

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 DHR 11563

DIANE IRENE MCCLANTON,  
Petitioner,

v.

NC DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION,  
Respondent.

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**FINAL DECISION**

THIS MATTER came on for hearing before the Undersigned, Selina M. Brooks, Administrative Law Judge, on October 29, 2013, in High Point, North Carolina.

**APPEARANCES**

For Petitioner: Daniel C. Nash  
Morgan Herring Morgan Green & Rosenblutt  
1801 Westchester Dr., Suite 200  
High Point, NC 27621

For Respondent: Josephine N. Tetteh  
Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**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 neglected a resident of Blumenthal Jewish Nursing & Rehabilitation Center in Greensboro, NC and entered findings of neglect 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 1-5 and 8-17 were admitted into the record.

## **WITNESSES**

Diane Irene McClanton (Petitioner)  
Kula Kamara (Nurse Aide at Blumenthal Jewish Nursing & Rehabilitation Center)  
Rosa Moore (Nurse at Blumenthal Jewish Nursing & Rehabilitation Center)  
Beverly Jane Weary (Facility Investigator)  
Jeanne M. 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 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 matter, Diane Irene McClanton ("Petitioner") was a Certified Nursing Assistant ("CNA") at Blumenthal Jewish Nursing & Rehabilitation Center ("BJNRC") in Greensboro, North Carolina, and therefore subject to N.C. Gen. Stat. § 131E-256. (Tr. p. 10)
2. BJNRC is a health care facility as defined by N.C. Gen. Stat. § 131E-256; therefore, its employees are subject to the jurisdiction of the Health Care Personnel Registry.
3. As a CNA, Petitioner's duties primarily involved checking for incontinent care, changing residents' bedding, and washing, dressing, and giving general CNA care to residents. (Tr. pp. 11-12; Resp. Ex. 1)
4. Petitioner completed all required training related to her job responsibilities, including training pertaining to residents' rights and on the facility policy on neglect and abuse. (Tr. pp. 47-48; Resp. Exs. 1-2)
5. At the times relevant to this proceeding, M.F. was a resident of BJNRC; was eighty-seven (87) years old; and her diagnoses included: hypothyroidism; anemia; atrial

fibrillation; difficulty walking; muscle weakness; lack of coordination; a fractured hip; and obesity. (Tr. p. 123; Resp. Ex. 14)

6. On December 13, 2012, Petitioner was scheduled to work the third shift and was specifically assigned to M.F.'s room. (Tr. pp. 14, 44; Resp. Exs. 3, 5)

7. Petitioner was responsible for providing continence care and repositioning resident M.F. every two hours. During the repositioning procedure, Petitioner was also to check M.F.'s diaper for wetness. (Tr. pp. 33-35)

8. Petitioner was running late on December 13, 2012. Accordingly, Kula Kamara ("Kamara"), another aide filled in on the unit for a few minutes until Petitioner arrived. Petitioner spoke with Kamara briefly about general matters when she began her shift, but did not speak to her about resident M.F. (Tr. p. 34; Resp. Ex. 8)

9. It is BJNRC policy to check on all residents at least once every two hours. Petitioner repositioned M.F. two times, once at 3:00am and again at about 4:30am. During the 3:00am reposition, Petitioner checked M.F.'s diaper for wetness because M.F. had not called for the bedpan since Petitioner started her shift. Petitioner checked M.F.'s diaper in a way that was not taught to her in nursing school, which was by taking a rubber glove and sliding it across the pad to see if it squeaked. Also during this reposition, Petitioner found M.F.'s diaper was unfastened. Again, she used her own procedure, not the procedure she was taught in training, to examine the unfastened diaper. (Tr. pp. 35-37)

10. M.F. was determined to be continent. However, continent patients may still sometimes wear diapers for precautionary measures and BJNRC employees are still required to check the diaper to make sure there is nothing in there. (Tr. pp. 60-62)

11. During the 4:30am repositioning, Petitioner took M.F.'s vital signs, which were elevated. Petitioner at once reported those results to the nurse. (Tr. pp. 41-43)

12. Petitioner made her last round at 5:30am and, while adjusting M.F., noticed the bed pan. Once again, she reported the findings to the nurse. (Tr. p. 42)

13. Petitioner reported that M.F.'s bed pad had not changed color during her shift and that the bed pan was not wet when she found it. But, Petitioner also explained that if a bed pad is wet, the color of the pad will usually change in color. In order to see if the pad has changed colors, the resident must be rolled over. Petitioner, based on her own admission at trial, did not roll M.F. over at any point during the shift. (Tr. pp. 54-55)

14. Ms. Moore was called by Petitioner to look at resident M.F. around 5:00am. At that time, Moore found resident M.F. on a bedpan and helped Petitioner remove it. When the bedpan was removed, it was full of urine and the urine had a pungent odor to it. Also, M.F.'s bottom was very raw and irritated with blisters. At this time, Moore notified her supervisor. (Tr. pp. 9-54 ; 65-69; Resp. Exs. 9-10)

15. The Health Care Personnel Registry (“HCPR”) investigates allegations of abuse, neglect, exploitation, and misappropriation of resident property involving unlicensed health care personnel in health care facilities. If an allegation is substantiated, the employee will be listed in the HCPR. The incident was reported to the HCPR for investigation. (Tr. p. 120)

16. At all times relevant to this matter, Jeanne Goss ("Goss"), was an HCPR investigator and conducted the HCPR Investigation in this matter. Goss is assigned to the north-central region of North Carolina, including Guilford County. Accordingly, BJNRC was part of her territory and Goss interviewed Petitioner for her investigation. (Tr. pp. 45; 118-119)

17. Goss further reviewed other BJNRC documents independently, made on-site visits; reviewed documents; and conducted interviews with other facility witnesses. (Tr. pp. 120-121; Resp. Exs. 6- 8)

18. Based upon the findings of the HCPR investigation, Goss substantiated the allegation of neglect against Petitioner and notified Petitioner of her findings. (Tr. pp. 125-127; Resp. Exs. 12-13)

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge 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 CNA working in a nursing and rehabilitation center, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.

4. “Neglect” is defined as “the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental abuse.” 10A NCAC 13O.0101.

5. Petitioner has the burden of proving Respondent otherwise substantially prejudiced Petitioner’s rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner neglected resident MF at Blumenthal Jewish Nursing & Rehabilitation Center and entered a finding of neglect by Petitioner’s name in the Health Care Personnel Registry. Overcash v. N.C. Dep’t of Env’t & Natural Res., 179 N.C. App. 697, 704 (N.C. Ct. App. 2006). Petitioner did not meet her burden.

6. On December 13, 2012, Diane Irene McClanton, a CNA, neglected Resident M.F. by failing to remove the resident’s bedpan for an extended length of time resulting in redness and

blisters to the resident's buttocks.

7. Respondent's decision to substantiate this allegation of neglect 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:

### **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 neglect by Petitioner's name on the Health Care Personnel Registry should be **UPHELD**.

### **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 3rd day of January, 2014.

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Selina M. Brooks  
Administrative Law Judge