

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 DHR 02911

<p>Kvi Sharmaine Oates Petitioner,</p> <p>v.</p> <p>N C Department Of Health And Human Services, Division Of Health Service Regulation Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on July 28, 2016 in Raleigh on the Petitioner's appeal of the entry of a finding of abuse on the Health Care Personnel Registry. Following the preparation of a transcript of the hearing, and the parties submission of proposed decisions, this Decision was prepared.

APPEARANCES

For Petitioner: Neubia Lechelle Harris
Legal Aid of North Carolina, Inc.
Raleigh, N.C.

For Respondent: Katherine Dickinson-Schultz
Assistant Attorney General
North Carolina Department of Justice
Raleigh, N.C.

ISSUES

Whether Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by rule or law, to the substantial prejudice of Petitioner's rights, by entering a finding of abuse against her on the Health Care Personnel Registry or about February 8, 2016.

APPLICABLE LAW

N.C. Gen. Stats. §§ 150B-23(f) and 131E-256; 42 C.F.R. § 488.301; and, 10A N.C.A.C. 130.0101.

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits 1-3
Respondent's Exhibits 1-16

WITNESSES

For Petitioner: Kvi Sharmainne Oates, Petitioner
Tamika R. McMillian
Kimberly Connare
Eric L. Ellis

For Respondent: Haseen Abdul-Jalil
Tamara F. Cuffee
Jessica Knudsen
Nancy Estella Haynes

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

FINDINGS OF FACT

1. At all times relevant to this matter, Petitioner was employed a mental health technician ("MHT") working for Holly Hill Children's Hospital ("Holly Hill"), a health care facility in Raleigh, North Carolina and was, therefore, subject to N.C. Gen. Stat. § 131E-256. (T. pp. 17-18; Resp. Exh. 1-2, 7).

2. In addition to providing direct care to residents, Petitioner also helped train new employees. (Resp. Exh. 13). By all accounts, Petitioner had positive employee performance evaluations prior to this incident. (Resp. Exh. 7; T. p. 139).

3. Petitioner received annual training from Holly Hill that provided a general overview of abuse and neglect. Petitioner was also trained on de-escalation techniques and on knowing when staff are authorized to use hands-on interventions such as therapeutic holds and physical restraints. This training included annual certification of NCI and CPI. (Resp. Exhs. 4-7; T. pp. 17; 63-66; 113-114). Petitioner also received training with regard to Holly Hill's policies and procedures on proper staff interactions with residents, on the authorized use of physical restraint, and on residents' rights. (Resp. Exhs. 6-7; T. pp. 115-16).

4. Holly Hill's official "Seclusion/Restraint/Physical Hold" policy states that physical restraint of a resident is only to be employed as a last resort measure when nonphysical interventions, such as verbal de-escalation, have been unsuccessfully implemented. Staff may only physically restraint or place a resident in a therapeutic hold if there is an unsafe situation

where either a staff member or another patient is in a dangerous situation. However, prior to using a physical restraint, staff are taught to use alternative de-escalation techniques. (T. p. 115; Resp. Exh. 4). Barring an emergency situation, Holly Hill mandates that a minimum of two people are required to place a resident in a therapeutic hold, each taking an arm by the wrist and upper arm. (T. p. 116; T. p. 70; Resp. Exh. 4, p 25).

5. Petitioner testified that she received annual training on Holly Hill's policies regarding the use of physical restraints and therapeutic holds. (T. p. 63). According to her transcript report, Petitioner received 6 hours of CPI training—training that teaches staff deescalation techniques and how to physically restrain a resident—on March 28, 2015. (T. p. 66; Resp. Exh. 6).

6. Petitioner was working at Holly Hill on October 13, 2015, during the time of the incident with resident KJ. KJ was diagnosed with oppositional defiant disorder, possible bipolar disorder, and post-traumatic stress disorder, and had come to Holly Hill only a couple of days before the incident. (T. pp. 117-18.) Petitioner was assigned to another unit that day, but went to One South, the unit where the incident occurred, to get a snack for another resident. (T. pp. 3031). Mental Health Techs Haseem Abdul-Jalil ("Mr. Abdul-Jalil") and Tamara Cuffee ("Ms. Cuffee") were also working on the One South unit on the day of the incident. (T. pp. 75-76, 103).

7. At trial, Petitioner testified that KJ was acting in a hostile and threatening manner toward another resident at the time she came into the dayroom. Petitioner claimed that she only intervened in the situation because she believed KJ was going to hurt another resident. KJ pushed Petitioner in her upper chest, and Petitioner grabbed KJ and physically restrained her. KJ continued to kick and punch Petitioner prior to Ms. Cuffee entering the room and assisting Petitioner with the situation. (T. pp. 41-46).

8. Jessica Knudsen ("Ms. Knudsen"), the chief operating officer of Holly Hill, conducted the internal facility investigation of the incident. In completing her investigation, Ms. Knudsen interviewed resident KJ, staff that was involved in the incident, and Petitioner. Ms.

Knudsen also viewed the security camera video of the incident and reviewed KJ's medical record. (T. pp. 118-19; Resp. Exhs. 3-6).

9. At the end of her investigation, Ms. Knudsen concluded that Petitioner's actions met the definition of abuse and were also a violation of Holly Hill's seclusion and restraint policy. (T. pp. 123-24). Specifically, Ms. Knudsen testified that, by all accounts, Petitioner failed to use any approved de-escalation techniques when talking with KJ but, instead and in direct opposition to her training, escalated the situation and invaded KJ's personal space. Furthermore, Ms. Knudsen stated that there was no clinical indication to support the use of a therapeutic hold or physical restraint on KJ; nor did Petitioner properly employ a therapeutic hold since only Petitioner was involved in the restraint as opposed to the mandated two-person minimum requirement under policy. Therefore, any hands-on contact Petitioner made with KJ constituted a violation of resident rights and facility policy. (T. pp. 118-26; Resp. Exh. 5). In the absence of an imminent threat to a person, the appropriate action would have been to "back off and give the [aggressive] person's space." (T. p. 126.)

10. Ms. Knudsen completed the 24-hour and 5-working day reports of the incident and submitted the documents to Respondent. (Resp. Exh. 1).

11. Mr. Abdul-Jalil testified at trial that he was conducting a group therapy session with KJ and several other residents in the dayroom of One South prior to Petitioner entering the room. According to him, several residents were upset about rumors, and Mr. Abdul-Jalil was helping them manage their behavior by modeling appropriate conflict resolution strategies. Mr. Abdul-Jalil stated that while the discussion was serious, the residents were all under control and the conversation was therapeutic. (T. pp. 75-78). Mr. Abdul-Jalil testified that when Petitioner first entered the dayroom, she was engaging in a positive manner with KJ about the conflict. However, the situation quickly escalated, and Petitioner and KJ began arguing and yelling back and forth with each other. Petitioner advanced upon KJ to the point where Petitioner was in KJ's face, yelling at her. Petitioner continued to aggressively confront KJ and eventually got so close to KJ that KJ had to take steps backwards. KJ put her hands up, and Petitioner grabbed her arms and pushed her backwards onto a chair and, eventually, onto the floor. Mr. Abdul-Jalil denied ever helping Petitioner put KJ in a therapeutic hold. (T. pp. 77-83). Mr. Abdul-Jalil testified that at no point was KJ acting in a manner that justified the use of a therapeutic hold. (T. p. 83).

12. Mr. Abdul-Jalil's testimony at trial was consistent with his statements given to the facility during its internal investigation and his statement given to Respondent's investigator. (Resp. Exh. 3, 9).

13. Ms. Cuffee also testified at trial. At the time the incident began, Ms. Cuffee was in a hallway outside of the dayroom. After she heard a commotion, she went into the dayroom and saw KJ sideways in the chair against the wall with Petitioner standing over her. Ms. Cuffee immediately told all the other residents to leave. By that point, KJ was crying on the floor. Petitioner continued to hold KJ's arms. Ms. Cuffee denied ever assisting Petitioner put KJ in a therapeutic hold. (T. pp. 103-108).

14. Ms. Cuffee's trial testimony was consistent with her written statements taken during the facility's investigation and her interview with Respondent's investigator. (Resp. Exh 3, 12).

15. Security camera footage of the incident shows the Petitioner entering the dayroom while the group therapy session is in progress. KJ is standing in front of a chair against the wall, with a table to her left. After Petitioner arrives, another resident walks calmly between KJ and the table, and a third resident involved in the discussion shifts to a chair at the table closer to KJ, apparently to give her chair to Mr. Abdul-Jalil. KJ does not appear to be threatening to anyone. Petitioner hears KJ speaking and initiates what appears to be, by their body language, a vociferous argument. Petitioner begins to advance toward KJ, gesturing towards her and leaning in close to her face. The seated girl gets up and moves away. As Petitioner closes on her, KJ throws her hands up by her face, and finally, with Petitioner just inches away, she pushes Petitioner on her upper chest. The much bigger woman instantly grabs KJ's right arm and drives her down on the chair behind her. Petitioner continues to hold KJ down. Mr. Abdul-Jalil comes over to them, but Petitioner continues to hold on to KJ. Ms. Cuffee comes into the room and squats beside KJ, putting her hands on her legs. All the other residents are sent out of the dayroom. Eventually,

Petitioner releases KJ, who is escorted out of the room by staff. Petitioner is clearly the physical aggressor in the encounter. (Resp. Exh. 16).

16. The Complaint Intake and Health Care Personnel Investigations section of the Department of Health Service Regulation investigated and substantiated the allegations against Petitioner, concluding that during her entire interaction with KJ, Petitioner failed to use the deescalation techniques taught to her, and instead, acted aggressively toward KJ and provoked the escalation that led to the hands-on contact; and that in doing so, Petitioner abused KJ by intimidating her and physically attacking her. (Resp. Exh. 14, T. p. 142).

17. Respondent entered a finding against Petitioner on the HEALTH CARE PERSONNEL REGISTRY that, on or about October 13, 2015, Petitioner “abused a resident (KJ) by intimidating the resident and using a non-therapeutic hold which caused the resident severe mental anguish.” (Resp. Exh. 14).

18. On February 8, 2016, Respondent gave Petitioner due notice of the “Entry of Finding” against her placed on the Health Care Personnel Registry, and previously had furnished Petitioner with notice of her right to appeal this adverse action to the Office of Administrative Hearings. (Resp. Exh. 15; T. p. 142).

19. The Petitioner timely filed a request for a contested case hearing in the Office of Administrative Hearings on March 8, 2016.

20. The Office of Administrative Hearings gave the parties due notice of the hearing in this matter on June 24, 2016.

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. §§ 131E-256 and 150B-23.

2. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012).

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. § 131E256 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 or neglected a resident in a health care facility.

4. Holly Hill is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).

5. As a health care personnel working in a health care facility, Petitioner was subject to the provisions of N.C. Gen. Stat. § 131E-256.

6. The Petitioner has the burden of proving that the Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, as alleged in the Petition, by a preponderance of the evidence. N.C. Gen. Stat. §§ 150B-23(a); 150B-25.1(a).

7. For the purposes of the Health Care Personnel Registry, North Carolina has adopted, by statute and rule, the definition of “abuse” in 42 CFR § 488.301, i.e., “willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. N.C. Gen. Stat. § 131E-256(a)(1)a.; 10A N.C.A.C. 130.0101.

8. The preponderance of the credible evidence presented at the hearing, particularly including the video recording of the incident, show that, on or about October 13, 2015, Petitioner “abused” KJ by intimidating her and physically attacking her, in violation of 10A N.C.A.C. 130.0101 and 42 CFR § 488.301. N.C. Gen. Stats. § 131E-256.

9. The 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 rule or law, within the meaning of N.C. Gen. Stat. § 150B-23(a), by placing the substantiated finding of abuse against Petitioner on the Health Care Personnel Registry.

10. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C.App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C.App. 545, 549 (1971).

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

DECISION

The Respondent’s decision to enter a finding of abuse against Petitioner 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 14th day of November, 2016.

J Randolph Ward
Administrative Law Judge