

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 20066**

FINAL DECISION

Both Petitioner and Respondent submitted proposals and argument. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until September 29, 2014 to file the decision in this case.

For Petitioner: John P. Fernandez
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For Respondent: Bethany A. Burgon
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Whether Respondent substantially prejudiced Petitioner's rights and acted erroneously

when Respondent notified Petitioner of its intent to enter a finding of abuse and a finding of neglect by Petitioner of a resident in a health care facility in the Health Care Personnel Registry as follows:

On or about 08/11/2013, Akinsola Okunsokan, a Nurse Aide improperly transferred a resident, (PL) resulting in a bruise, swelling, and redness to the resident's right hand (finding neglect).

On or about 08/11/2013, Akinsola Okunsokan, a Nurse Aide, abused a resident (PL) by removing the resident's clothes without asking, grabbing the resident by her hands rather than using a lift to transfer the resident, and showing the resident his muscles.

APPLICABLE STATUTES AND RULES

(including but not limited to the following)

N.C. Gen. Stat. § 131E-256

N.C. Gen. Stat. §150B-23

42 CFR § 488.301

10A N.C.A.C. 13O.0101

EXHIBITS

For Petitioner: Exhibits 1-3 were admitted.

For Respondent: Exhibits 1-10, 12, 13, and 15-21 were admitted.

WITNESSES

Akinsola Okunsokan
Marcia Powell
Sarah Ryder
Gisele Charles
Solomon Weiner

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.

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Akinsola Okunsokan, was employed as a Nurse Aide at Rex Rehabilitation and Nursing Care Center (“Rex Rehab”) in Raleigh, North Carolina. Petitioner attended orientation and received training at Rex Rehab regarding patient rights as well as patient abuse and neglect. Petitioner helped care for the residents at Rex Rehab.

2. Resident PL was admitted to Rex Rehab to receive occupational therapy after she had a stroke. She required extensive assistance for self-care during this time. Resident PL is an alert and oriented, 89 year old female. She is described as very sharp and cognitively intact. She is usually a quiet person and she is usually smiling.

3. Each resident at Rex Rehab has caregiver instructions posted on the door of their room. Resident PL had caregiver instructions posted for her in her room. The instructions stated that she was bladder and bowel incontinent. Resident PL’s ambulation was by wheelchair. Under mobility, the instruction stated that Resident PL was “up with assistance of 2 person(s).” A note was added that Resident PL is a “total lift.” (Resp. Ex. 12)

4. On August 13, 2013, Resident PL told her occupational therapist, Sarah Ryder, that Petitioner handled her roughly the evening of August 11, 2013. She stated that she was “being handled roughly during the transfer from her wheelchair to her bed, and being talked to disrespectfully by a male aide on Sunday August 11 on the evening shift.” (Resp. Exs. 4, 9)

5. Ryder filled out a Concern Report with Resident PL on August 13, 2013. Resident PL stated that Petitioner told her “even shitiness tastes good when it is fired” after she had an episode of incontinence. She stated further that Petitioner shook his bottom at her while laughing and licking his lips. She reported that he was rough picking her up out of the wheelchair and putting her into bed. She got a bruise located on the right posterior web space of her hand and stated that it was very painful. PL further reported that when Petitioner was leaving he instructed her not to ring the call bell anymore. Resident PL stated that she was fearful of ringing the call bell. Resident PL was also apprehensive about filling out the Concern Report due to fear of retaliation. Resident PL also requested to only have female nurse aides assigned to her at this time. (Resp. Ex. 8)

6. Gisele Charles is the RN Clinical Manager for Station Two at Rex Rehab. She oversees the everyday activities of the unit and supervises the staff. Charles also conducts the facility investigations of abuse and neglect in her position. She has conducted over twenty investigations. Charles has been employed at Rex Rehab for eleven years and has been a nurse manager for five years. She has been in nursing for thirty-three years.

7. Resident PL is a resident on Charles’s unit. Charles conducted the facility investigation resulting from the Concern Report completed by Resident PL. She interviewed Resident PL and Petitioner. Charles testified that Petitioner had been at Rex Rehabilitation and

Nursing Care Center a long time. She stated Petitioner was a good worker and that she was shocked when she heard about the conduct that is the subject of this hearing.

8. Charles interviewed Resident PL on August 13, 2013 and reported in Respondent's Exhibit 9 what PL relayed to her. Resident PL stated that on Sunday evening after supper at about 7:00 pm she put on her call light for assistance. When the aide, whom she identified as Petitioner, came in she told him she had an accident and needed to be changed. Petitioner said to her, "shit again, fried shitty taste good" licking his lips while he made the comment. Resident PL was sitting in a wheel chair. Petitioner approached PL and pulled her blouse over her head and pulled off her bra. Resident PL tried to cover her breasts. Petitioner put on her gown and grabbed her by the hands and pulled her up. She told Petitioner that he needed to use the Hoyer lift for her transfer. Petitioner showed Resident PL his muscles like he was strong and put her to bed. Resident PL said, "He hurt my hand when he pulled me up. He handled my roughly." Resident PL pointed to a bruised area about the size of a quarter between her right thumb and index finger and a swollen right thumb. She said that it was painful. She stated that she had never been treated or talked to like that before. Resident PL said she had never had an issue with being taken care of by males. She mentioned two other male assistants she worked with. She stated that after the way Petitioner treated her, she would prefer not to have male assistants assigned to work with her anymore. (Resp. Ex. 9)

9. Resident PL stated that she did not report the incident to anyone that day because she was afraid of retaliation. She said that she could not get her mind off of it and she was hurt so she decided to file the report. A bruise can take anywhere from eight to twenty-four hours to appear. The bruise on Resident PL looked fairly new when Charles inspected it on August 13th. Resident PL complained of pain. Her right thumb was swollen and reddened. She could move the thumb but expressed that there was soreness when she did. Charles checked Resident PL's records to see if there was any prior documentation of the injury to Resident PL. There was no documentation in her record so Charles completed a Wound Sheet Evaluation per policy. (Resp. Exs. 5, 6, 9) Charles read from Rex Rehab nursing notes indicating that for each day August 9 to August 13, 2013 Respondent PL was reported as alert, verbal, and showing no symptom of pain or discomfort, and that the reference to Resident PL complaining of pain is inserted after the alleged events used to charge Petitioner with abuse and neglect. (Pet. Ex. 2)

10. Charles interviewed Petitioner for her investigation after she had spoken to Resident PL. Petitioner was not able to come to the facility so Charles interviewed him by phone. She always conducts the interviews with two people so she had the Director of Nursing in her office. Charles has worked with Petitioner for eleven years. She said that he has a very thick accent. She understands him for the most part but always asks him to clarify when she does not understand. While interviewing Petitioner, Charles would repeat what he said after he said it and would have him confirm that it was correct.

11. Charles informed Petitioner that there was an allegation against him but did not tell him the specific allegation. She told Petitioner the allegation involved F Hall, Room 172, the room of Resident PL. Petitioner confirmed that he was assigned to 172-B on the evening shift of Sunday, August 11, 2013. Petitioner stated that he had taken care of Resident PL several times

before on the night shift. He stated that she used the mechanical lift. Petitioner stated that Resident PL asked to go to bed around 7:45 pm. He stated that he undressed her and put her to bed using the Hoyer without assistance. Petitioner said Resident PL had a large bowel movement and he changed her. (Resp. Ex 2)

12. After Petitioner made this statement, Charles informed Petitioner of the specifics of the allegation. She told him that the resident had stated she had been transferred without a lift the evening he was assigned to her. Petitioner stated that this had occurred on Saturday night. He said that he was not assigned to her that night. He said that he did not use the lift to transfer the resident because he did not know that the resident used the Hoyer lift. He said that her care plan was not in her room. He said she did not have her pad under her on Saturday. (Resp. Ex. 2)

13. Petitioner testified that on Saturday, August 10, 2013, Petitioner was working the evening shift at Rex Rehab and was not assigned to Resident PL. Petitioner testified that he was running to help a male resident who was about to fall from his chair and noticed that Resident PL had turned her lights on. Petitioner said he asked Resident PL could he help her at which point Petitioner noticed that Resident PL was crying and her pants and “everything” were soiled with diarrhea and throw-up. Petitioner testified that Resident PL’s roommate was in the room witnessing all of this.

14. Petitioner testified that he checked the patient bathroom for Resident PL’s care instructions, but Resident PL’s patient information was not there and that the only patient information in the bathroom was for a previous patient named Ms. B. Petitioner said he looked for the C.N.A. who was assigned to Resident PL, but that C.N.A. was nowhere to be found. He testified that Resident PL did not have a Hoyer lift pad on her wheelchair, so Petitioner had no way of knowing that she was supposed to be moved by a mechanical lift. Petitioner stated that he noticed that Resident PL’s left side was weak, but her right side was strong. He said he positioned the chair near to the bed and told Resident PL that he would help her. Petitioner testified that he helped Resident PL into her bed by lifting her under her armpit and across her chest.

15. The pad referenced by the witnesses is a Hoyer lift pad. It is placed behind a resident in the resident’s chair. It is connected to the Hoyer lift and used to lift the resident. The Hoyer lift is a machine that has a U shape. The Hoyer pad has four reigns with two towards the bottom of the leg and two towards the top. The pad is hooked to the machine to lift the patient. The pad can swing. Two people are used for safety reasons. One person guides and the other person is there to assist because the patient can tip over.

16. Gisele Charles had personal knowledge about Resident PL’s pad on Friday, August 9, 2013. There had been a question from another nurse aide involving Resident PL and her transfer. There was no pad under Resident PL on Friday. Charles found her pad in the closet. Charles slid the pad behind Resident PL in her wheelchair. Once the pad is in the chair it stays with the resident. During this time, on Friday, August 9, 2013, Charles also confirmed that Resident PL had her care plan attached to her bedroom door. Charles confirmed that the care plan was there and showed it to the “Friday” nurse aid. The nurse aide said that she had seen it

and that was why she came to Charles about the pad. The nurse aide saw on the care plan that Resident PL used the Hoyer lift so she wanted to make sure she had a pad.

17. Petitioner also said in his statement to Charles that he could have asked a nurse or coworker about PL since he was not sure of her routine but he did not. He stated that the information is usually available in the resident's room on the resident's care sheet but that the plan was for another resident. This statement contradicts Charles's confirmation of Resident PL's being on the door. Petitioner stated to Charles that Resident PL had a bowel movement and he said, "I told her she had a big baby in there." He denied telling the resident not to use the call bell again. (Resp. Ex 2)

18. Petitioner further testified that on Saturday he noticed that PL's bed was soaked through, so he changed the bed sheet, took it to the bathroom and washed it. He stated that he took Resident PL's pants to the bathroom and washed them and hung them up to dry. Petitioner testified that Resident PL said, "God bless your heart by saving my life." (T. p. 19)

19. Petitioner testified that on Sunday, August 11, 2013, he was again working the evening shift at Rex Rehab and was assigned to Resident PL in room 172B. He stated that when Resident PL saw Petitioner, she said, "Thank you for saving my life yesterday." (T. p.19) Petitioner also testified that later that shift, he helped remove Resident PL's bra at bedtime and used a Hoyer lift to get her into bed while a nurse named Marcia watched him while there to give medications. Petitioner stated that this was the first day that he knew about the mechanical lift requirement for Resident PL.

20. Petitioner had an opportunity to review his statement when he came to Rex Rehab. He was informed to come to the facility because of disciplinary action. Petitioner reviewed his statement when he returned and he did not make any corrections to the document. Petitioner called Charles later, after he had reviewed the statement. At that time, Petitioner changed his statement. He said that he forgot to tell Charles he had actually transferred the resident with a nurse, Marcia Powell.

21. Gisele Charles spoke to Powell immediately after Petitioner called. She asked Powell if she had assisted any of the nurse aides with a transfer on that Saturday or Sunday. Powell said no. Charles asked specifically if she had assisted in 172-B with Resident PL and Powell again said no. Powell wrote a statement documenting that she had not assisted with the transfer. (Resp. Ex. 10) Powell testified that Resident PL is alert and knows what is going on. Powell stated that Resident PL used the Hoyer lift from the first day she was transferred to the hall. The care plan for Resident PL documented that she was a total assist with two people. Powell said that the care plan for Resident PL was in her room the entire time she was on the hall.

22. Petitioner denies making the statement, "even shittiness tastes good when it is fried" and handling PL roughly. He attributes the misunderstanding to his thick Nigerian accent. Respondent's witness Sarah Ryder stated that Petitioner is not easy to understand and that it is possible that Resident PL misunderstood him.

23. There are discrepancies between what Petitioner claims to have said during a telephone conference with Gisele Charles and Leslie Smith, and what was written in the Staff Interview report. Petitioner attributes those discrepancies to him being very emotional during the teleconference and crying as a result of the allegations.

24. Charles sent the 24 Hour Initial Report and the 5 Working Day Report to the Health Care Personnel Registry (HCPR) reporting the allegation, and reporting that it was substantiated. (Resp. Exs. 16-17)

25. At all times relevant to this incident, Solomon Weiner was employed as an investigator for the HCPR. He was first employed at HCPR in October of 2010. Weiner has an Associate's degree in nursing from Wake Tech, a Bachelor of Arts Degree in psychology from North Carolina State University and his J.D. from the University of North Carolina at Chapel Hill.

26. Sol Weiner was charged with investigating allegations against health care personnel in a region including Wake County, North Carolina. Accordingly, the Rex Rehab was in his region and he received and investigated the allegation that Petitioner had neglected and abused Resident PL.

27. As part of the investigation, Weiner interviewed Petitioner, the staff members that had knowledge of the incident, and the resident. He did not interview Resident PL's unnamed roommate. He reviewed the resident's records and took into account the internal investigation conducted by the facility. Weiner conducted his on-site investigation on October 15, 2013.

28. Weiner interviewed Petitioner face to face. Weiner asked questions and would let Petitioner answer. Petitioner had the opportunity to review his interview and make changes. Petitioner signed the interview after he reviewed it. Petitioner admitted he did not properly use the Hoyer lift. Petitioner did not admit to anything that would constitute abusing Resident PL. (Resp. Ex 3)

29. Weiner noticed several inconsistencies between the statement the Petitioner gave for the facility and the statement Petitioner gave to the HCPR. In the facility statement, Petitioner said he put Resident PL to bed without the assistance of a co-worker on Sunday and that the bowel movement occurred on Sunday. In the HCPR statement he said that the bowel movement occurred on Saturday and that he used the Hoyer lift with assistance from Powell. In the facility statement, Petitioner stated that he told Resident PL that she had a big baby in there. In the HCPR statement, Petitioner said that he did not say that, Resident PL did. (Resp. Exs. 2, 3)

30. Weiner further noted that Petitioner's statement was inconsistent with the other statements about the incident. Marcia Powell stated that at no time did she help Petitioner with the Hoyer lift. Gisele Charles stated that, contrary to Petitioner's statements, the care plan for Resident PL was in the room. The statement from Resident PL also contradicted Petitioner's

statement. It was inconsistent based on the timeframe and based on how she had been treated.

31. Weiner reviewed the statements made by Resident PL and determined they were consistent with one exception. Resident PL was inconsistent with when she reported the incident. Petitioner had many discrepancies within his statements and with the statements of others. Weiner found the statements of Resident PL to be more credible over the statements of Petitioner in making his final conclusions. His report indicates that Resident PL thought she understood Petitioner's accent because she lived in diverse communities though he did not explore what diverse communities she had lived in.

32. Solomon Weiner viewed all the information together, and took all materials including but not limited to the medical records of the resident and the health care facility investigation documentation, as well as all statements, into consideration. Weiner concluded that Petitioner had abused and neglected Resident PL based on the consistency of the statements and the credibility of the witnesses. Weiner wrote an Investigation Conclusion Report which documented the conclusion. (Resp. Ex. 18)

33. Petitioner was notified by letter that a finding of abuse would be listed against him name in the Health Care Personnel Registry. Petitioner was further notified of his right to appeal. (Resp. Ex. 20)

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

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. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

3. The North Carolina Department of Health and Human Services, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a registry that contains the names of all health care personnel working in health care facilities who are subject to a finding by the Department that they neglected or abused a resident in a health care facility or who have been accused of abusing or neglecting a resident if the Department has screened the allegation and determined that an investigation is required.

4. As a nurse aide 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. The Rex Rehabilitation and Nursing Care Center (“Rex Rehab”) in Raleigh, North Carolina is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b).

6. “Neglect” is defined as “a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.” 10A N.C.A.C. 130.0101, 42 CFR § 488.301.

7. On or about 08/11/2013, Akinsola Okunsokan, a Nurse Aide, neglected Resident PL by improperly transferring Resident PL, resulting in a bruise, swelling, and redness to the resident’s right hand.

8. “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. 130.0101, 42 CFR § 488.301.

9. On or about 08/11/2013, Akinsola Okunsokan, a Nurse Aide, abused Resident PL by removing the resident’s clothes without asking, and grabbing the resident by her hands rather than using a lift to transfer the resident. Petitioner spoke inappropriately to Resident PL and instructed her not to ring the call bell anymore. PL feared retaliation if she reported Petitioner’s conduct. Petitioner’s actions intimidated Resident PL and resulted in mental anguish.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on those conclusions and the facts in this case, the Undersigned holds that Respondent's decision to substantiate allegations of neglect and abuse against the Petitioner is supported by a preponderance of the evidence. Respondent did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in its investigation and by placing a substantiated finding of neglect and abuse against Petitioner’s name on 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 Statutes Chapter 150B, Article 4, 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 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. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. In conformity with the Office of Administrative Hearings' Rules, 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.

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.

IT IS SO ORDERED.

This is the 26th day of September, 2014.

Augustus B. Elkins II
Administrative Law Judge