

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DHR09799

<p>KESHA JOHNSON, Petitioner,</p> <p>v.</p> <p>NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on July 24, 2013, at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioner:	Michael C. Byrne Law Offices of Michael C. Byrne Wells Fargo Capitol Center 150 Fayetteville Street, Suite 1130 Raleigh, NC 27601
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, acted erroneously, or failed to act as required by law or rule when Respondent substantiated the allegations that Petitioner abused a resident of Cherry Hospital in Goldsboro, North Carolina and entered a finding of abuse by Petitioner's name in the Health Care Personnel Registry when it listed an allegation that "on or about 6/24/2012, Kesha Johnson, a Health Care Personnel, abused a resident, (JD) by willfully grabbing and pushing the resident against a locker, resulting in pain and mental anguish."

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 ("R. Exs.") 1, 3-7, 9, 11-19, and 23-26 were admitted into the record. Respondent's exhibits 27-28 were accepted as offers of proof. No exhibits were offered for Petitioner.

WITNESSES

Petitioner Kesha Johnson
Lori Henderson
Rachel Linqanti
Dawn Ratliff
Rae Ann Davis
Miranda Bennett
Nancy Gregory

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 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. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper. At all times relevant to this matter, Petitioner Kesha Johnson was a Health Care Technician I at Cherry Hospital, a facility of the North Carolina Department of Health and Human Services located in Goldsboro, North Carolina. Cherry Hospital is a residential care facility and therefore subject to N.C. Gen. Stats. §131E-255 and §131E-256.

2. Petitioner was trained in residents' rights, abuse, and abuse procedures at Cherry Hospital. (R. Ex. 3)
3. As of June 2012, Petitioner had worked in the health care industry for 18 years. She had worked at Cherry Hospital for 14 years and, prior to that, worked at O'Berry Center, another DHHS facility. Petitioner has no prior disciplinary action on her record for patient abuse.
4. On June 24, 2012, Petitioner was working at Cherry Hospital. She was assigned to work as a "one on one" with Resident JD. In a "one on one" assignment, the staff member is assigned to work closely with one patient only during his or her shift. Patients are placed in one on one situations because it has been determined that they could, among other reasons, pose a danger to other patients, staff members, or themselves.
5. Petitioner had worked with JD numerous times in the past, including one on ones. JD previously had assaulted Petitioner on one occasion, requiring Petitioner to visit employee health. JD also had assaulted other staff members and residents. Petitioner thought that she generally worked well with JD and had asked to be assigned to him in the past.
6. JD was known to "pick up" or take things that did not belong to him. However, Petitioner had never experienced JD attempting to take anything of hers.
7. On June 24, 2012, Petitioner had taken JD to "Central Section," a section of the ward between the two wings, and was setting up a movie for him to watch. While doing so, Petitioner removed a ring that she was wearing for the purposes of putting on hand sanitizer.
8. When Petitioner did this, JD took Petitioner's ring and refused to return it. Petitioner attempted multiple times verbally to "re-direct" JD without using physical intervention. Petitioner then called for help from other staff.
9. Petitioner took JD by his collar and--depending on the testimony of the witness concerned-- placed (Petitioner), pushed (Dawn Ratliff), or slammed (Rachel Liguanti) JD against a row of lockers, at which time Nurse Rachel Liguanti was able to remove the ring from JD's finger. Petitioner's hold on JD was an "unsanctioned hold" under non-emergent circumstances.
10. Registered Nurse Ratliff examined JD immediately after the incident and noted no physical pain or injuries to JD. There was no evidence of any intent on Petitioner's part to hurt or harm JD in the incident. No witness to the incident testified as to any mental anguish on the part of JD as a result of Petitioner's actions.
11. In interviews with the HCPR investigator, witnesses and interviewees unanimously agreed that JD displayed no physical pain or injury as a result of Petitioner's actions, and

no witness or interviewee affirmatively stated in interviews that Petitioner's actions caused "mental anguish" to JD.

12. Following an investigation by HCPR Investigator Nancy Gregory ("Investigator Gregory"), Respondent substantiated a finding that "on or about 6/24/12, Kesha Johnson, a Health Care Personnel, abused a resident, (JD) by willfully grabbing and pushing the resident against a locker, resulting in mental anguish and pain."
13. Respondent duly notified Petitioner of that finding in the manner required by law, and Petitioner timely appealed that finding.
14. Abuse is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." Investigator Gregory determined that Petitioner willfully abused resident JD, causing pain and mental anguish.
15. Petitioner consistently denied any intent to cause pain or mental anguish to JD.

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

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Respondent conducted a reasonable and appropriate investigation into the allegation of abuse and did not act in an arbitrary or capricious manner.
3. As a health care technician working in an adult care facility, Petitioner is a "health care personnel" and subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.
4. Petitioner was a credible witness. A staff member who witnessed the incident, Dawn Ratliff, R.N., was a credible witness. The other staff member who witnessed the incident, Rachel Liquanti, R.N., was a significantly less credible witness. Rachel Linquanti made claims regarding Petitioner's actions in the incident that were not substantiated by Nurse Ratliff or by other witnesses, and which in some cases were not substantiated by Nurse Linquanti's own interview statements at the time of the incident. Further, while claiming at hearing not to have any personal problems with Petitioner, Nurse Linquanti made various very negative statements regarding Petitioner's job performance to Investigator Gregory, those statements not being substantiated by--and, in some cases, contradicted by--the other Cherry Hospital witnesses involved.
5. The greater weight of the evidence does not support the allegation of abuse which stated that, "on or about 6/24/12, Kesha Johnson, a Health Care Personnel, abused a resident, (JD) by willfully grabbing and pushing the resident against a locker, resulting in mental

anguish and pain.” Based on the evidence and governing law, it is found that there is no evidence of pain or mental anguish to JD resulting from Petitioner’s actions.

6. Respondent acted erroneously because there is insufficient evidence to support Respondent’s conclusion that Petitioner abused JD. I find that Respondent’s actions were not arbitrary and capricious and that Respondent acted in good faith in conducting its investigation.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent’s decision to place a finding of abuse at Petitioner’s name on the Health Care Personnel Registry is not supported by the evidence 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 03.0102, 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 3rd day of October, 2013.

Beecher R. Gray
Administrative Law Judge