that BD refused to get dressed, and that Petitioner clapped her hands together, like she does often, as a means of grabbing BD's attention. Petitioner further testified that she patted BD on the bottom following the hand clap in a soft encouraging way and called BD a "silly goose."

24. There was no medical, psychological, or illustrative evidence offered by Respondent as to how a minor child with BD's conditions and diagnosis could or should exhibit any different reaction to pain than a typical child.
25. There was no evidence offered by Respondent that BD suffered any physical harm, pain, or mental anguish.
26. It has not been shown that BD was hurt or injured due to the circumstances surrounding this allegation, and did not receive medical treatment of any kind.
27. The factual showing for Respondent to show willful abuse of this child was weak.

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. ND meets the test of competency pursuant to *State v. Higginbottom*, 312 NC 760 (1985) and had sufficient intelligence to give evidence that would assist the finder of fact in rendering a decision.
4. As a Habilitation Technician 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. "Abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." 10A NCAC 130 .0101
6. Petitioner did not willfully inflict injury, unreasonable confinement, intimidation, or punishment upon BD that resulted in physical harm, pain, or mental anguish, and therefore cannot be found to have "abused" BD.
7. 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.

8. The conundrum presented by the evidence in this case is basically a “he said, she said” scenario of the only eye witness, a minor child, to offer testimony; based on ND’s report of the allegations, and the fact that she did not articulate exactly what she witnessed, *viz-a-viz* the definition of abuse. Therefore, 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.
9. Respondent did not conduct a complete investigation when it failed to interview potential witnesses, including but not limited to, the biological father who was present in the home, just mere feet away when the alleged incident of abuse occurred.
10. Petitioner proved by a preponderance of the evidence that she did not abuse BD 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

This case presents a threshold showing of alleged “abuse” and because of the terminal sanction to Petitioner, it places the decision maker in the position of weighing evidence, although less than convincing against a petitioner who faces the loss of her ability to work in her chosen field for five (5) years. Because there is no discretion in the sanction which must be imposed, a clear and convincing showing of “abuse” must be apparent from the facts. This was not established by Respondent and Petitioner was able to show by a preponderance of the evidence that Respondent’s decision was erroneous and not pursuant to law.

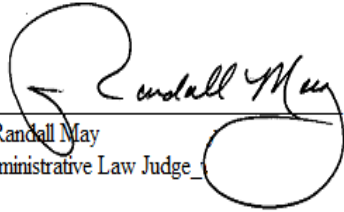
Therefore, the undersigned hereby determines that Respondent’s decision to place a finding of abuse at Petitioner’s name on the Health Care Personnel Registry should be, and is, **REVERSED**.

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 22nd day of August, 2013, *remote supplicio*.



J. Randall May
Administrative Law Judge