

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DHR09012

Priscilla Shearin
Petitioner

v.

Department Of Health And Human Services
Respondent

FINAL DECISION

THIS MATTER came on for hearing before the Hon. J. Randolph Ward on March 24, 2015 in High Point, North Carolina, upon a Petition for a Contested Case Hearing, filed in the Office of Administrative Hearings, to contest Respondent's decision to place adverse findings concerning Petitioner on the Health Care Personnel Registry.

APPEARANCES

For Petitioner: Charles R. Holton, Supervising Attorney
Ian McDonald, Legal Intern
Wendy Angus Anderson, Legal Intern
Duke Law-Civil Justice Clinic
Durham, NC

For Respondent: Candace A. Hoffman, Assistant Attorney General
North Carolina Department of Justice
Raleigh, NC

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights and 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 finding that on or about July 31, 2014, Petitioner abused and neglected "M.A.," a health care facility resident.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256, N.C. Gen. Stat. § 150B-23, 42 C.F.R. § 488.301, and 10A N.C.A.C. 13O .0101

EXHIBITS

Respondent's exhibits ("R. Exs.") 1-3, 6-8, 10, and 15-17 were admitted into evidence.

WITNESSES

For Petitioner: Priscilla Shearin, Petitioner

For Respondent: Donnitra Ash, Resident Care Director
Jeanne Goss, R.N., Health Care Registry Investigator

MOTIONS AND PRELIMINARY MATTERS

On February 12, 2015, Respondent filed a Motion to Dismiss the Petition for the failure of Petitioner to file a Prehearing Statement. When Respondent received the then-*pro se* Petitioner's Prehearing Statement substantially setting out her factual contentions, Respondent filed an Amended Motion to Dismiss. The Motion was denied on February 25, 2015.

* * *

Under the supervision of Mr. Holton, Mr. McDonald and Ms. Anderson appeared for Petitioner as Certified Legal Interns, pursuant to the Rules Governing Practical Training of Law Students of the North Carolina State Bar, 27 N.C.A.C. 01C .0201 - .0207.

* * *

The statements or declarations of persons other than the putative victim who did not testify at the hearing under oath and subject to cross-examination, whether contained in documents received in evidence or recited in Respondent's Offer of Proof testimony, are **excluded** as evidence to prove the truth of the matters asserted to the degree they materially contradict Petitioner's sworn testimony and Prehearing Statement. N.C. Gen. Stat. § 8C-1, N.C. Rules of Evidence 102(a), 801(c), 803(8), and 804(a)(4).

UPON DUE CONSIDERATION of the arguments of the parties, the documents and other exhibits admitted, and the sworn testimony of each of the witnesses, in light of their opportunity to see, hear, know, and recall relevant facts and occurrences; any interests they may have in the outcome of the case; and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the preponderance of the competent evidence of the record as a whole in accordance with the applicable law, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Priscilla Shearin, was employed as a Resident Aide ("RA") working for Ameritas-Brookdale Group Home ("Ameritas"), a health care

facility in Greensboro, North Carolina, and was therefore subject to N.C. Gen. Stat. § 131E-256 concerning “health care personnel.” (T. p. 13; R. Ex. 2) Ameritas specialized primarily in “memory care,” with the majority of its residents having a dementia diagnosis or maladies causing memory loss.

2. Petitioner received all relevant training for her position as an RA. Petitioner testified that she received training on the facility’s abuse and neglect policies, resident rights, and the appropriate way to handle combative residents. This included instruction that verbal coercion and intimidation, as well as physical striking and pinching, were considered forms of prohibited “abuse” and that the failure to prevent physical or mental pain constituted “neglect.”
3. Petitioner testified that she was instructed to ask someone for help if a resident became combative. She further testified that she should either “ask somebody else for help” or, if it were a very dangerous situation, they had “to call the police.” She also received training on working with residents in the Special Care Unit. (T. p. 14; R. Ex. 2)
4. At the time of the incident giving rise to this matter, “M.A.” was a 90-year-old resident of Ameritas diagnosed with Alzheimer’s disease, dementia, anemia, edema, chronic rhinitis, glaucoma, dysphasia, aphasia, hypertension, emphysema, insomnia, and depression. M.A. was often confused and could become recalcitrant when receiving care and guidance with activities of daily living. This was noted in M.A.’s care plan to alert staff to redirect or reapproach that behavior. Redirection might take the form of calming and distracting the patient verbally or giving her a snack. An aide might reapproach resistance by leaving the patient and letting another member of the staff try to work with her. Hitting a patient was never considered an acceptable means of dealing with a resistant or combative patient. (T. pp. 40-42)
5. Petitioner testified that on July 31, 2014, at approximately 2:30 or 3:00 a.m., M.A. was sitting in the doorway to the staff break room. Petitioner pulled M.A.’s wheelchair out of the doorway and entered the break room. As described in Petitioner’s Prehearing Statement filed February 12, 2015, M.A. then reentered the break room.

I was standing in front of the table when [M.A.] came in with her wheelchair. Now mind you, the room is not that big. [M.A.] said move in a matter of fact way. I said you move, she then hit me on the left leg with her right hand, and I hit her back on the left leg with my right hand. She hit me again, and said stop hitting. I hit her again and said you stop hitting me. We did that back and forth two or three times. I wheeled her out of the break room into the common area and she went on about her way, and that was the end of it. I did not hit her to hurt her, it was to show her that it was not nice.

Petitioner also testified that when she hit M.A., the impact was audible. She admitted that it was not acceptable to hit residents and that she had disregarded her training when she hit

M.A. Petitioner struck M.A. multiple times with sufficient force to inflict pain and anguish in order to “to show [M.A.] that it was not nice.”

6. Donnitra Ash, the Resident Care Director at Ameritas, testified that she became aware of the incident on July 31, 2014, when she received statements by three employees who were present at the incident between M.A. and Petitioner. These employees had written the statements and turned them in at her office, unprompted. Upon review of these statements, Ms. Ash began an investigation on behalf of Ameritas.
7. Ms. Ash interviewed the employee witnesses and Petitioner about the incident, and Petitioner also submitted a written statement. Ms. Ash did not consider M.A. “interviewable.” Ms. Ash concluded that the facts substantiated abuse. She felt a reasonable person would have been intimidated due to being hit multiple times by Petitioner if she “had the mental capacity to understand what was going on.” However, due to M.A.’s impairment, Ms. Ash thought that she might not have suffered anguish. On July 31, 2014, Ms. Ash suspended Petitioner from her position for the duration of the investigation, and discharged her the following day.
8. Pursuant to N.C. Gen. Stat. § 131E-256, the Health Care Personnel Registry Investigations Branch of the N.C. Department of Health and Human Services investigates accusations of abuse, neglect, and other specified allegations against patient care personnel in health care facilities and enters the names and offenses of culpable employees on the Registry. The health care facility Ameritas-Brookdale Group Home, and its certificated (non-licensed) health care employees, including Petitioner, were subject to the Branch’s jurisdiction on July 31, 2014.
9. Ms. Ash prepared and submitted the required 24 Hour and 5 Day Working Reports to Respondent Health Care Personnel Registry (“HCPR”). Jeanne Goss, R.N., an Investigator for HCPR, received these reports and initiated an investigation into whether Petitioner had abused and neglected M.A. As part of the investigation, Ms. Goss interviewed Petitioner, Ms. Ash, and the three employee witnesses who had initially submitted statements. She also reviewed the resident’s records and the internal investigation conducted by the facility.
10. In light of M.A.’s diagnosed cognitive impairments, Ms. Goss used the reasonable person standard to determine that hitting M.A. several times and pinching M.A. would result in pain and mental anguish.
11. Ms. Goss and Respondent concluded that Petitioner abused M.A. by hitting her multiple times and pinching her, which resulted in pain and mental anguish to the resident and that by failing to follow her training and facility policies which prohibited hitting and pinching, Petitioner neglected M.A.
12. While M.A. was significantly impaired, emotionally labile, and inarticulate due to Alzheimer’s disease, dementia, insomnia, and depression, the evidence that during her July 31, 2014 encounter with Petitioner, she showed defiance, responded to being hit by hitting, said “stop hitting me,” and left the area after Petitioner “wheeled her … into the common

area,” demonstrate that she had the level of cognition to experience pain, mental anguish, intimidation, and punishment.

13. The preponderance of the evidence shows that Petitioner abused M.A. by striking her, and neglected M.A. by denying her the benefit of the training and services of a Resident Aide.
14. By letter dated October 22, 2014, Respondent notified Petitioner of its intent to enter findings of abuse and neglect against her in the Health Care Personnel Registry, pursuant to N. C. Gen. Stat. § 131E-256(a), and gave Petitioner due notice of her right to contest those findings before the Office of Administrative Hearings. Petitioner timely filed a Petition contesting those findings in the Office of Administrative Hearings on November 17, 2014, pursuant to N.C. Gen. Stat. § 131E-256(d).
15. To the extent that portions of the following Conclusions of Law include findings of fact, such are incorporated by reference into these Findings of Fact.

Upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are incorporated by reference into these Conclusions of Law.
2. The parties and the subject matter of this contested case hearing are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §§ 131E-256; 150B-23.
3. “*Abuse* means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.” 42 C.F.R. § 488.301; 10A N.C.A.C. 13O .0101(1).
4. “*Neglect* means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.” 42 C.F.R. § 488.301; 10A N.C.A.C. 13O .0101(10).
5. In order to fulfill the statutory mandate to “protect the health and safety of every resident” of healthcare facilities, “including those who are incapable of perception or unable to express themselves,” the law “presumes that instances of abuse of any resident … cause physical harm, pain or mental anguish.” *Allen v. N.C. DHHS, Division of Facility Services*, 155 N.C. App. 77, 85, 573 S.E.2d 565, 570, (2002).
6. While Petitioner's behavior might not be considered the most egregious, in the context of extremely regulated health facility care, given the patients' dependency on persons entrusted with their care, sanctionable ‘abuse’ “may fairly be understood to reach behavior short of more flagrant forms dealt with in other settings.” 704 A.2d 1181, 1183 (1997).” *Allen v. Dep't of Health & Human Servs.*, 155 N.C. App. 77, 85, 573 S.E.2d 565, 570 (2002), quoting *Hearns v. District of Columbia Dep't of Consumer & Regulatory Affairs*,

704 A.2d 1181, 1183 (1997).

7. On July 31, 2014, Petitioner Priscilla Shearin, a Resident Aide employed in a health care facility subject to N.C. Gen. Stat. § 131E-256, abused a resident of that facility by hitting her multiple times, inflicting pain and mental anguish on the resident.
8. On July 31, 2014, Petitioner neglected a resident of the health care facility subject to N.C. Gen. Stat. § 131E-256 where she was employed, by failing to follow her training and the facility's policies prohibiting medical staff from hitting residents, and this failure resulted in pain and mental anguish for the resident.
9. Petitioner has the burden of proving Respondent prejudiced her rights by finding that the evidence substantiated the allegation that Petitioner abused and neglected a health care facility resident. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704 (N.C. Ct. App. 2006). Respondent's findings are supported by a preponderance of the evidence.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

FINAL DECISION

Respondent's decision to enter findings of abuse and neglect against Petitioner on the Health Care Personnel Registry, pursuant to N.C. Gen. Stat. § 131E-256, must be, and hereby is, AFFIRMED.

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 29th day of June, 2015.

J. Randolph Ward
Administrative Law Judge