

STATE OF NORTH CAROLINA
COUNTY OF VANCE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

Darrion Smith, Petitioner, v. Murdock Developmental Center and the North Carolina Department of Health and Human Services, Respondent.	12OSP06780
Ricky Bass, Petitioner, v. North Carolina Department of Health and Human Services, Respondent.	12DHR08134
Darrion Smith, Petitioner, v. North Carolina Department of Health and Human Services, Respondent.	12DHR08136

FINAL DECISION

The above-captioned cases were heard before Administrative Law Judge Beecher R. Gray on March 11th and 12th, 2013, in Raleigh, North Carolina. A decision was rendered at the close of evidence and after argument from the three parties. The decision was issued on both the Just Cause issue and on the entry of substantiated findings in the North Carolina Health Care Personnel Registry. Petitioner submitted a proposed decision on March 26, 2013. Respondent submitted its proposed decision on June 19, 2013.

APPEARANCES

For Petitioner: Gabe Talton, Attorney at Law
Law Office of Talton & Gilbert
318 South Academy Street
Cary NC 27511
Tel. 919-397-1026

For Respondents: Roy A. Cooper, III, Attorney General
Derek Hunter, Assistant Attorney General, Appearing
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Adam Shestak, Assistant Attorney General Appearing
300 Veazey Road
Butner, NC 27509

Josephine Tetteh, Assistant Attorney General, appearing
N.C. Department of Justice
P.O. Box 629
Raleigh NC 27602-0629

WITNESSES

The witnesses consisted of Nicola Elwood, Darrion Smith, Ricky Bass, Mike Senter, Carmelo Asuncion, Solomon Weiner, Corie Henderson, and Joanna Crews.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 and 2 and Respondent's exhibits ("R. Exs.") 1-40 were admitted. All admitted exhibits were entered into the record upon stipulation of the parties as to authenticity.

ISSUES

- 1) Whether Respondent Murdoch Developmental Center ("Murdoch Center") and the North Carolina Department of Health and Human Services ("DHHS") had just cause to terminate Petitioner Darrion Smith from employment for unacceptable personal conduct.
- 2) Whether Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section ("HCPR") properly substantiated allegations of abuse and neglect against Petitioners Darrion Smith and Ricky Bass.

FINDINGS OF FACT

- 1) The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

- 2) In the State Personnel Manual, with which DHHS and its Divisions, including Murdoch Center, are required to comply, the State of North Carolina has adopted a policy that establishes that State employees are subject to disciplinary action for unacceptable personal conduct. Unacceptable personal conduct includes, among other things, (i) conduct for which no reasonable person should expect to receive prior warning; (ii) the willful violation of known or written work rules; and (iii) conduct unbecoming a State employee that is detrimental to State service. (R. Ex. 1, pg 397)
- 3) Murdoch Center is a certified intermediate care facility for the treatment of individuals with mental retardation (“ICF/MR”) operated by the North Carolina Department of Health and Human Services, Division of State Operated Healthcare Facilities. To be eligible for admission to Murdoch Center, a person must have a diagnosis of profound, severe, or moderate intellectual/developmental disabilities or a related developmental disability.
- 4) Petitioner Ricky Bass (“Bass”) was hired at Murdoch Center in October 2001. Petitioner Bass had been working as a Youth Program Assistant I in the Meadowview Cottage for six (6) years after working in other capacities at Murdoch Center. He had returned to work on February 2, 2012, after medical leave.
- 5) Petitioner Darrion Smith (“Smith”) was hired as a Youth Program Assistant I at Murdoch Center in March 2010 and worked in the Meadowview Cottage.
- 6) The STARS (Specialized Treatment for Adolescents in a Residential Setting) Unit, located in Meadowview Cottage, serves adolescents, ages 13-17, who have a dual diagnosis of a developmental disability and a mental illness.
- 7) Petitioner Bass consistently had received a rating of “Very Good” on his performance evaluations in his time at Murdoch Center and never had been subject to any discipline.
- 8) Petitioner Smith consistently had received a rating of “Very Good” on his performance evaluations in his time at Murdoch Center and never had been subject to any major disciplinary actions.
- 9) On March 6, 2012, the census of the STARS Unit was thirteen (13) residents, which required a minimum coverage of six (6) staff persons. There were six (6) staff members assigned to the STARS Unit, which therefore met the minimum staff coverage.
- 10) Resident W was a resident on the STARS Unit who had a history of committing violent acts against staff and other residents. Resident W was known to kick, bite, pull hair, hit, and spit at staff and other patients.
- 11) Murdoch Center employs and trains its employees in North Carolina Interventions (“NCI”). NCI is a standardized training program created by the North Carolina Department of Health and Human Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services (“DMH/DD/SAS”), designed to prevent the

unnecessary use of restraints and seclusion for individuals with mental illness and developmental disabilities. NCI teaches physical restraints and interventions that can be performed to subdue and protect combative individuals from harming themselves, others, and/or damaging property. NCI is used in all DMH/DD/SAS facilities.

- 12) On March 6, 2012, Resident W struck another resident in the dining room of Meadowview Cottage. Resident W was disciplined for this incident.
- 13) Subsequently, Resident W attacked Resident H without provocation while sitting on the bleachers in the gymnasium waiting for a basketball game to start. Resident W lunged at Resident H and bit Resident H on his inner thigh. This was less than 30 minutes after the first incident in the dining room. Both Petitioners Smith and Bass were present when the incident with Resident H occurred. In response to this attack, Petitioners Smith and Bass correctly and appropriately implemented Resident W's special NCI floor restraint, as developed by Resident W's treatment team to be performed to restrain Resident W in the event of aggressive behavior.
- 14) Once Resident W was released from the floor restraint, he walked up the bleacher stairs and attacked Resident J, knocking off Resident J's glasses and attempting to bite him on the leg.
- 15) Petitioners Smith and Bass removed Resident W from the bleachers and correctly and appropriately implemented Resident W's special floor restraint a second time. Division Director Nicola Elwood was present and witnessed Resident W's behavior and Petitioners' restraint of Resident W, as assisted by employee Felicia Thompson. Employee Nicole Lee, in her third trimester of pregnancy, timed the floor hold of Resident W.
- 16) Once Petitioners Smith and Bass released Resident W from his special floor restraint, they escorted him back to Meadowview Cottage in a prescribed controlled walk, with a Petitioner on each side of Resident W.
- 17) Petitioners Smith and Bass entered Meadowview Cottage with Resident W in an NCI-approved limited control walk. At this time, Resident H was in the nurses' station being treated by Carmelo Asuncion, RN ("Nurse Asuncion") for the bite inflicted by Resident W. As Petitioners and Resident W passed the nurses' station, Resident W became agitated at the sound of Resident H's voice and became violent against Petitioners Smith and Bass while they sought to contain Resident W as he attempted to break free and get into the nurses' station where Resident H was located. Petitioners Smith and Bass and Resident W were approximately 5 feet from the STARS Unit Door when Resident W turned himself around by twisting and squirming so as to face back toward the sound of Resident H's voice in the nurses' station. Resident W went limp and dropped to the floor in an attempt to free himself from the hold of Petitioners Smith and Bass.
- 18) Program Coordinator Joanna Crews testified that she emerged from a conference room and witnessed Petitioners Smith and Bass "dragging" Resident W backwards down the

hallway towards the STARS Unit. At the time Program Coordinator Crews entered the hallway from the conference room, Petitioners Smith and Bass each were holding Resident W by one of his arms facing away from Program Coordinator Crews, while Resident W, facing toward Program Coordinator Crews and the nurses' station, had his heels on the floor. Program Coordinator Crews could not tell if Resident W's bottom was on the floor. Program Coordinator Crews assisted Petitioners Smith and Bass in taking Resident W to the floor in a sitting position right at the STARS Unit doorway.

- 19) Program Coordinator Crews yelled out, "guys," when she saw Petitioners Smith and Bass pulling Resident W, and they stopped moving with him. Program Coordinator Crews knew that Resident W had a special procedure that was to be used in the event that he needed to be restrained and saw that Petitioners Smith and Bass were not employing Resident W's special procedure. Program Coordinator Crews, having just stepped out of a conference room into the hallway, apparently was unaware of the exigent circumstances faced by Petitioners Smith and Bass as they struggled to contain Resident W and get him decelerated from his determined effort to go after Resident H in the nurses' station.
- 20) Nurse Asuncion testified that he also saw Petitioners Smith and Bass pulling Resident W backwards by his arms towards the STARS Unit. He exited the nurses' station to assist in the restraint of Resident W, but did not have to intervene as Petitioners Smith and Bass and Program Coordinator Crews correctly had employed Resident W's special procedure by the time Nurse Asuncion reached them in the hallway.
- 21) Petitioner Bass testified that he and Petitioner Smith had been thrown off balance by Resident W's weight shift when he went limp. Petitioner Bass could not remember the moment to moment struggle with Resident W, but testified that Resident W had slipped from their grasp, and they were trying to prevent his escaping so as to attack Resident H, who was in the nurses' station. Petitioner Bass--newly returned to work after a one year absence while being treated for cancer and somewhat weak--described pulling Resident W down the hallway backwards by his arms as the best they could do under exigent circumstances until a proper hold could be obtained, but did not characterize the action as "dragging."
- 22) Petitioner Smith testified that Resident W had gone limp and slumped toward the floor in an effort to get free and attack Resident H, who was located in the nurses' station. He demonstrated the limited control walk and how Resident W tried to resist him and Petitioner Smith. Petitioner Smith similarly described pulling Resident W down the hallway backwards and by his arms as an effort to prevent Resident W's determined effort to go after Resident H.
- 23) Nurse Asuncion testified that he examined Resident W after the incident and that Resident W had no injuries.
- 24) Program Coordinator Crews reported the incident to Division Director Nicola Elwood. The incident then was referred to Patient Advocacy for an investigation. Mike Senter conducted an investigation. Investigator Senter took the statements of Petitioners Smith,

Bass, and the staff members who were involved in or witnessed the incident. After his investigation, Investigator Senter substantiated the allegations of abuse against Petitioners Smith and Bass.

- 25) Corie Henderson is a preceptor at Murdoch Center who is an NCI instructor and trains Murdoch Center's employees in NCI. Corie Henderson testified that when Resident W attempted to break free of the limited control walk outside the nurses' station, proper NCI technique would have been for Petitioners Smith and Bass to release Resident W and immediately attempt to implement his special procedure. Corie Henderson further testified that pulling Resident W in the manner that Petitioners Smith and Bass did is not an NCI-approved technique. Corie Henderson also testified that no consideration was given, in the formulation of that opinion, to Resident W's intent, strenuous attempt, and threat to go after Resident H in the nearby nurses' station.
- 26) Solomon Weiner, RN, an investigator for HCPR, conducted an independent investigation regarding this incident. As a result of his investigation, Investigator Weiner substantiated the allegations of abuse and neglect against Petitioners Smith and Bass. Investigator Weiner based his opinion that the abuse and neglect allegations should be substantiated upon his belief that Resident W's mental anguish was aggravated by Petitioners because they did not release Resident W and attempt to implement the correct NCI hold when he dropped to the floor. Investigator Weiner interviewed Petitioners Smith and Bass, as well as other employees who had some involvement in the incident with Resident W, but did not interview Resident W. Investigator Weiner also established that part of Resident W's diagnosis includes cognitive disabilities.
- 27) By letter dated March 7, 2012, Petitioner Smith was notified in writing that he was being placed on investigatory leave with pay to allow Murdoch Center to conduct an investigation into the March 6, 2012, incident.
- 28) By letter dated March 13, 2012, Petitioner Smith was notified that a recommendation was made that he be dismissed from his position as a Youth Program Assistant I for unacceptable personal conduct and that a pre-disciplinary conference was scheduled for March 14, 2012, during which time the matter would be discussed with him, and he would be allowed to present any additional information.
- 29) The pre-disciplinary conference was held on March 14, 2012, and, by letter dated March 16, 2012, Petitioner Smith was notified that he was being terminated from his position as a Youth Program Assistant I at Murdoch Center for unacceptable personal conduct as a result of the March 6, 2012, incident.
- 30) Petitioner Smith participated in the internal grievance process and, by letter dated July 2, 2012, his termination was upheld by Albert A. Delia, then-Acting Secretary of DHHS.
- 31) Abuse is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." 10A NCAC 130.0101(1); 42 CFR § 488.301.

- 32) Neglect is denied as a “failure to provide good and services necessary to avoid physical harm, mental anguish or mental illness.” 10A NCAC 13O.0101(10); 42 CFR § 488.301.

Based on the foregoing findings of fact, I make the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner Darrion Smith is a “career State employee” as defined in N.C.G.S. § 126-1.1.
3. As Youth Program Assistants, Petitioner Smith and Petitioner Bass both are health care personnel as defined in N.C.G.S. § 131E-256(c) and are subject to the provisions of N.C.G.S. § 131E-256.
4. The evidence produced by Respondent is insufficient to demonstrate unacceptable personal conduct by Petitioner Smith or Petitioner Bass, or any conduct amounting to abuse or neglect by Petitioner Smith or Petitioner Bass.
5. Respondent’s evidence does not establish just cause for the termination of Petitioner Smith’s employment under the provisions of Chapter 126 of the North Carolina General Statutes as interpreted and applied in existing case law.
6. The evidence would support an oral warning for inadequate performance of duties as to Petitioner Smith.
7. The evidence is sufficient to demonstrate that substantiations of abuse and neglect improperly were entered by the North Carolina Health Care Personnel Registry.

FINAL DECISION

- 1) Based upon the foregoing Findings of Fact and Conclusions of Law, I find that Respondent has failed to establish, by a preponderance of the evidence, just cause for the dismissal of Petitioner Smith from his employment as a Youth Program Assistant I. Petitioner Smith back pay, front pay until satisfactory reinstatements occur, and reasonable attorney’s fees and costs.
- 2) Based upon the foregoing Findings of Fact and Conclusions of Law, I find that Petitioners Darrion Smith and Ricky Bass met their burdens, by a preponderance of the evidence, that the allegations of abuse and neglect improperly were substantiated by the Health Care Personnel Registry and said entries shall be removed as pertains to Petitioners Smith and Bass.

NOTICE

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 Wake County or in the Superior Court of the county in which the party resides. **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 03.012, 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 24th day of August, 2013.

Beecher R. Gray
Administrative Law Judge