

STATE OF NORTH CAROLINA  
COUNTY OF LEE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
21 DHR 04370, 22 DHR 00353, 22 DHR 00672

<p>Sunil S Persad CEO Victor &amp; Associates Inc Andrews Drive Family Care Facility Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Respondent.</p>	<p><b>FINAL DECISION</b> <b>GRANTING PETITIONER’S MOTION</b> <b>FOR SUMMARY JUDGMENT IN THE</b> <b>MATTERS OF:</b> <b>22 DHR 353 &amp; 22 DHR 672</b></p> <p><b>&amp;</b></p> <p><b>ORDER DENYING SUMMARY</b> <b>JUDGMENT IN THE MATTER OF:</b> <b>21 DHR 4370</b> <b>(Pursuant to N.C.G.S. § 1A-1, Rule 56)</b></p>
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**THIS MATTER** came before the Honorable Karlene S. Turrentine, Administrative Law Judge, upon consideration of Petitioner’s Motion for Summary Judgment (hereinafter, “Petitioner’s Motion”) and Memorandum in Support of Petitioner’s Motion for Summary Judgment, both filed May 26, 2022, pursuant to N.C.G.S. § 1A-1, Rule 56 and 26 NCAC 3 .0101 and .0115.

Petitioners Sunil Persad and Victor & Associates, Inc. own and operate the three (3) mental health facilities at issue herein. Respondent is the State agency responsible for licensing and regulating mental health facilities, including those owned and/or operated by Petitioners. The Parties have three (3) separate matters which have been consolidated for trial and/or disposition: *i)* Andrews Drive Family Care Facility, License No.: MHL-053-082 and OAH docket #22 DHR 672 (hereinafter, “Andrews Care”); *ii)* Harmony Home, License No.: MHL-043-075 and OAH docket #22 DHR 353, and; *iii)* Woodhaven Family Care Facility, License No.: MHL-043-048 and OAH docket #21 DHR 4370 (hereinafter, “Woodhaven”). All three (3) of Petitioners’ facilities have been licensed as “.5600C” facilities providing supervised living for adults with developmental disabilities. *See* 10A NCAC 27G .5600(c)(3).

Following surveys it conducted between August 2021 and January 2022, Respondent cited the various Petitioners with Type A1 violations based on various alleged rule violations and assessed monetary penalties against Petitioner for each of the Type A1 violations cited. To be valid, Respondent’s citations of Petitioners’ violations must meet the statutory requirement that the violation “result[ed] in death or serious physical harm, abuse, neglect, or exploitation.” N.C. Gen. Stat. § 122C-24.1(a)(1). “**Type A1 Violation**” means a violation by a facility of the regulations, standards, and requirements set forth in Article 2 or 3 of this Chapter or applicable

State or federal laws and regulations governing the licensure or certification of a facility **which results in death or serious physical harm, abuse, neglect, or exploitation.** *Id.* (emphasis added). (There are lesser results required from Type A2 Violations and Type B Violations but, the Tribunal need not consider those since Respondent did not assess lesser violations to Petitioners.)

Moreover,

(2a) A Type A1...Violation as defined above **shall not include a violation by a facility** of the regulations, standards, and requirements set forth in Article 2 or 3 of this Chapter or applicable State or federal laws and regulations governing the licensure or certification of a facility **if all of the following criteria are met:**

- a. The violation was discovered by the facility.
- b. The Department determines that the violation was abated immediately.
- c. The violation was corrected prior to inspection by the Department.
- d. The Department determines that reasonable preventative measures were in place prior to the violation.
- e. The Department determines that subsequent to the violation, the facility implemented corrective measures to achieve and maintain compliance.

(2b) As used in this section, “substantial risk” shall mean the risk of an outcome that is substantially certain to materialize if immediate action is not taken.

N.C. Gen. Stat. § 122C-24.1(2a) and (2b)(emphasis added).

### **STANDARD OF REVIEW**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). “A ‘genuine issue’ is one that can be maintained by substantial evidence.” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

The moving party bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008). “If the movant successfully makes such a showing, the burden then shifts to the non-movant to come forward with specific facts establishing the presence of a genuine factual dispute for trial.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002).

A Court must view the evidence in the light most favorable to the non-movant. *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. A Court may also grant summary judgment against the moving party, if appropriate, and may be done on a judge’s own motion. N.C. Gen. Stat. § 1A-1, Rule 56 (c); *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999); *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447 (1979); *Stegenga v. Burney*, 174 N.C. App. 196, 198, 620 S.E.2d 302, 303 (2005).

**ANDREW CARES**

License No.: MHL-053-082  
OAH docket #22 DHR 672

A complaint survey was completed January 3, 2022 and Respondent cited Andrews Care for an A1 Violation and fined it \$2,000.00 for violating Rule 10A NCAC 27G .0203 Competencies of Qualified Professionals and Associate Professionals. *See* Resp. Exh A, p.1 and, Exh B, pp.1-2/12, pp.6-7/12, pp.10-11/12 attached to Respondent’s Prehearing Statement (“PHS”) filed March 1, 2022.

Respondent also cited Petitioner for violating 10A NCAC 27G .5602 Staff and 10A NCAC 27G .0304 Facility Design and Equipment, but no penalty was assessed therefore. *See* Resp PHS Exh A, p.1. More importantly, neither of these additional alleged violations rise to the level of a Type A1 Violation as cited.

Per Respondent, at the time of the survey, “According to the Director of Quality Management there are no clients being served at the facility. The last time clients were served at the facility was November 19, 2021. Deficiencies were cited.” *Id* at p.1/12. Looking to the definition of a Type A1 Violation and recognizing the violation cited **must** have “**result[ed] in death or serious physical harm, abuse, neglect, or exploitation**”, N.C.G.S. § 122C-24.1(a)(1)” the only actual harm cited was the allegation that a former employee of Andrews Care “(Former Staff #A7) came in[ to a resident’s] bedroom and hit her with a plastic clothes hanger on the back, head and legs... and...also...hit her with the tennis shoe.”<sup>1</sup> Resp. PHS Exh B, p.3/12. By the time of the survey, the employee was no longer working for Petitioner, the resident

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<sup>1</sup> Upon review of Harmony Home’s Statement of Deficiencies and Plan of Correction, it appears this incident actually occurred at Harmony Home and *not* Andrew Cares yet, *both* facilities were cited for it.

had been to the hospital for care of any injury sustained and the facility had no residents.

Pursuant to N.C. Gen. Stat. § 150B-25.1(b), “In a contested case involving the imposition of civil fines or penalties by a State agency for violation of the law, the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed rests with the State agency.”

The A1 Violation cited meets all the criteria of GS § 122C-24.1(2a). As such, the Respondent has failed to meet its burden outlined in GS § 150B-25.1 for the citation and assessment against Andrew Cares. Thus, with no genuine issue of material fact, Petitioner is entitled to summary judgment as to its Andrew Cares facility.

### **HARMONY HOME**

License No.: MHL-043-075  
OAH Docket #22 DHR 353

An annual, complaint, and follow up survey was completed on December 16, 2021 and Respondent cited Harmony Home for a Type A1 Violation and fined it \$2,000.00 for violating Rule 10A NCAC 27G .0203 Competencies of Qualified Professionals and Associate Professionals, and \$1,000.00 for violating Rule 10A NCAC 27D .0304 Protection from Harm, Abuse, Neglect or Exploitation. *See* Resp. Exh A, p.1 and, Exh B, pp.1-2/58 and, pp.28-29/58 attached to Respondent’s PHS filed March 2, 2022 in OAH docket #22 DHR 353.

Respondent also cited Petitioner for violating 10A NCAC 27G .0207 Emergency Plans and Supplies, 10A NCAC 27G .0209 Medication Requirements, 10A NCAC 27G .5601 Scope, 10A NCAC 27G .5603 Operations, 10A NCAC 27E .0107 Training on Alternatives to Restrictive Interventions, 10A NCAC 27E .0108 Training in Seclusion, Physical Restraint and Isolation Time-Out, 10A NCAC 27G .0303 Location and Exterior Requirements, 10A NCAC 27G .0304, Facility Design and Equipment, *See* Resp. Exh B, pp.8-9/58, pp.10-11/58, pp.16-18/58, pp.25-26/58, pp.35-39/58, pp.43-47/58, pp.51-52/58, pp.55-56/58, but no penalty was assessed therefore. *See also*, Resp PHS Exh A, p.1. More importantly, none of these additional alleged violations rise to the level of a Type A1 Violation as cited.

Regarding the first Type A1 Violation cited, Respondent’s Statement of Deficiencies and Plan of Correction (“Stmt of Deficiencies”) issued to Harmony Home recounted the exact incident for which Andrews Care was cited. Resp’s PHS, Exh B in OAH #22DHR353 reveals the employee

“was terminated for client rights violations of physical abuse and neglect. ...Review on 12/16/21 of a Plan of Protection written by [Harmony Home]...revealed: ‘An investigation was conducted and completed and the staff terminated prior to the survey. An IRIS (incident response improvement system) report was completed and appropriate notifications took place and the investigation. Findings were shared in a timely manner[...and...] the QP provided training to the Harmony Home staff on Abuse, neglect and exploitation.”

” *Id.* at pp.5-7/58.

In support of its second cited Type A1 Violation against Harmony Home, Respondent recited *for the third time* the resident’s recounting of the hanger and tennis shoe incident, including: a) Petitioner’s response to the incident; b) the police report about the incident; c) the medical summary from the doctor who addressed the resident’s injury; d) the survey interview notes from talking with the resident at issue; and, e) the IRIS report Petitioner generated pursuant to its immediate investigation of the incident at the time of its occurrence. *Id.* at 30-35/58.

With Respondent resting on the same “Andrew Cares” incident to support its two (2) A1 Violation citations and, since the incident meets all the criteria of GS § 122C-24.1(2a), Respondent has failed to meet its burden outlined in GS § 150B-25.1 for the two (2) citations and assessments against Harmony Home. Thus, with no genuine issue of material fact, Petitioner is entitled to summary judgment as to its Harmony Home facility.

### WOODHAVEN

License No.: MHL-043-048  
OAH Docket #21 DHR 4370

An annual, follow up and complaint survey was completed on September 2, 2021 and Respondent cited Woodhaven for a Type A1 Violation and fined it \$5,000.00 for violating Rule 10A NCAC 27G .0203 Competencies of Qualified Professionals and Associate Professionals. See Resp. Exh A, p.1 and, Resp. Exh B, pp.9-10/59 attached to Respondent’s PHS filed November 9, 2021 in OAH docket #21 DHR 4370.

In its Statement of Deficiencies and Plan of Correction and in support of its Type A1 Violation assessment, Respondent alleged several issues including, but not limited to, the issue of two (2) residents being

“verbally & physically aggressive towards one another[ having had] altercations between the[m...which] resulted in [resident #1] a black eye and sutures[...and] staff repor[ing] they were not trained to deal with the aggression between [the residents]. ...Behavior tracking logs were

not completed consistently...treatment plans were not updated. ...[Residents] did not receive their medications as ordered by their physician.... There were no blood sugars documented the entire month of August 2021...[and t]he water temperatures were not maintained between 100-116 [degrees].”

PHS Exh B, pp.15.

These allegations, if found to be true, would support a finding of serious neglect as defined by a Type A1 Violation: “a disabled adult who is...not able to provide for himself or herself the services which are necessary to maintain [their] mental or physical health or is not receiving the services from the person’s caretaker.” N.C. Gen. Stat. § 108A-101(m). *See also* GS § 122C-24.1(a)(1), *supra*. As such, there are genuine issues of material fact regarding the Woodhaven assessment and Petitioner is not entitled to summary judgment thereon.

**IT IS THEREFORE ORDERED, ADJUDGED & DECREED** that Petitioner’s Motions for Summary Judgment in the matter of Woodhaven Family Care Facility v. DHHS, OAH docket #21 DHR 4370 is **DENIED**. That matter shall be re-calendared for hearing. Moreover,

#### **FINAL DECISION**

Petitioner’s Motion for Summary Judgment in the matters of Andrews Drive Family Care Facility v. DHHS, OAH docket # 22 DHR 672 and Harmony House v. DHHS, OAH docket #21 DHR 353 are hereby **GRANTED**.


#### **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.

**SO ORDERED.** This the 8th day of July, 2022.



Hon. Karlene S. Turrentine  
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 8th day of July, 2022.



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