

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DHR00187

ANDREA SCHULLER PETITIONER, V. DEPARTMENT OF HEALTH AND HUMAN SERVICES RESPONDENT.	FINAL DECISION
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A contested hearing was held in this matter on August 4, 2014, at the Haywood County Courthouse, in Waynesville, North Carolina, before the Honorable J. Randall May, Administrative Law Judge. Petitioner Andrea Schuller appeared pro se. Respondent N.C. Department of Health and Human Services was represented by Thomas Royer, Assistant Attorney General.

Judge May explained that Petitioner has the burden of proof in this matter, but informed Petitioner that since Petitioner is pro se and unaccustomed to the hearing process, Judge May would request that Respondent put on its evidence first.

ISSUE

Did Respondent properly deny Petitioner's request to have her name removed from the North Carolina 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. In making the findings of fact, the undersigned has weighed all the evidence, or lack thereof, and has assessed the credibility of the witness 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 and the evidence, the undersigned states the following:

FINDINGS OF FACT

1. Petitioner worked as a certified nursing assistant from 2000 - 2012.
2. On January 10, 2008, Respondent sent Petitioner a letter by certified mail notifying her that Respondent had investigated and substantiated an allegation that Petitioner had neglected a resident of Black Mountain Center in Black Mountain, North Carolina.
3. Delivery of the January 10, 2008 letter was attempted three (3) times, but ultimately the letter was returned to Respondent as unclaimed and unable to forward.
4. On February 22, 2008 Petitioner's name was placed on the North Carolina Health Care Personnel Registry based upon a finding of resident neglect.
5. Petitioner submitted a request to Respondent to have her name removed from the registry, which Respondent received on May 6, 2009.
6. On May 7, 2009, Respondent sent Petitioner a letter notifying Petitioner that "[t]o have the substantiated neglect finding considered for removal, [petitioner] must provide certain documents in order for [Respondent] to begin a review of the request."
7. On June 22, 2012, Petitioner requested by telephone that Respondent provide her with a copy of the letter listing the required documents to have the finding of resident neglect removed from the North Carolina Health Care Personnel Registry.
8. On May 16, 2013, Respondent sent Petitioner a letter notifying her that consideration of her request for removal of the neglect finding was unable to continue until she provided all documents previously requested, and that still outstanding was Petitioner's current state criminal record check.
9. On December 11, 2013, Respondent sent Petitioner a letter notifying her that she had not met the state requirements allowing for removal of the neglect finding because additional incidents of neglect were found in her employment history; therefore, the finding of resident neglect would remain on the Health Care Personnel Registry. Respondent also notified Petitioner of her right to contest this decision by filing a petition for a contested hearing with the Office of Administrative Hearings.
10. At the hearing of this matter, Respondent called Petitioner and Debra Hockaday, Health Care Personnel Registry Investigator. Ms. Hockaday testified that she had been the person in charge of reviewing Petitioner's request. In her testimony, Ms. Hockaday explained the process outlined above and the reason why Respondent had denied Petitioner's request.
11. Both Ms. Hockaday's testimony and documentary evidence submitted by Respondent specified that Petitioner's request to have her name removed from the Health Care Personnel Registry was denied because there is a pattern of neglect in her employment

history. Respondent cited two written warnings issued to Petitioner while she was working at Black Mountain Center, and a corrective action which took place while Petitioner was employed by Asheville Healthcare Center.

12. The first warning involved an incident where Petitioner failed to prepare a snack according to a resident's prescribed diet order and failed to supervise the resident in a way that prevented the resident from choking.
13. The second warning involved an incident where Petitioner tied a resident's brief causing an indentation in the resident's hip.
14. The corrective action cited involved an instance where Petitioner failed to get assistance in transferring a dependent resident to bed.
15. Respondent also cited an incident involving Petitioner, for which she was terminated; but this incident did not involve resident neglect, and the undersigned does not find that it is relevant to the inquiry.
16. After Respondent had finished presenting evidence, Petitioner called two witnesses to testify on her behalf. Both of these witnesses were credible and assisted the finder of fact. The first witness ("Witness I") supervised Petitioner during the time that she had worked for Asheville Healthcare Center. Witness I testified that she was always glad when Petitioner was assigned to her hall; that Petitioner always did her job properly; that the residents liked Petitioner; and that Witness I did not know Petitioner to abuse or neglect residents.
17. Petitioner called a second witness ("Witness II") as a character witness. Petitioner had lived with Witness II to get away from her now-ex-husband who had been abusive. Witness II testified that she had some knowledge about Petitioner as a caretaker because Petitioner had helped her take care of her elderly mother. Witness II testified that Petitioner was very helpful to her as her mother's health deteriorated. Witness II stated that Petitioner used her skills as a certified nursing assistant in helping her care for her mother, including helping her to bathe her mother; prepare her mother's food and ensure proper nutrition; and that Petitioner provided emotional support to her during that time.
18. Witness II also testified that from her interactions with Petitioner during that time, she could tell how much she cared about the residents in her care. Witness II testified that at that time, Petitioner was working for Asheville Healthcare Center and that Petitioner held the residents in very high regard. Petitioner had pictures of residents and went to visit residents, when she was not scheduled to work, to celebrate birthdays and other milestones. Witness II stated that she knew Petitioner was a very hard worker and cared personally for the residents in her care. Witness II stated that Petitioner was very devoted to residents and was a woman of good character and ethics. Witness II testified that she did not have much information about Petitioner during the time that she worked at Black Mountain Center, except that she was very young—a teenager.

CONCLUSIONS OF LAW

1. North Carolina General Statutes § 131E-256(a) provides that “[t]he Department shall establish and maintain a health care personnel registry containing the names of all health care personnel working in health care facilities in North Carolina who have [b]een subject to findings by the Department of [n]eglect or abuse of a resident in a health care facility”
2. North Carolina General Statutes § 131E-256(i) provides that “the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that: (1) The employment and personal history of the health care personnel does not reflect a pattern of abusive behavior or neglect; (1a) The health care personnel's name was added to the registry for a single finding of neglect; (2) The neglect involved in the original finding was a singular occurrence; and (3) The petition for removal is submitted after the expiration of the one-year period which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section.”
3. The evidence and testimony presented does not support a finding that Petitioner’s employment and personal history reflect a pattern of neglect. Although Respondent points to incidents where Petitioner received warnings and a corrective action, the majority of the evidence supports a finding that Petitioner provided high quality care to the residents in her charge. Further, the evidence indicates that Petitioner was a valued employee who cared a great deal about the residents she attended. Petitioner had, on occasion, made mistakes and those mistakes were noted in her employment record; however, her overall performance as a certified nursing assistant was positive. She presented as a most credible witness.
4. Notably, the same supervisor who signed the corrective action cited by Respondent, sent a letter to Respondent which stated that:

[Petitioner] was a dedicated and dependable CNA, she frequently volunteered to do extra duties or stay beyond her regular scheduled [sic]. [Petitioner’s] residents never once complained about any poor treatment or poor care. Some of her residents would ask for her by name to take care of them. When [Petitioner] was no longer employed at Asheville Health Care a family member requested her to continue to provide one to one for their loved one and she did for several months. Not one time did I have to counsel or reprimand [Petitioner] for any abuse or neglect to the residents in her care. She showed compassion, caring, and giving to the residents. [Petitioner] got along well with her other coworkers and the charge nursing.
5. Other previous employers corroborated this evidence, providing positive letters of recommendation on her behalf. Both the letters and the testimony of witnesses indicated that Petitioner was dependable and compassionate. Employers consistently commented that residents liked her and that she had a strong work ethic. Employers

also commented on Petitioner's willingness to volunteer her time and went above and beyond what was required of her.

6. Petitioner presented compelling evidence to show that Respondent's position was improper, erroneous, arbitrary, and capricious.

FINAL DECISION

The Respondent's decision to deny Petitioner's request to have her name removed from the North Carolina Health Care Personnel Registry is REVERSED.

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 17th day of October, 2014.

J. Randall May
Administrative Law Judge