

STATE OF NORTH CAROLINA
COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 10745

KENNETH TERRELL FORD)
PETITIONER)
VS.)
N. C. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, DIVISION OF)
FACILITY SERVICES)
RESPONDENT)

FINAL DECISION

On October 25, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Goldsboro, North Carolina. On December 9, 2013, the undersigned ruled that Respondent failed to present sufficient evidence to substantiate the finding that Petitioner abused a resident of O’Berry Neuro-Medical Treatment Center on August 13, 2012. On January 17, 2014, pursuant to the undersigned’s Order, Petitioner filed a proposed Final Decision with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Dustin B. Pittman
Strickland, Lapas, Agner & Associates
112 North William Street
Goldsboro, North Carolina 27530

For Respondent: Josephine N. Tetteh
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
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ISSUES

1. Whether Respondent failed to use proper procedure, or failed to act as required by law or rule by failing to afford Petitioner the right to the hearing before substantiating and entering a finding of abuse against Petitioner’s name on the Health Care Personnel Registry?
2. Whether Respondent acted erroneously, or acted arbitrarily and capriciously when it entered a substantiated finding of abuse against Petitioner’s name on the Health Care Personnel Registry?

APPLICABLE LAW

N.C. Gen. Stat. § 131E-256, and rules promulgated thereunder
N.C. Gen. Stat. § 150B-22, et seq. and rules promulgated thereunder

PREHEARING MOTION

Before hearing, Petitioner made a Motion in Limine to exclude any reference to a photo array and any and all photographic identification of Petitioner by the resident PH as such identifications were unreliable and likely to confuse the trier of fact pursuant to Rule 403 of the Rules of Evidence. The Court reserved ruling on the motion until testimony was heard. Based on the preponderance of evidence heard at trial, the undersigned hereby denies Petitioner's Motion.

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: Exhibits 1 - 31

WITNESSES

For Petitioner: No witnesses

For Respondent: Kenneth Terrell Petitioner, Kim Brantham, Donna Trolinger,
Dr. Donald Statuto, Donna Ramsey, Tony Walters,
Gwendolyn Woods, Lynette Cox, Pamela Anderson

FINDINGS OF FACT

Procedural Background

1. On March 21, 2013, Respondent notified Petitioner that it was substantiating an allegation of abuse against Petitioner for abusing a resident of O'Berry Neuro-Medical Treatment Center, on August 13, 2012, in Goldsboro, North Carolina. Respondent also advised Petitioner that it was listing the substantiated finding against Petitioner's name on the Health Care Personnel Registry as follows:

On or about August 13, 2012, Kenneth Terrell Ford, a Health Care Personnel, abused a resident (PH) by willfully kicking the resident in the groin and pushing the resident's head against a wall resulting in physical harm, pain, and mental anguish.

(Respondent's Exhibit 30)

2. Petitioner was employed at O'Berry Neuro-Medical Treatment Center ("O'Berry") as a Health Care Technician I from May 15, 1999 until October 10, 2012. At O'Berry, Petitioner was generally referred to as "Ken." (T. p. 157)

3. On August 13, 2012, PH was a 72 year old resident who was assigned to Petitioner's care on the "B" shift in Unit 6-3 at O'Berry. PH had been diagnosed with vascular dementia, moderate mental retardation, cardiovascular accident, contractures, hypertension, atherosclerosis, and had a long time history of seizures. (Resp Exh 27)

a. PH was ambulatory, and walked with an unsteady or staggered gait due to one leg being shorter than the other, and because he had a flat left foot. PH wore custom insoles in his shoes to help with walking. Because of his leg and foot issues, PH was considered a high risk for falls, and required assistance with mobility at times. PH's upper right arm was contracted. (Resp Exh 27, T. p.164)

b. PH functioned in the high or severe range of Mental Retardation cognitively, and in the moderate range adaptively. He was verbal and able to communicate, but also stuttered. According to PH's Person Center Plan and O'Berry staff, PH easily became confused and forgot things, would not recognize familiar faces or objects, and forgot people's names. "When he gets upset, he starts rambling and talks very fast, and puts all kinds of stuff together. He may put things that happened in the past with things now." (Resp Exh 24) "He may become irritable and curse or hit at staff." When asked to do something, he may have problems carrying out tasks. (Resp Exh 27) The unit staff provided supports to PH that PH needed to minimize agitation associated with his dementia. (Resp Exh 4)

c. The preponderance of the evidence established that resident PH would get the present and future mixed up, and sometimes exaggerated. "He adds the future with the present." (Resp Exh 17) PH did not refer to individuals by name, but called them "boy" or "girl." (Resp Exh 17, T. p. 67))

4. In August of 2012, Petitioner was assigned to unit or group home 6-3 at O'Berry where he generally worked the "B" Shift from 7:00 a.m. until 3:30 p.m.

5. On August 13, 2012, Petitioner arrived at work at approximately 7:00 a.m. and attended a morning briefing until approximately 7:10 a.m. Petitioner was assigned to care for resident PH. The employees on the "A" shift had already awakened and dressed Petitioner's patients. Health care tech Jerry McClarin had gotten resident PH out of bed, and dressed. The "A" shift employees had completed the body check form indicating no injury was noted to PH after the "A" shift had performed its body check of PH.

6. At 7:00 a.m., resident PH asked health care tech Swindell Coley for his money. Coley advised PH to wait until they finished with morning briefing.

7. After the morning briefing, Petitioner began walking down the hall, and met PH. Petitioner and Jerry McClarin performed a superficial body check of PH's arms and legs since PH was already dressed, and wearing shorts. Petitioner did not see any injuries on PH.

8. At approximately 7:15 a.m., Petitioner began grooming his other patients.

9. About 7:15 a.m., Coley and Jerry McClarin gave PH \$2.00 in the canteen area. PH left the canteen room behind Coley and McClarin.

10. At approximately 7:30 a.m. on August 13, 2012, PH approached Donna Trollinger (“Trollinger”), a licensed practical nurse who was distributing medications, to obtain his medications. Trollinger thought PH appeared mad and upset. After Trollinger asked PH what was wrong, PH told Trollinger that “Kent kicked me.” Trollinger gave PH his meds, and turned away from PH to sign the medication book. When Trollinger turned back around, she saw that PH had pulled his pants and underwear down, and was pointing to his pelvic or groin area, above and to the left of his penis. PH advised that “Kent kicked me.” PH told Trollinger that Kent kicked him two or three times. (Resp Exhs 9, 10, 19, 21)

11. Ms. Trollinger asked Petitioner to wait a minute, and asked Swindell Coley for assistance. Trollinger explained to Coley what PH had told her. When Coley saw PH, PH pointed to his groin, and explained that “that boy” banged or pushed his head against the wall. PH stomped his foot, and hit himself in the stomach area. (Resp Exhs 9, 10, 19, 21)

12. Mr. Coley notified Tony Walters, the Group Home Manager, of PH’s statements. Walters notified Wanda Medline, Administrator on Duty, who contacted Kim Brantham, Chief Advocate. PH told Walters that “a boy” or “that boy” pushed PH’s head it against the wall. “He didn’t say a name. He normally did not call names. I never heard him call a staff name.” (Resp Exh 17)

13. Around 7:40 a.m. or 7:50 a.m., Walters, Trollinger, Petitioner, and Jerry McClarin, took PH to a private bathroom to perform a body check. Petitioner stood at the door while Trollinger examined PH. Nurse Trollinger observed a quarter-size mark in PH’s pelvic area, above and to the left of his penis. That area was tender to the touch. It was difficult for Trollinger to see the bruise without the use of a flashlight. Trollinger found no injury to PH’s head or shoulder. (Resp Exhs 10, 21)

14. Mr. Walters had been on the unit hall that morning between 7:00 am and 7:30 am. He did not recall any commotion, or noise which was out of the ordinary. He did not hear anything that would leave him to believe a patient had been kicked in the scrotum. Walters never heard PH say the name “Kent,” or witnessed PH identify Petitioner in any way as the person who kicked or pushed him. At hearing, Mr. Walters acknowledged that the only way an injury is reported on the body check form is if a staff member writes it on there. Walters also acknowledged that if he willfully injured a patient, he would not report an injury on his body check form.

15. Petitioner asked PH why he said Petitioner’s name as the body who hit him. PH told Petitioner that, “It wasn’t you. It was another guy in short pants, and he had something on his shoulder.” (Resp Exh 7)

16. At approximately 11:30 a.m. on August 13, 2012, Dr. Donald Statuto examined PH, and observed a bruise in PH’s pelvic area that was in the process of diffusing over the pubic area. Dr. Statuto was employed at O’Berry, and has been since 2006. His responsibilities included treating residents for injuries. Dr. Statuto’s examination revealed that PH’s skin over the bruise was intact. In Statuto’s medical experience, the bruise appeared like a “blunt force trauma,” and the injury occurred within the last twenty-four hours. (Resp Exh 18, T. pp. 93-94) PH told Dr. Statuto that someone hit him, but PH never told Statuto that he was kicked. PH never mentioned any names to Statuto.

17. On August 13, 2012, Petitioner left work at 1:30 P.M., and was off work on August 14, 2012. On August 15, 2012, Petitioner returned to work, and was assigned to a different unit until August 17, 2012. (T. p. 164) Petitioner had no interactions with PH after the kicking incident was reported on August 13, 2012.

18. Kim Brantham was responsible for the training of employees and the investigation of allegations of abuse or neglect of residents. At some time prior to 8:00 a.m. on August 13, 2012, Brantham received notice of the allegation of abuse regarding PH. Brantham was notified that PH was kicked by Kent in his bedroom.

19. At hearing, Brantham opined that the injury experienced by PH could have been caused by an accident, or means other than abuse, but that possibility was not examined during her investigation into the August 13, 2012 incident with PH.

20. Lynette Cox was a Unit Director at O’Berry, and was responsible for two clusters, which comprise eight homes. She never witnessed PH personally identify Petitioner as the individual who kicked him, but did indicate that PH identified Petitioner from photographs. Petitioner consistently denied to her that he abused PH. Cox was aware that PH had fallen and been injured in the past.

21. On August 13, 2012, Nurse Donna Trollinger, Unit Director Lynette Cox, and Chief Advocate Kim Brantham interviewed PH. The staff asked PH if there was anything he wanted to share with them. PH “pointed to his groin area,” and stated “that man kicked him and pushed his head into wall.” (Resp Exh 25) PH rambled from one topic to another. PH could not remember the name of the man who kicked him, but he told staff that the incident happened “last night in his bedroom.” As PH was preparing to leave the office, Petitioner came to the door. PH said, “That’s the boy.” Staff asked PH if Petitioner was the man who kicked, and pushed his head against the wall. PH stated that Petitioner was the man that had kicked him, and pushed his head against the wall. PH also told staff that Petitioner was the man with the yellow pants and his friend. PH then said it was another man [who hit him]. (T. pp. 68-69) PH described the man who hit him as wearing shorts with a striped shirt “like his.” PH was wearing a blue-striped polo shirt. O’Berry staff determined during its investigation that another staff member was wearing a striped shirt like PH’s and shorts on August 13, 2012. (Resp Exh 25, p. 7 of 21)

22. On August 17, 2012, O’Berry management placed Petitioner, and two other staff members on administrative leave or investigative status.

23. Gwendolyn Woods (“Woods”) is the niece of PH. On August 13, 2012, O’Berry nurse April Sprague telephoned Ms. Woods, and advised her of the incident involving PH. The next day, August 14, 2012, Woods visited PH. PH told Woods that “Ken” kicked him in the private area.

24. On August 17, 2012, Woods visited PH again at O’Berry, and performed a body check on PH. Woods observed red and purple whelps on PH’s side and buttocks, which were not previously reported to her. She showed 3 nurses the whelps. The ones on PH’s buttocks had not healed completely, and some were fresh. (T. pp. 140-141) Because PH told Woods he was

still hurting, Ms. Woods took PH to Lenoir Memorial Hospital that day for an evaluation of his injuries. (Resp Exhs 11, 31)

25. On August 22, 2012, Cox and Brantham interviewed PH again with Ms. Woods present. Staff laid seven photographs of male staff members in front of PH. They asked PH if he saw the man who kicked him. PH looked through the photos one by one. Upon seeing Petitioner's photo, PH said, "That's the man." When staff asked PH if Petitioner was the man who kicked him, PH began talking about tapes, dogs, and various other unrelated topics. Staff sporadically placed the photos in front of PH again, and asked PH if he saw the person who kicked him. PH selected Petitioner's photo. PH also identified another male staff member as the person who gave him his bath. (T. p. 49) When PH looked again at the photos, he pointed to Petitioner's photo, and said, "That's the man. That's my friend." (T. p. 50) PH also identified Frankie Bellamy, another health care tech, and talked about hitting Mr. Bellamy "beside the head with his belt. PH stated that "a man had come in his room and got in his bed." (Resp Exh 25)

26. On August 29, 2012, Cox and Brantham interviewed PH with Woods present. PH claimed that a man who lives down the hall came to his room and got into the bed with PH. PH identified Frank Bellamy, another staff member, by photograph as the man who got into his bed, and hit him with a belt while he resided at O'Berry. PH described how his head was slammed "up side that bed, my foot up, my head down, my arm and my shoulders," by that man. PH noted that the man who hit him doesn't live with him, but comes in the back door [of O'Berry]. PH described how that man drives different cars, and works with PH at night. (Resp. Exh. 25) During this interview, PH frequently became confused. PH made various statements wherein he mixed together incidents from his past, including things that he experienced during his childhood, and things his dad did to him, with things that occurred in his room at O'Berry.

27. Woods removed PH from O'Berry, and brought him to live with her and her family. PH told Ms. Woods that "staff were hitting me, but he wouldn't call any names . . . he [PH] was telling me from 2012 that he didn't want to be there, and he said they were hitting him." (Resp Exh 22) While staying with Woods, PH cried a lot, had a lot of nightmares, and always talked about the incident over and over, saying that Kent kicked him. (T. pp. 139-141) At times, PH would holler at Woods' home, and she would tell him not to yell, hit, or cuss her. PH responded to Woods that, "they hit, they kick, they punch." (T. p. 140)

28. Pamela Anderson ("Anderson") is a nurse investigator employed by Respondent who investigates complaints of abuse and neglect at facilities regulated by Respondent. Ms. Anderson supervised investigator Ann Groves who primarily investigated the allegations of abuse against Petitioner.

29. On March 4, 2013, almost six months after the alleged incident occurred, Investigator Groves interviewed PH. PH remembered living at O'Berry and recalled Petitioner. Groves asked PH, "Did you ever have an incident with Kenneth Ford?" PH's answer on the interview sheet was, "He put his hand over my eyes." Ms. Groves asked PH, "Where did the incident occur?" PH answered, "In the shower." PH told Ms. Groves that he got hit, and pointed to a bruise in his groin area.

a. Ms. Groves showed PH a photograph of Petitioner, and asked PH if he knew who that was. PH said, "That was the man that did it." PH called the man Kenneth, and said he

hit him with a belt, and poured water on his head. When Groves asked who kicked him, PH took the picture of Petitioner and said, "He did." (Resp Exh 23)

b. At hearing, during cross-examination, Ms. Anderson acknowledged that PH did not know that the photograph they showed him was Petitioner. She also acknowledged that PH did not identify Petitioner as the man who kicked him until Ms. Groves showed Petitioner's photograph to PH. (T. pp. 206-207)

30. Based on Respondent's investigation, Anderson opined that Petitioner kicked PH in the groin on the morning of August 13, 2012. Anderson believed that PH was standing behind Petitioner, and kicked PH "donkey style," which resulted in PH's injury. However, Anderson acknowledged that no person she interviewed in the course of the investigation heard any commotion in the unit which would suggest Petitioner kicked PH "donkey style" on August 13, 2012. (T. pp. 199-201)

31. Anderson based her finding, in part, on what she described as inconsistencies in the statements Petitioner gave to individuals during the O'Berry investigation and the DHHS investigation. However, upon closer examination, Anderson was unable to identify any inconsistent statements made by Petitioner.

32. Dr. Donna Ramsey ("Ramsey") is a psychologist who treated PH from January of 2013 until June of 2013. After conducting a clinical assessment of PH, Dr. Ramsey diagnosed PH with Post Traumatic Stress Disorder ("PTSD"). Ramsey indicated that PH seemed to relive a trauma from his past that affected his behavior and overall demeanor. Ramsey described PH's statements about this incident as the "same man, with the same belt, standing there at night." Ramsey indicated that PH never mentioned a kick, and it seemed to her like the event he was describing happened at night. Ramsey was also aware from Ms. Woods that PH had experienced some physical and sexual abuse. She "got many statements from him [PH] that there absolutely was a trauma," and that it impacted PH psychologically, physically, and emotionally. (T. p. 104)

33. A preponderance of evidence showed that Petitioner never worked the "A" or night shift while he was employed at O'Berry.

34. At hearing, Statuto opined that based on his "logical medical opinion," PH's injury was most likely caused by a fall into a curved object like the edge of a table. He explained that:

I envision a curved surface. The corner of a table would be a – a good way to explain how the blood vessel was probably broken. . . . He could have fallen. More likely than not, that's what it is.

(T. p. 95-97) In his medical opinion, the injury was not caused by a kick or a punch.

35. A preponderance of the evidence also established that PH suffered bruises on his right buttocks and side, but the origin or source of such injury was unknown and not determined by Respondent.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. Chapters 131E and 150B. To the extent the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. All parties have been correctly designated, and there is no question of misjoinder or nonjoinder.

3. Respondent has the burden of proving by a preponderance of the evidence that Respondent acted erroneously, acted arbitrarily or capriciously, failed to use proper procedure, or failed to act as required by law or by rule in violation of N.C. Gen. Stat. § 150B-23.

4. N.C. Gen. Stat. § 131E-256(a)(1)(a) requires Respondent maintain a registry containing the names of all health care personnel working in health care facilities in North Carolina who have been subject to findings of abuse of a resident. The Health Care Personnel Registry provides a process to protect residents from abuse by preventing the future employment of personnel in health care facilities who are known to be abusive.

5. As a health care personnel working in a health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

6. “Abuse” is defined by 42 CFR Part 488.301 to mean: “the willful infliction of injury, unreasonable confinement, intimidation or punishment which results in physical harm, pain, or mental anguish.”

7. A preponderance of the evidence showed that Respondent did not deny Petitioner any due process rights to a hearing before substantiating and entering a finding of abuse against Petitioner’s name on the Health Care Personnel Registry. This contested case hearing afforded Petitioner the required due process rights to a hearing before Respondent could implement any agency action against Petitioner.

8. A preponderance of the evidence clearly established that resident PH suffered physical injury to his groin area on or about August 13, 2012. However, Respondent failed to present sufficient evidence to prove by a preponderance of the evidence that Petitioner was the person who abused resident PH on August 13, 2012, at O’Berry, by kicking PH in the groin and pushing PH’s head against a wall.

a. First, PH was the only person who identified Petitioner as the man who kicked him in the groin on August 13, 2012, and there were no eyewitnesses to the incident.

b. Secondly, a preponderance of the evidence proved that PH’s identification of Petitioner as the perpetrator was not reliable. PH had dementia, and was known to “mix together” events from the past with events in the present. During the facility’s three interviews of PH, PH’s confusion of the past and present day events was apparent and frequent. PH rambled in his answers. At the same time that PH identified Petitioner, from a photograph, as

the man who hit him, PH pointed to Petitioner's photo and called Petitioner his friend. PH described the man who kicked him as someone wearing shorts and striped shirt like he was wearing on August 13, 2012. On August 13, 2012, PH similarly told Petitioner that Petitioner wasn't the man who kicked him, and "It was another guy in short pants, and he had something on his shoulder." (Resp Exh 7) During O'Berry's investigation, PH indicated he was hit while in his bedroom, and Respondent determined that PH was kicked while in his bedroom. However, during Respondent's investigation of PH, PH said the hitting incident occurred in the shower.

c. There was no evidence that Petitioner was wearing shorts and a striped shirt at work on August 13, 2012. O'Berry management learned that another staff member was wearing shorts and striped shirt like PH on August 13, 2012. (Resp Exh 25) There was no evidence Respondent further investigated this factor.

d. During O'Berry's interview of PH, PH not only accused another staff member of getting in the bed and sexually abusing him, but claimed that someone hit him with a belt.

e. Contrary to Respondent's determination that PH was kicked around 7:20 a.m. on August 13, 2012, PH claimed that he was hit at night.

f. Dr. Statuto's logical medical opinion was that PH's injury was most likely caused by a fall into a curved object like the edge of a table. Statuto examined PH four hours after PH was injured, while there was no evidence that Respondent physically examined PH, and Respondent did not interview PH until seven months after the injury occurred. Respondent presented insufficient medical evidence to rebut Dr. Statuto's medical opinion.

9. The photographic evidence of PH's bruised buttocks, combined with PH's statements, and Dr. Ramsey's statements undoubtedly proved that PH suffered physical harm from being hit by a belt during the subject time period. Nevertheless, since that issue was not part of the contested case before me, the undersigned will not make any determination regarding that issue.

10. Based on a preponderance of the evidence in this case, Respondent erred in substantiating a finding of abuse against Petitioner's name, and listing such finding against Petitioner's name on the Health Care Personnel Registry.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **REVERSES** Respondent's decision to place a finding of substantiated abuse against Petitioner's name on the Health Care Personnel Registry, and Orders such finding against Petitioner's name be removed from the Health Care Personnel Registry.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 12th day of February, 2014.

Melissa Owens Lassiter
Administrative Law Judge