

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DHR 05496

<p>Odel Neufville Petitioner,</p> <p>v.</p> <p>Department of Health and Human Services, Division of Health Service Regulation Respondent.</p>	<p>FINAL DECISION</p>
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BACKGROUND

This matter was heard before the Honorable Selina Malherbe, Administrative Law Judge, on April 6, 2022, virtually via Webex. In lieu of a transcript, citations will be made to the audio-recording of the hearing (hereinafter “ __:__:__”).

PROTECTIVE ORDER

Any information related to resident(s) mentioned in this proceeding, including their names, shall be considered confidential and is used for the sole purpose of findings in this proceeding alone and is not properly disclosed in any other setting or hearing.

APPEARANCES

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APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256, § 150B-1, *et seq.*, 10A N.C.A.C. 13O .0101(10), 42 C.F.R. § 488.301 and 26 N.C.A.C. 03 .0122.

ISSUE

Whether Respondent deprived Petitioner of property or otherwise 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 it substantiated an allegation that, on or before October 13, 2020, Petitioner abused and neglected a resident of Freedom Group Home when she hit, pushed, and dragged resident Q.S. across the floor.

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: No exhibits were offered.

For Respondent: Exhibits A, B, C, D, E, G, H, I, J and K were admitted.

WITNESSES

For Petitioner: Odel Neufville

For Respondent: Jenita Hooks
Sarah Sriratanakoul
Taylor Manning

STIPULATED FACTS

1. Resident Q.S. has a medical history that includes diagnoses of autism, profound intellectual developmental disability, psychotic disorder, ADHD, profound sensorineural hearing loss, as well as disruptive behavior.
2. Resident Q.S. has a behavioral support plan that states he communicates using manual signs, gestures, and facial expressions.
3. Resident Q.S. requires one-one assistance when agitated or upset.
4. Resident Q.S.’s behavioral support plan identifies target behaviors such as non-compliance, physical aggression, social aggression, feeding/stealing and stealing clothing.

5. Resident Q.S.'s behavioral support plan states that when Q.S. is being physically aggressive that he should be immediately removed to a quiet area or to remove the audience. If Q.S. cannot be moved then staff can be creative in moving peers to go for a walk, dance, stand, or stretch.

6. Resident Q.S.'s behavioral support plan states that if Q.S. is non-compliant and is not hurting others that staff should wait several minutes and attempt to re-engage him.

7. Resident Q.S.'s behavioral support plan states that in an unsafe environment Q.S. should be removed and monitored from a distance without appearing to give attention.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented 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 witnesses, 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.

Parties/Witnesses

1. Respondent, the Division of Health Service Regulation ("Agency" or "Division"), is a division of the North Carolina Department of Health and Human Services and an administrative agency of North Carolina state government operating under the laws of North Carolina. The Agency is statutorily required to maintain the health care personnel registry ("Registry" or "HCPR"), which contains "the names of all health care personnel working in health care facilities in North Carolina" against whom the Agency has substantiated neglect, abuse, misappropriation, diversion of drugs, or fraud. N.C. Gen. Stat. § 131E-256(a)(1).

2. Petitioner, at all times relevant to this matter, was employed as a direct support professional at the Freedom Group Home, in Charlotte, NC, a health care facility subject to the provisions of N.C. Gen. Stat. § 131E-256. See N.C. Gen. Stat. § 131E-256(b).

3. Jenita Hooks is the Program Director at Freedom Group Home. Ms. Hooks's job duties include conducting investigations into incidents at Freedom Group Home. Ms. Hooks has been the program director for two years.

4. Taylor Manning worked at Freedom Group Home. Mr. Manning worked for Freedom Group Home for about a year before he terminated his employment there.

5. At all times relevant to this matter, Sarah Sriratanakoul, was a Nurse Consultant for Respondent and performed health care personnel investigations for the State. As a Nurse

Consultant Ms. Sriratanakoul is tasked with investigating allegations of abuse, neglect, fraud, diversion of drugs and misappropriation of property against unlicensed health care providers.

Facility Investigation into Abuse Allegations

6. On October 13, 2020, the facility was made aware of an allegation that the staff were being trained to beat and scare the clients. This allegation was made by a staff member after termination from employment. The allegation prompted the facility to conduct an investigation into whether the allegations were credible. (Resp't Ex. A)

7. During the investigation, the facility was shown a video of an incident in which a staff member was seen yelling, hitting, and dragging a client. Id.

8. Taylor Manning stated to the facility investigator that he witnessed Petitioner dragging Q.S. across the floor. Mr. Manning further informed the facility that he was in possession of videos and pictures of this incident and agreed to share the videos with Jenita Hooks. (Resp't Ex. B)

9. After a review of the videos provided by Mr. Manning, the facility determined that Q.S. was physically abused by Petitioner. Id.

10. The facility substantiated the allegation that Petitioner abused Q.S. (Resp't Ex. C)

Trial Testimony and Video Evidence

11. Petitioner reviewed the videos prior to the hearing. (00:31:45-55)

12. On direct examination, Petitioner testified that she could not identify herself or Q.S. in the videos. (00:37:00-55) When she was recalled by Respondent, Petitioner identified herself and Q.S. in the videos, and testified that the videos were of the incident that was the subject of the hearing. (01:25:00-57)

13. Petitioner received some trainings. (00:21:54) The trainings were centered on how to position and block advances from residents and included information about how to deal with residents who might try to bite her. (00:35:30-55)

14. Petitioner admitted that she was aware of Q.S.'s behavioral support plan and the best way to provide him services. (00:22:00)

15. Petitioner was working third shift on the day of the incident. (00:25:00-26)

16. Petitioner admitted that when she "tried to throw the bottle on the other side of the living room" it struck Q.S. (00:27:10-37; 00:49:18-33, 40)

17. It was at this moment that Petitioner noticed that Q.S. had soiled himself. She tried to walk him back to his room so that she could assist him with a shower. (Resp't Ex. K)

18. The next morning, Petitioner informed her manager that she had lost her temper the previous night. (0:29:30-30:37)

19. As a result of the incident, Petitioner was terminated. (00:32:00-15)

20. Taylor Manning received videos depicting an incident between Petitioner and Q.S. which were sent to him from an unknown number and sender. Mr. Manning turned the videos over to Freedom House and the HCPR investigator. Mr. Manning did not alter the videos in any way. (00:57:20-55)

21. Mr. Manning sent the videos to the facility because it was the right thing to do and he was disturbed by their content. (01:05:30-59)

22. Mr. Manning identified the Petitioner and Q.S. in the videos. (01:06:50-07:10)

23. After listening to the videos, Petitioner admitted that she told Q.S. that he “smelled like shit”. (01:22:40-46)

24. Petitioner admitted that her actions were not therapeutic, constituted abuse and neglect. (00:52:13-20; 01:26:00-35)

25. The videos were collectively labeled Respondent’s Exhibit K:

a. Video 1 depicts Petitioner throwing a water bottle at Q.S. as he sits on the couch. Petitioner then gets directly in the face of Q.S. and screams aggressively at him.

b. Video 2 depicts Petitioner pushing Q.S. towards the couch in the living room. Q.S. has clearly soiled boxers. Q.S. lands on the couch. Petitioner pulls him up and takes him off camera. Q.S. is heard crying in the background. It is at this moment that Petitioner tells Q.S. that he “smells like shit” and directs him to go take a shower. Petitioner and Q.S. come back in view of the camera as Petitioner pushes him towards the shower.

c. Video 3 depicts Petitioner dragging Q.S. across the floor towards the couch as Q.S. cries. Petitioner then taunts Q.S. as he is on the floor stating, “you think I’m playing with you tonight.” Petitioner then drags Q.S. from the floor to the couch and again taunts him saying, “try that shit with me.” Q.S. attempts to walk away from Petitioner and Petitioner quickly snatches him back and pushes him towards the couch. Q.S., sitting on the couch, holds his hand out towards Petitioner in a surrendering motion as Petitioner continues to yell at him to sit down. Petitioner begins to advance aggressively and Q.S. cries out in distress.

Agency Investigation Summary

26. Sarah Sriratanakoul received an Initial Allegation Report and an Investigation Report, which summarized the facility investigation, regarding the allegations of abuse and neglect against Petitioner. (Resp't Ex. A)

27. Based on her review of the internal facility investigation Ms. Sriratanakoul screened in the allegation of neglect against Petitioner for investigation. (Resp't Ex. E)

28. As part of her investigation Ms. Sriratanakoul interviewed Petitioner, other Freedom House staff, reviewed the personnel file of Petitioner, reviewed the medical records of Q.S., and reviewed facility policy and procedures. (Resp't Ex. E)

29. Further, Ms. Sriratanakoul reviewed the same videos the facility reviewed during their investigation into the incident.

30. Ms. Sriratanakoul determined that Petitioner neglected Q.S. by failing to maintain a therapeutic milieu for the resident to avoid physical harm and emotional distress. (Resp't Ex. E)

31. Ms. Sriratanakoul also determined that Petitioner abused Q.S. by yelling, hitting, pushing, and dragging resident Q.S. across the floor resulting in intimidation and mental anguish. (Resp't Ex. E)

32. Ms. Sriratanakoul used the statutory definition of neglect when determining if Petitioner's actions constituted neglect. (01:39:00-15)

33. Ms. Sriratanakoul used the statutory definition of abuse when determining if Petitioner's actions constituted abuse. (01:41:00-30)

34. Ms. Sriratanakoul testified that Petitioner verbally, physically, and emotionally abused Q.S. when she swore at Q.S., pushed Q.S., hit Q.S., dragged Q.S. across the floor and threw a water bottle at him. (01:56:50-01:58:00)

35. Ms. Sriratanakoul followed the proper procedures in making her determination. (02:01:00-10)

36. The Undersigned finds the testimony of Jenita Hooks, Sarah Sriratanakoul and Taylor Manning to be credible.

37. The Undersigned finds the testimony of Petitioner to be credible and her admitted conduct to carry great weight.

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 designated correctly, 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 he or she abused or neglected a resident in a health care facility.

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

5. Freedom Group House is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b).

6. “Neglect is the failure of the facility, its employees or service providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish, or emotional distress.” 10A N.C.A.C. 13O .0101(10); 42 CFR § 488.301.

7. “Abuse is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.” 10A N.C.A.C. 13O.0101(1), 42 CFR § 488.301.

8. The exercise of the Agency’s discretion is entitled to great deference by the court, which should not substitute its interpretation of the law which the Agency is charged with enforcing, so long as “the Agency’s interpretation is reasonable and based on a permissible construction of the statute.” *Craven Reg’l Med. Auth.*, 176 N.C. App. at 58, 625 S.E. 2d at 844; and accord, *Good Hope Health Sys., LLC v. N.C. HHS*, 189 N.C. App. 534, 544, 659 S.E. 2d 456, 463 (N.C. Ct. App. 2008), *aff’d sub nom.*, *Good Hope Health Sys., LLC v. N.C. HHS*, 362 N.C. 504, 666 S.E. 2d 749 (2008).

9. N.C. Gen. Stat. § 150B-34(a) states, “The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.”

10. “Because Respondent is the agency charged with carrying out the provisions of the Registry statute, due regard is given in these proceedings to Respondent’s interpretation.” *Sauls v. NC DHHS*, 18 DHR 05219, 2019 NC OAH LEXIS 279, *12.

11. In a contested case hearing, what evidence may be considered by the administrative law is determined by 26 NCAC 03 .0122 which states in pertinent part:

The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall govern in all contested case proceedings, except as provided otherwise in these Rules and G.S. 150B-29.

(1) The administrative law judge may admit all evidence that has probative value. Irrelevant, incompetent, and immaterial or unduly repetitious evidence shall be excluded. An administrative law judge may, in his discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will:

(a) necessitate undue consumption of time; or

(b) create substantial danger of undue prejudice or confusion. ...

12. Petitioner relies upon the opinion of *State v Snead*, wherein our Supreme Court sets forth the foundational requirements for the admission of video evidence in a criminal proceeding. *State v Snead*, 368 N.C. 811 (2016). The Court also noted that “[g]iven that defendant admitted that he is one of two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video.” *Id.* at 815.

13. Similarly, in the within contested case, Petitioner identified herself in the video and also testified that she had committed the acts in question of throwing a water bottle at resident Q.S., that the water bottle struck resident Q.S. and that she used offensive language.

14. Following the reasoning of *Snead*, there is no reason to doubt the reliability or accuracy of the footage contained in the videos when the Petitioner admits the alleged conduct in her testimony.

15. Petitioner also argued that the contested case proceeding was “quasi criminal” in nature because of the consequences of the outcome of the proceeding for the Petitioner. (01:07:00-01:12:00) No authority was provided to support the argument that any type of contested case proceeding is quasi criminal and no authority was offered to allow the administrative law judge to disregard administrative rule 26 NCAC 03 .0122.

16. Further, the Petitioner throughout her testimony was evasive and at times refused to answer simple yes or no questions. The Undersigned notes the difference in the testimony of Petitioner prior to the videos being shown at trial and after.

17. The video evidence at trial showed Petitioner throw a water bottle at Resident Q.S. Further, the video evidence showed Petitioner taunting and berating resident Q.S. The inhumane actions of Petitioner continued as she dragged Q.S. throughout the living room of Freedom House and verbally degraded him as she attempted to take him to take a shower. Q.S. can be heard in the video, crying out in distress as Petitioner aggressively advances towards him.

18. Petitioner's actions as depicted in the video meet both the common sense and legal definition of abuse. A single act of abuse is enough for the Respondent to substantiate an allegation of abuse.

19. Petitioner's treatment of resident Q.S. is a clear failure to provide the goods and services that are necessary to avoid physical harm, pain, mental anguish, or emotional distress, thus constituting neglect.

20. Petitioner had the burden to show by a preponderance of the evidence that Respondent deprived her of property or otherwise substantially prejudiced her rights and failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it substantiated allegations of abuse and neglect against Petitioner. N.C. Gen. Stat. § 150B-29(a).

21. Petitioner did not meet her burden to show by a preponderance of the evidence that Respondent substantially prejudiced her rights, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it substantiated allegations of abuse and neglect against Petitioner. N.C. Gen. Stat. § 150B-29(a).

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 and a finding of neglect next to Petitioner's name on the Health Care Personnel Registry should be AFFIRMED.

NOTICE OF APPEAL

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 as indicated by 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.

IT IS SO ORDERED.

This the 6th day of July, 2022.



Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 6th day of July, 2022.



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