

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 03645

Estella White Petitioner v. The Department Of Health And Human Services, Division of Health Service Regulation Respondent	FINAL DECISION
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THIS MATTER came to hearing before the undersigned, Selina M. Brooks, Administrative Law Judge, on October 29, 2014, in High Point, North Carolina.

APPEARANCES

For Petitioner:	Estella White 805 Sharon Way (Apt. 31) High Point, NC 27602
For Respondent:	Candace A. Hoffman Assistant Attorney General North Carolina Department of Justice 114 W. Edenton Street Raleigh, NC 27699-9001

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it denied Petitioner's request to remove the findings of neglect against Petitioner from the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256

N.C. Gen. Stat. § 150B-23

42 C.F.R. § 488.301

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

EXHIBITS

Respondent's exhibits 1 through 14 were admitted into the record.

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. A finding of resident neglect was listed with Petitioner's name on the Health Care Personnel Registry ("HCPR") and the Nurse Aide I Registry on June 4, 2012. (Resp't. Ex. 4)
2. By letter dated June 6, 2013, Petitioner requested that her name be removed from the HCPR. (Resp't. Ex. 3)
3. At all times relevant to this matter, Debra T. Hockaday was employed as an investigator for the HCPR. She investigated Petitioner's request to remove the finding of neglect. (T. pp. 19-23)
4. By letter dated June 10, 2014, the HCPR notified Petitioner of the statutory requirements which must be met in order to have a finding of neglect removed from the HCPR, and what documentation would be required. (T. p. 25; Resp't. Ex. 4)
5. Ms. Hockaday obtained and reviewed all of the necessary documentation received from Petitioner concerning her employment history. (T. pp. 25-26; Resp't. Exs. 5, 6)
6. In May 2005, while working at Providence Place Senior Health and Housing, Petitioner was disciplined for eating a resident's food and was accused of rough handling by a resident. (T. p. 35; Resp't. Ex. 10)

7. On November 8, 2007, Petitioner was terminated from employment at Westwood Health and Rehabilitation Center for poor quality of work performance because she failed to ensure that a resident's safety needs were met. (T. pp. 38-40; Resp't Ex. 12)

8. On May 5, 2008, while working at Graybrier Nursing and Rehabilitation Center, Petitioner received an employee reprimand for refusing a direct order from her supervisor to help with feeding the residents. She also had received a written warning on May 15, 2007 for failing to feed a resident in a timely manner. (Resp't Ex. 11) Ms. Hockaday testified that both situations are considered instances of neglect. (T. pp. 35-38)

9. On October 4, 2010 while working at Libertywood Nursing Center, the facility substantiated a finding of neglect against Petitioner for refusing to get out of a resident's wheelchair and to help another resident. (T. p.28-32; Resp't. Ex. 9)

10. Ms. Hockaday testified that the HCPR has considered a pattern to be something that has occurred more than once. If the act which would be considered the failure to provide goods and services to avoid physical harm, mental anguish or mental illness has occurred more than once the definition has been met. (T. pp. 42-44)

11. Ms. Hockaday summarized the results of her investigation for the HCPR on April 11, 2014 on a document entitled Review Conclusion Regarding Removal of Neglect Finding from the Nurse Aide I Registry and Health Care Personnel Registry for Estella White. (T. p. 40; Resp't. Ex. 13)

12. By letter dated April 17, 2014, the HCPR notified Petitioner that she had not met the state requirements allowing for removal of the finding of neglect. (T. p. 41; Resp't. Ex. 14)

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 Health Care Personnel working in a residential care facility at the time the incident occurred, Petitioner was subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. N.C. Gen. Stat. § 131E-256(a)(1)(a) requires the Health Care Personnel Registry ("HCPR") to 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 neglect of a resident.

5. Neglect is defined in 42 CFR Part 488.301 as the failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. It is the obligation of the HCPR to protect the health and safety of residents. The HCPR must ensure that unlicensed staff in health care facilities has the ability to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.

6. The HCPR established a Policy And Procedure to permit health care personnel with a finding of neglect to petition to have his or her name removed from the registry. (Resp't. Ex. 2) The policy states that "[a]n individual with a finding of neglect listed in the NC Nurse Aide I Registry and/or Health Care Personnel Registry may petition the Department to remove the listed finding ... 5. An individual with a neglect finding who has received disciplinary action/warning for abusive behavior or neglect in his/her employment history other than the incident that resulted in the neglect finding will not be eligible for removal of the listed neglect finding." (Resp't. Ex. 2)

7. Pursuant to N.C. Gen. Stat. § 131E-256(i), after an entry of finding is entered on the Health Care Personnel Registry, only a finding of neglect can be removed by petitioning the Department, to wit:

In the case of a finding of neglect under subdivision (1) of subsection (a) of this section, 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 nurse aid does not reflect a pattern of abusive behavior or 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.

8. Black's Law Dictionary defines a "pattern" as a series of acts that are recognizably consistent. Webster's Dictionary defines a "series" as a number of things or events of the same kind occurring in a row or following one after the other in succession. Webster's II Dictionary (2nd Edition 1999)

9. The HCPR established and used proper procedures for the removal of a finding of neglect and, therefore, the HCPR acted as required by law under the provisions of N.C. Gen. Stat. § 131E-256(i).

10. Pursuant to N.C. Gen. Stat. § 131E-256(d) and (d1), Health Care Personnel can appeal findings of neglect listed in the HCPR pursuant to N.C. Gen. Stat. § 131E-256(a)(1) by filing a petition for a contested case hearing within 30 days of the mailing of the written notice of

the HCPR's intent to place the findings in the registry.

11. The preponderance of the evidence shows that the Petitioner has displayed a pattern of neglectful behavior which does not ensure the ability to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. The request for removal does not meet the eligibility requirements of the HCPR's policy and procedures.

12. Respondent's decision to deny Petitioner's request to remove the findings of neglect that were listed against Petitioner on June 4, 2012 from the Health Care Personnel Registry is in compliance with N.C. Gen. Stat. § 131E-256(i) which prohibits the removal of a finding of neglect if the employment history of the nurse aide reflects a pattern of neglect.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Respondent's decision to deny Petitioner's request to remove the findings of neglect that were listed against Petitioner on June 4, 2012 from the Health Care Personnel Registry is **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 9th day of January, 2015.

Selina M. Brooks
Administrative Law Judge