

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 06571

FINAL DECISION

APPEARANCES

For Respondent: Candace A. Hoffman
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

Whether Respondent otherwise substantially prejudiced Petitioner's rights or acted erroneously when Respondent substantiated the allegation that on or about March 13, 2014 Petitioner, a nurse aide, abused a resident H.E. by deliberately spraying water into the face of a resident creating a high potential for harm.

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23

EXHIBITS

Respondent's exhibits 1-12 were admitted into evidence.

WITNESSES

For Respondent: Keisha Watson
 Jane Jahn
 Teresa Crites

For Petitioner: Erica Johnson
 Leroy Williams
 Paula Corpening

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 Petitioner, Erica Johnson, was employed as a Health Care Personnel working for Sunrise Rehabilitation & Care Home ("Sunrise"), a health care facility in Nebo, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 8-9; Resp. Exh. 2)

2. Petitioner completed all required training related to her job responsibilities as a Certified Nurse's Assistant ("CNA"). Petitioner received training while working at Sunrise on their policies concerning abuse and neglect of residents. Petitioner signed the general orientation packet, which included a segment called "defining resident abuse/neglect." Petitioner also completed an orientation quiz entitled "Rights of Residents." Petitioner's training included information on dealing with combative residents, and how to give showers. Petitioner completed a corporate compliance quiz, and correctly answered "True" to the True/False question: "Elder abuse is the intentional or unintentional hurting, either physical or emotional of a person who is over the age of 60." (T. pp. 8, 18-24; Resp. Exh.2)

3. Petitioner testified that if a resident was displaying behaviors in the shower, staff

were trained to have another staff take their place. Petitioner acknowledged that it was considered abuse to spray a resident in the face with water to intimidate the resident. (T. p. 21)

4. Petitioner was called into work on March 3, 2014 to watch a corporate compliance video by Robin Wilcox (“Wilcox”), a supervisor at Sunrise. While at Sunrise, Wilcox asked Petitioner to stay and work on the hall housing the Hospice residents. Petitioner agreed to stay and work, but noted she was wearing her “street” clothes.

5. Petitioner requested not to give showers, because she was wearing a new pair of shoes. (T. p. 25; Resp. Exh. 5) The two residents that Petitioner would have ordinarily given showers were assigned to other staff for the showers.

6. Having agreed to stay and work, Petitioner was on duty and working at Sunrise on March 3, 2014 from 2:37 pm to 10:30 pm, during the time of the incident with H.E.

7. Keisha Watson (“Watson”), another CNA, was also working at Sunrise on March 3, 2014. (T. pp.12, 38; Resp. Exh. 5) Watson often worked with H.E. (T. p. 37; Resp. Exhs. 5, 10) Petitioner admitted to seeing Watson on March 3, 2015 at Sunrise. (T. p. 26)

8. H.E. was age 91 at the time of the Health Care Personnel Registry investigation. H.E. was diagnosed with Non-Complicated Senile Dementia with Behavioral Disturbance, and Hypertension. (Resp. Exh. 7)

9. Petitioner was generally assigned to the Hospice Hall, and knew all of the residents well. Petitioner often worked with the resident H.E. Petitioner described H.E. as a “yeller” Petitioner testified that H.E. would yell constantly for any number of reasons. Petitioner also acknowledged that H.E. suffered from dementia, and was often not cognizant of what was going on around her. (T. pp. 24-25)

10. On March 3, 2014 Watson was assigned to give H.E. a shower. While Watson was assisting H.E. with her shower H.E. began yelling. H.E. often yelled while taking a shower. According to Watson, Petitioner entered the shower room where Watson was assisting H.E. and took the shower head from Watson. Petitioner then sprayed H.E. in the face for several seconds. While spraying H.E. in the face with water, Petitioner told Watson “This is how you get her to shut up.” Watson took the shower head out of Petitioner’s hands, and told Petitioner she should not do that. (T. pp. 38-41; Resp. Exhs. 9, 10)

11. According to Watson, H.E. began moving her face back and forth to try to avoid the water. (T. pp. 38-41; Resp. Exhs. 9, 10)

12. After the incident, Watson pushed the call light button located in the shower room. Watson immediately reported the incident to the nurse supervisor in charge on that shift. (T. p. 45; Resp. Exhs. 9, 10)

13. At the time of the incident Watson had been employed by Sunrise for only a few

months. Watson testified that she did not have any ill will or personal problems with the Petitioner before this incident occurred. (T. p. 59)

14. In March of 2014 Jane Jahn (“Jahn”) was the acting interim administrator for Sunrise. Jahn was responsible for investigating incidents within Sunrise. (T. p. 66; Resp. Exhs. 3, 6)

15. Jahn conducted the facility investigation into this incident. Jahn was conducting interviews of all staff working in Sunrise due to other allegations of abuse at the facility. Those other allegations were concerning the director of nursing and not this Petitioner. During her investigation Jahn was made aware of the incident with the Petitioner and H.E.

16. Jahn interviewed the Petitioner over the phone. (T. pp. 67; Resp. Exhs. 3, 6) Jahn interviewed Watson, and had Watson make a written statement describing the incident with H.E. Watson informed Jahn that she had witnessed the Petitioner spray H.E. in the face with water. (T. pp. 70-72; Resp. Exhs. 3, 6)

17. Jahn submitted a 24 hour and 5 Day Working Report to the Health Care Personnel Registry. (T. pp. 69-70; Resp. Exh. 1) Those reports were not submitted in a timely manner; however, it was due to the actions of the director of nursing who was being investigated, and not otherwise attributable to the facility.

18. After the facility investigation was completed, Jahn substantiated the allegation of abuse and recommended Petitioner be terminated. Petitioner was terminated from employment with Sunrise. (T. pp. 71-72; Resp. Exhs. 3, 6)

19. The Health Care Personnel Registry Investigation’s Branch (“HCPRIB”) investigates allegations of abuse, neglect and other allegations against health care personnel in health care facilities. If the allegation is substantiated, the employee will be placed on the Registry. The HCPRIB covers most health care facilities in North Carolina that provide patient care. Accordingly, health care personnel at Sunrise are covered by the Registry. (T. pp. 84-86)

20. At all times relevant to this incident, Teresa Crites (“Crites”) was employed as an investigator for the HCPRIB. She is charged with investigating allegations against health care personnel in the western region of North Carolina. Accordingly, Sunrise was in her region and she received and investigated the complaint that Petitioner had abused Resident H.E. (T. pp. 84-86; Resp. Exh. 1)

21. After the complaint against Petitioner was received, it was determined it needed further investigation. As part of the investigation, Crites interviewed Petitioner, Watson and Jahn. She also reviewed the resident’s records and took into account the internal investigation conducted by the facility. (T. pp. 84-88; Resp. Exhs. 1-11)

22. Crites spoke with Petitioner over the phone. Petitioner did not wish to participate in an interview, and opted to send a written statement to Crites. Petitioner prepared a written

statement and mailed it to Crites. Crites reviewed Petitioner's statement during the course of her investigation. (T. p. 87; Resp. Exh. 8)

23. On July 8, 2014, Crites interviewed Watson over the phone. Watson informed Crites that she witnessed Petitioner spray H.E. in the face with water in order to shut her up. (T. p. 87-88; Resp. Exh. 10)

24. On July 8, 2014, Crites interviewed Jahn over the phone. Jahn reported to Crites that she learned of the incident while performing an investigation into several other incidents of abuse at Sunrise. Jahn conducted a thorough investigation into the incident by reviewing resident files, Petitioner's files, and interviewing the Petitioner and other CNA's working at Sunrise during the time of the incident. Jahn substantiated the allegation of abuse against Petitioner. (T. p. 89; Resp. Exh. 3, 6)

25. On July 8, 2014, Crites attempted to interview resident H.E., however H.E. was generally unresponsive. (T. p. 90; Resp. Exh. 7)

26. Crites used a reasonable person standard to determine that spraying H.E. in the face resulted in mental anguish, and the potential for harm. A reasonable person standard is used when determining whether a resident who is nonverbal or unable to express themselves, has suffered physical injury, mental anguish or pain. It is not necessary that signs of physical abuse be found on the resident, the mere threat to someone with severely diminished capacity is enough to cause that resident mental anguish. (*Allen v. NCDHHS*, 155 N.C. App. 77, 85, 88; 575 S.E.2d 565, 570, 572 (2002)).

27. Crites took Petitioner's statement into consideration and viewed all the information together. Crites found the statements of Watson and Jahn to be credible and consistent. Crites found that on or about March 3, 2015 Petitioner abused H.E. by deliberately spraying water into the face of a resident creating a high potential for harm. Crites wrote an investigation report which documented the conclusion. (T. pp. 91-93; Resp. Exh. 11)

28. The testimony in this hearing by Watson and Jahn is found to be credible and believable

29. Abuse is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." Crites determined Petitioner abused resident by deliberately spraying water into the face of a resident creating a high potential for harm. (Resp. Exh. 11)

30. Petitioner was notified by letter that a finding of abuse would be listed against her name in the Health Care Personnel Registry ("HCPR"). Petitioner was further notified of her right to appeal. (Resp. Exh. 12)

31. Petitioner denies spraying H.E. in the face with the shower head. (T. p. 14; Resp. Exh. 8)

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. The North Carolina Department of Health and Human Services, Division of Health Service Regulation, 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 and nurse aides working in health care facilities who are subject to a finding by the Department that they abused a resident in a health care facility.
4. As a health care personnel working in a health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.
5. Sunrise Rehabilitation is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).
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. 130.0101, 42 CFR § 488.301.
7. On or about March 3, 2015, Petitioner abused a resident (H.E.) by deliberately spraying water into the face of a resident creating a high potential for harm.
8. In *Allen v. NC DHHS-Division of Facility Services*, 155 N.C. App. 77, 85, 573 S.E.2d 565, 570 (2002) the court stated:

Our obligation is to protect the health and safety of every resident, including those that are incapable of perception or are unable to express themselves. This presumes that instances of abuse of any resident, whether cognizant or not, cause physical harm, pain or mental anguish.
9. Respondent's decision to substantiate this allegation of abuse is supported by a preponderance of the evidence. Therefore, Respondent did not otherwise substantially prejudice Petitioner's rights or act erroneously by placing a substantiated finding of abuse 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 abuse at Petitioner's name on the Health Care Personnel Registry should be **UPHELD**.

NOTICE

Pursuant to N.C.G.S. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing 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 party seeking review must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Decision and Order. Pursuant to N.C.G.S. 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 thirty (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 10th day of March, 2015.

Donald W. Overby
Administrative Law Judge