

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DHR16311

Almon A Barnwell III,)	
Petitioner,)	
v.)	FINAL DECISION
Dept of Health and Human Services, Division)	
of Health Service Regulation,)	
Respondent.)	

THIS MATTER came for hearing before the undersigned, the Honorable Selina M. Brooks, Administrative Law Judge presiding, on March 31, 2014, at the Vanguard Center, 5501 Seventy Seven Center Drive, Suite 150, Charlotte, North Carolina.

APPEARANCES

For Petitioner:	Almon A. Barnwell, III, <i>pro se</i> 531 Spruce Street Charlotte, NC 28203
For Respondent:	Derek L. Hunter Assistant Attorney General North Carolina Department of Justice Post Office Box 629 Raleigh, NC 27602-0629

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights and acted erroneously when Respondent substantiated the allegations that (i) Petitioner abused a resident (K.H.) of Echelon Care in Charlotte, North Carolina, by willfully choking K.H., resulting in bruising to K.H.'s neck; and (ii) Petitioner neglected K.H. by failing to apply an approved therapeutic hold and failing to appropriately respond to K.H.'s behaviors, and entered said findings on the North Carolina Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. § 150B-1, *et seq.*
42 CFR § 488.301
10A N.C.A.C. 130 .0101(1)
10A N.C.A.C. 130 .0101(10)

EXHIBITS

Respondent=s Exhibits 1 – 8, 10 – 14, and 16 – 22 were admitted into the record.

WITNESSES

Antoine Lassiter (Quality Management Director, Echelon Care)
LaToya McClain (Service Coordinator, Echelon Care)
Taa Jwar Webber (Service Coordinator, Echelon Care)
Deanna Cosby, LPC, LCAS (K.H.'s Former Therapist)
Marcellette Joyner (Child Protective Services, Mecklenburg County Department of Social Services)
Almon A. Barnwell, III (Petitioner)
Athena Foreman, RN, MSN (Investigator, Health Care Personnel Registry)

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 and conclusions of law. 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 witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. At all times relevant to this matter, Almon A. Barnwell, III (“Barnwell”) was employed as a health care personnel—namely, a Residential Counselor—at Echelon Care in Charlotte, North Carolina.
2. Echelon Care is a residential facility, as defined by N.C. Gen. Stat. § 122C-3(14)e, and is therefore subject to the purview of N.C. Gen. Stat. § 131E-256.
3. Barnwell’s duties as a Residential Counselor included, among other things, management of the day-to-day operations of the facility; providing, through daily supervision, a safe and therapeutic environment for the residents of the group home; and accurately and thoroughly documenting residents’ behavior, incidents, and medications. (Resp. Exhs. 4 and 5)
4. Barnwell received training in the areas of resident’s rights, abuse, neglect, and North Carolina Intervention (“NCI”). NCI is a standardized training program to prevent the use of restraints and seclusion, created by the North Carolina Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.

NCI employs various therapeutic holds that are implemented when an individual exhibits behaviors that are dangerous to the resident, others, or property. (Resp. Exhs. 4, 5, 7, and 8)

5. On May 1, 2013, Barnwell worked the 12:00 a.m. – 8:00 a.m. shift and was assigned to provide care to the four (4) residents of Echelon Care, including K.H., a 13-year-old male with diagnoses of attention deficit hyperactivity disorder, bipolar disorder, and oppositional defiant disorder. (Resp. Exhs. 20 and 21)

6. K.H. awoke at approximately 4:30 a.m., came downstairs, and asked to use the computer. Barnwell denied K.H.'s request and sent him back to bed. K.H. eventually returned to his room when the other staff member on duty, Kim Young, asked K.H. to return to his room. (Resp. Exhs. 10, 14, and 19)

7. K.H. came back downstairs at approximately 6:30 a.m. to get ready for school. At approximately 7:15 a.m., Kim Young left the facility to take two (2) residents to school. K.H. and Resident H.F. remained in the facility with Barnwell. H.F. normally rode the bus to school and Barnwell normally took K.H. to school. (Resp. Exhs. 14, 18, and 19)

8. At approximately 7:30 a.m., Barnwell confronted K.H. when Barnwell found K.H. in another resident's room without permission. K.H. claimed that he went into the resident's room to obtain a bag that he had sold to the resident, but for which the resident had not paid him. It was later discovered that K.H. had stolen a cellular phone from the resident's room. (Resp. Exhs. 18 and 19)

9. Subsequently, K.H. admits to confronting Barnwell and approaching Barnwell in a threatening manner. K.H. also admits—and H.F. corroborates—that he punched Barnwell numerous times with his fists. Barnwell attempted to prevent K.H. from hitting him and K.H. and Barnwell ended up on the couch in the living room. (Resp. Exhs. 14, 18, and 19)

10. K.H. alleged that Barnwell dragged him into the kitchen where their confrontation continued and, at that point, Barnwell slammed K.H. down on the table and choked K.H. Barnwell denies ever choking K.H. Barnwell testified that what he employed was a "simple" NCI restraint on K.H. (Resp. Exhs. 14, 18, and 19)

11. After their confrontation, K.H. left the facility and walked to school. Upon leaving the facility, K.H. immediately called his mother, LaToya McClain ("McClain"), Service Coordinator for Echelon Care, and Deanna Cosby, his former therapist, to report the altercation that had just occurred between him and Barnwell. K.H. told McClain that he was bleeding from the neck because Barnwell had scratched him. (Resp. Exhs. 12 – 14)

12. After speaking with K.H., McClain, who was sick at home, telephoned Taa Jwar "TJ" Webber ("Webber"), Service Coordinator at another Echelon Care facility, informed him of the altercation, and asked Webber to go to K.H.'s school to check on K.H.'s condition. (Resp. Exhs. 12 and 16)

13. Webber arrived at K.H.'s school at approximately 8:00 a.m. and found K.H. in the assistant principal's office. Webber noticed bruising on the right side of K.H.'s neck and took pictures of K.H.'s neck. The bruises on the right side of K.H.'s neck were consistent with someone placing their left hand around K.H.'s neck. Webber returned to Echelon Care to retrieve K.H.'s shoes. Upon his arrival, he spoke to Barnwell about the incident, but did not disclose to Barnwell the injuries to K.H.'s neck. Barnwell told Webber that he had employed a "normal restraint" on K.H. Later that day, Webber accompanied K.H. and K.H.'s mother to the doctor for K.H. to be treated for the injuries to his neck. (Resp. Exh. 16)

14. Deanna Cosby, K.H.'s former therapist, testified that after having been called by K.H.'s mother on the morning of May 1, 2013, to report the incident, K.H. also called her and reported that he and Barnwell had had an altercation, during which Barnwell slammed K.H. down on a table and grabbed K.H. by the throat. (Resp. Exh. 13)

15. Antoine Lassiter ("Lassiter"), Quality Management Director for Echelon Care, received a call from McClain informing him of the incident between K.H. and Barnwell. Lassiter conducted the facility's internal investigation, during which he interviewed Barnwell and asked Barnwell several times to thoroughly document what had occurred between him and K.H. on May 1, 2013. Barnwell refused to document the incident and called it a "simple restraint." (Resp. Exhs. 17 and 18)

16. Barnwell testified that he is right-handed. However, during an interview with the North Carolina Health Care Personnel Registry ("HCPR") investigator, Barnwell said he is ambidextrous, but stronger in his left hand. (Resp. Exh. 19)

17. Marceleette Joyner, a Child Protective Services employee of the Mecklenburg County Department of Social Services, investigated the incident and substantiated an allegation of neglect against Barnwell.

18. As a result of the incident, Barnwell was terminated from his position as Residential Counselor at Echelon Care.

19. Lassiter, McClain, and Webber are all NCI-certified and each testified that there is no NCI-approved therapeutic hold that is applied above the shoulders and that would result in the injuries suffered by K.H.

20. HCPR investigates allegations against unlicensed health care personnel working in health care facilities in North Carolina. The allegations investigated by HCPR include, but are not limited to, abuse and neglect. With the exception of a finding of a single instance of neglect, substantiated findings against health care personnel are permanently listed on the HCPR. N.C. Gen. Stat. § 131E-256.

21. Upon receipt of the allegation against Barnwell, Athena Foreman, RN, MSN (“Foreman”), Investigator for HCPR, determined that the matter required further investigation and, by certified letter dated May 13, 2013, notified Barnwell of the same. (Resp. Exh. 3)

22. At all times relevant to this incident, Foreman was employed as an Investigator for HCPR. She is charged with investigating allegations of abuse and neglect, among others, against unlicensed health care personnel in Mecklenburg County, North Carolina, and was assigned to conduct the investigation into the allegations against Barnwell.

23. As a part of her investigation, Foreman visited Echelon Care and reviewed K.H.’s medical records, Barnwell’s personnel file, and Echelon Care’s documentation regarding this incident. Foreman also interviewed Barnwell, K.H., Lassiter, and Webber. (Resp. Exhs. 14, 16, 17, and 19)

24. Based on her investigation, Foreman determined that Barnwell abused and neglected K.H. on May 1, 2013, and, accordingly, substantiated the allegations against Barnwell. (Resp. Exhs. 20 and 21)

25. By certified letter dated July 23, 2013, Foreman notified Barnwell that the allegations that Barnwell had abused and neglected K.H. had been substantiated and said findings would be listed on the Health Care Personnel Registry. Barnwell was further notified of his appeal rights. (Resp. Exh. 22)

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. Pursuant to N.C. Gen. Stat. § 131E-256, the North Carolina Department of Health and Human Services (“Department”) is required to establish and maintain a health care personnel registry that contains the names of all unlicensed health care personnel working in health care facilities in North Carolina who are subject to a finding by the Department that they, among other things, abused or neglected a resident in a health care facility, or have been accused of such an act if the Department has screened the allegation and determined that an investigation is warranted.

4. Echelon Care is a residential facility, as defined by N.C. Gen. Stat. § 122C-3(14)e, and is therefore subject to the purview of N.C. Gen. Stat. § 131E-256.

5. As a health care personnel—namely, a Residential Counselor—working in a residential facility, Barnwell is subject to the provisions of N.C. Gen. Stat. § 131E-256.

6. “Abuse” is 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(1); 42 CFR § 488.301.

7. The preponderance of the admissible evidence in the record shows that on May 1, 2013, Barnwell abused K.H. by willfully choking K.H. during an altercation resulting in scratches and bruises to K.H.’s neck.

8. Respondent’s action to substantiate the allegation of abuse against Barnwell is supported by a preponderance of the evidence.

9. Barnwell is not a credible witness and his testimony is inconsistent with the admissible evidence in the record.

10. “Neglect” is defined as the failure to provide goods and services necessary to avoid physical injury, mental anguish, or mental illness. 10A N.C.A.C. 13O .0101(10); 42 CFR § 488.301.

11. The preponderance of the admissible evidence in the record shows that on May 1, 2013, Barnwell neglected K.H. by failing to apply an NCI-approved therapeutic hold on K.H. and failing to appropriately respond to K.H.’s behaviors, resulting in scratches and bruises to K.H.’s neck.

12. Respondent’s action to substantiate the allegation of neglect against Barnwell is supported by a preponderance of the evidence.

13. Barnwell failed to meet his burden that Respondent substantially prejudiced his rights and acted erroneously when Respondent substantiated the allegations that (i) Barnwell abused a resident (K.H.) of Echelon Care in Charlotte, North Carolina, by willfully choking K.H., resulting in bruising to K.H.’s neck; and (ii) Barnwell neglected K.H. by failing to apply an NCI-approved therapeutic hold and failing to appropriately respond to K.H.’s behaviors, and entered said findings on the North Carolina 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 findings of abuse and neglect against Petitioner on the North Carolina Health Care Personnel Registry should be **UPHELD**.

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 the 2nd day of May, 2014.

The Honorable Selina M. Brooks
Administrative Law Judge