

STATE OF NORTH CAROLINA  
COUNTY OF MARTIN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
21 DHR 04716

<p>Nikkie Irene Harris Petitioner,</p> <p>v.</p> <p>Department of Health Human Services Respondent.</p>	<p><b>FINAL DECISION</b></p>
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**THIS MATTER** was heard by the Undersigned on November 18, 2022 in Farmville, North Carolina.

**APPEARANCES**

For Petitioner: Nikkie Irene Harris, *pro se* (did not appear)  
1054 Ever Green Rd.  
Robersonville, N.C. 27871

For Respondent: William Foster Maddrey  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, N.C. 27602

**ISSUE**

Whether Respondent substantially prejudiced Petitioner's rights by failing to act as required by law or rule by determining that an investigation be conducted based on allegations of Petitioner's abuse and neglect of a resident and by listing Petitioner's name on the Health Care Personnel Registry during the investigation?

**ADMITTED EXHIBITS**

For Petitioner: None

For Respondent: R. Ex. 1 (Health Care Personnel Investigations, Policies and Procedures);  
R. Ex. 2 (October 13, 2021 Letter advising of listing of allegation);

R. Ex. 3 (Vintage Inn Initial Allegation Report); and  
R. Ex. 4 (Vintage Inn Investigation Report)

**WITNESSES**

For Petitioner: None

For Respondent: Pam Anderson, Supervisor  
Andrea “Linn” Henson, R.N., Nurse Consultant I

**PROCEDURAL HISTORY**

1. Petitioner filed her petition for a contested case hearing on November 2, 2021 contesting the entry of her name on the Health Care Personnel Registry and Respondent’s investigations of allegations of abuse and neglect against her. On December 6, 2021, a Scheduling Order was issued by J. Randolph Ward (“ALJ Ward”), which scheduled this case for hearing in Farmville, North Carolina the week beginning April 18, 2022.

2. On March 25, 2022, ALJ Ward issued a Notice of Hearing, which scheduled the hearing in this matter for April 19, 2022 in Farmville, North Carolina.

3. Upon Respondent’s Motion to Continue filed on March 28, 2022, this matter was continued by ALJ Ward pending resolution of Petitioner’s underlying criminal matter. ALJ Ward, *sua sponte*, also stayed the action advising that “due regard for the Petitioner’s Fifth Amendment rights require that the Administrative Hearing, in which she would bear the burden of proof, be postponed until after the trial on the criminal charges.” Order Continuing Hearing and for Stay and Status Report, p. 1.

4. By the terms of the March 28, 2022 Order, this matter was stayed pending resolution of Petitioner’s underlying criminal matter and Respondent was ordered to file a Status Report advising of the criminal prosecution on or before May 20, 2022 and every 90 days thereafter unless the matter had been otherwise resolved.

5. On July 13, 2022, Respondent filed a Status Report advising that “the next court date for Petitioner’s related criminal charge is July 20, 2022” and advised that, upon information and belief, Petitioner’s related criminal charges had yet to be resolved.

6. On July 15, 2022, this matter was reassigned to the Undersigned because of ALJ Ward’s retirement from the Office of Administrative Hearings.

7. Thereafter, on August 1, 2022, the Undersigned issued an Order for Lifting of Stay, which dissolved the stay previously entered in this matter on March 28, 2022.

8. On August 8, 2022, the Undersigned issued a Notice of Rescheduled Hearing, which scheduled this matter for hearing on September 8, 2022 in Ayden, North Carolina. The parties appeared at the hearing and the Undersigned continued this matter once again upon representation that the criminal case was scheduled within a few weeks.

9. On September 9, 2022, the Undersigned issued an Order for Status Report (“Order”) and Completion of Investigation, which ordered the Parties to file a Status Report on or before October 7, 2022 advising the Undersigned of the anticipated completion date of the underlying investigation by Respondent in this matter, and the hearing date of Petitioner’s underlying criminal case. The Undersigned also advised the following:

Substantiation of the alleged abuse and neglect in this matter has been pending since at least November 2, 2021. The substantiation decision should not be dependent on the criminal adjudication as they each have different burdens of proof. Respondent’s continued delay of the investigation prejudices the Petitioner.

Unless good cause is shown, the investigation and substantiation decision **SHALL** be completed within forty-five (45) days of this Order.

(Order) (Emphasis in original).

10. Neither Party filed a Status Report by October 7, 2022.

11. On October 18, 2022, the Undersigned issued a Second Order for Status Report requiring the Parties to file a Status Report on or before October 31, 2022 and advised that failure to comply with the order may include dismissal of the Petition or suppressing of Respondent’s defenses.

12. On October 24, 2022, Respondent filed a Status Report and advised that “[t]he hearing in this matter is currently awaiting the completion of Respondent’s investigation of the alleged incident involving Petitioner and a resident of Vintage Inn in Williamston, NC[,]” and that “Petitioner’s next court date is set for November 9, 2022.”

13. Respondent failed to complete its investigation in this matter by the deadline set forth in the Undersigned’s September 9, 2022 Order for Status Report and Completion of Investigation.

14. After receipt of the Status Report, on October 27, 2022, the Undersigned issued a Notice of Rescheduled Hearing, and on November 1, 2022 issued an Amended Notice of Rescheduled Hearing, which scheduled the hearing in this matter for November 18, 2022 in Farmville, North Carolina.

15. Upon calling the case for hearing, Petitioner was absent and did not subsequently appear. Respondent moved to dismiss the case. The Undersigned denied Respondent’s motion, and this matter proceeded to hearing pursuant to N.C. Gen. Stat. § 150B-25(a) which states that

“[i]f a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.”

### **FINDINGS OF FACT**

1. By certified letter dated October 13, 2021 (“Letter”), Respondent, the North Carolina Department of Health and Human Services, Division of Health Service Regulation (“Respondent” or “Department”), advised Petitioner Nikkie Irene Harris (“Petitioner” or “Harris”) that it had determined that an investigation was to be conducted pursuant to allegations that on or about September 29, 2021, Petitioner abused and neglected a resident at Vintage Inn Retirement Community (the “Facility”).

2. The Respondent is responsible for investigating allegations of resident abuse, neglect, misappropriation of property, diversion of drugs, or fraud by a nurse aide or health care personnel.

3. On September 29, 2021, Petitioner worked as a health care personnel at a Vintage Inn Retirement Community, a health care facility.

4. The Letter advised Petitioner that Petitioner’s name would be listed on the Health Care Personnel Registry (the “Registry”) and advised Petitioner of the right to appeal the listing of the allegations.

5. On November 2, 2021, Petitioner timely appealed to the Office of Administrative Hearings alleging that Respondent prejudiced Petitioner’s rights by failing to act as required by law or rule stating as follows:

I have been falsely accuse [sic] of hitting a resident. No bruises or marks b/c I didn’t touch her. [T]he police was [sic] called & they didn’t find anything[.] [T]hey only went by Ta-naisha[.] Tanisha said she was around the corner what corner [sic][.] The police didn’t go down where the resident was.

(Pet.)

6. Respondent was originally notified of the accusations when it received the Facility’s mandatory 24-hour report on September 30, 2021. After receipt of the 24-hour report, based on Respondent’s procedures, Andrea “Linn” Henson began the “screen-in” process to determine if the allegations warranted further investigation by the Respondent. Resp. Ex. 3.

7. Based on the September 29, 2021 incident, that same day, Petitioner was charged by law enforcement with misdemeanor assault on an individual with a disability pursuant to N.C. Gen. Stat. § 14-32.1(F).

8. Petitioner was terminated from her employment with the Facility on October 1, 2021.

9. The Facility filed its 5-day report on October 7, 2021. Resp. Ex. 4.

10. On October 13, 2021, Respondent notified Petitioner by certified letter that it had screened the allegations and determined that an investigation needed to be conducted. In addition, Respondent listed Petitioner's name on the Health Care Personnel Registry. Resp Ex. 2. The Letter advised Petitioner of her appeal rights and she timely appealed her listing on the Registry.

11. Soon thereafter, Ms. Henson began the investigation process. Ms. Henson interviewed Petitioner on December 2, 2021, and witness Tanisha Hill during the same week. When interviewed, Petitioner denied that she assaulted or neglected the resident. Witness Hill said that Petitioner slapped the resident's chest.

12. Also, during the investigation process, Ms. Henson reviewed the medical records of the Resident, personnel file of Petitioner, and attempted to contact Detective Goddard, the officer assigned to the police investigation, numerous times. Because the Resident was diagnosed with Alzheimer's, Ms. Henson did not interview the Resident but rather observed the Resident by Zoom.

13. Although it is not clear if Ms. Henson ever spoke with Detective Goddard, Ms. Henson was able to obtain the Incident/Investigation Report ("the Police Report"). Resp. Ex. 4, pp. 7-8. The Report described the attack as: "Staff member struck patient after being kicked." Under the Report's "Injury" section, the injury to the resident was marked as "none". *Id.*

14. Before substantiating or unsubstantiating the allegations, Respondent was waiting for the final adjudication of the criminal matter.

15. Respondent has established Policies and Procedures and Screening Guidelines (collectively "Procedures") for investigating allegations that require the listing of a health care personnel's name on the Registry. *See generally* Resp. Ex. 1.

16. In its Procedures, Respondent sets forth the following:

d. Allegations that meet the screen-in criteria for HCPI should be investigated by the HCPI Investigator regardless of law enforcement involvement (including local law enforcement, SBI, FBI, Medicaid Investigations Division (MID)). During the investigation, if it is found that key evidence is only available to law enforcement (such as in a rape investigation), collect the evidence that is available, and keep the pending listing active on registry. Based on the evidence collected, if the investigator cannot substantiate the allegation but is aware of key evidence collected by law enforcement and criminal charges have or will be filed against the accused, the HCPI investigator should discuss their evidence with their Regional Supervisor. In this situation, the Regional Supervisor must approve any decision to await criminal proceedings.

\* \* \*

f. For any allegation screen in solely based on a law enforcement investigation (including local law enforcement, SBI, FBI, Medicaid Investigations Division):

- The HCPI investigator should send a letter to the investigating law enforcement agency requesting to be notified if charges are filed against the accused individual.
- If the criminal investigation remains open/active without charging the accused individual by the end of six (6) months, rescind the screen-in decision and close the case. If the accused individual is subsequently charged and a conviction results, re-open the case and substantiate the allegation, or if at the end of six (6) months, the law enforcement agency investigating the case indicates that charges against the accused are imminent, await one additional month, for a total of seven (7) months before closing the case. If the accused individual is not charged by the end of the seventh (7<sup>th</sup>) month, rescind the screen-in decision and close the case.
- Monthly documentation should be entered into the “Info field” of the HCPI Database by the assigned HCPI Investigator to update a case that is awaiting conclusion of a law enforcement investigation. If charges are brought against the accused individual, the HCPI Investigator should document scheduled court dates in the “Info field,” and update the “Info field” within 2 weeks of a scheduled court date regarding the current criminal trial status.

\* \* \*

h. A criminal conviction involving a HCPI allegation will be considered an automatic substantiation of the allegation. If an accused is found not guilty (of an allegation) in a court of law, unsubstantiate the allegation.

Resp. Ex. 1, p. 2-3 (emphasis in original).

17. Ms. Henson completed her investigation by the end of December 2021 but did not substantiate or unsubstantiate the allegations. To this day, the allegations have not been substantiated or unsubstantiated. Petitioner’s name has been on the Registry for over 1 year.

18. According to Ms. Henson, the only outstanding information needed to substantiate or unsubstantiate the allegations was the “outcome of the criminal matter.” If Petitioner was found guilty of the criminal charges, per the Procedures, allegations would be automatically substantiated.

19. When asked whether there was any missing “key evidence” that was only available to law enforcement, Ms. Henson speculated that there may have been some photos.

20. The Undersigned finds that even if such photos exist, they do not constitute “key evidence” only available to law enforcement. Respondent already had information from the Facility that the resident had “redness to the chest area” and that a bruise under her eye was visible

the next day. Resp. Ex. 4, p. 3. Per the Procedures, the lack of photographic evidence should not have kept the Petitioner's listing active on Registry. Moreover, there was no evidence that the Regional Supervisor had approved any decision to await criminal proceeding as required by the Procedures.

21. Additional concerns arise because of Respondent's reliance on the outcome of criminal proceedings. A criminal case adjudication is based on a different burden of proof than an administrative action. Respondent's Procedures allow the criminal matter to dictate the result of its investigation. Yet, if Petitioner is convicted of assault by the criminal court, Respondent will consider it an automatic substantiation of the allegation. If an accused is found not guilty (of an allegation) in a criminal court, the Procedures require that the allegation must be unsubstantiated.

22. Based on Respondent's investigator, Ms. Henson, the only reason that allegations against Petitioner remain "screened-in" is based solely on the conclusion of the law enforcement investigation. As such, based on Respondent's own Procedures, because the criminal investigation has remained open/active without charging the Petitioner for over six (6) months, Respondent is required to rescind the "screen-in" decision, close the case, and remove Petitioner's name from the Registry. Respondent could wait an additional month, up to the seventh (7) month, if criminal charges are imminent. Afterwards, Respondent must "screen-out" and close the case. The Procedures allow the case to be re-opened if Petitioner is later convicted.

23. Such a process balances the interests of both parties when there is a significant delay in criminal court proceedings. The length of time Petitioner's name remains on the Registry, and during which time Petitioner cannot work in the health care field, is limited to 6-7 months. Respondent's duty to protect health care residents from abuse, neglect, fraud, or exploitation is also protected because delay in the criminal adjudication does not foreclose re-opening of the case. If Petitioner is found guilty, Respondent can re-open the previously screened-out case.

24. Law enforcement involvement should not have delayed Respondent's substantiation or unsubstantiation of Petitioner's allegations.

25. Based on its Procedures, Respondent has not followed its own Procedures in handling this investigation and it should have been closed April 11, 2022 (6 months) or at the latest by May 11, 2022 (7 months).

### **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 correctly designated and there is no question as to misjoinder or nonjoinder.

3. N.C. Gen. Stat. § 131E-256(a)(2) mandates that Respondent establish and maintain a registry containing the names of health care personnel working in health care facilities in North Carolina who have been accused of neglect, abuse, misappropriation, diversion of drugs, or fraud

(“Health Care Personnel Registry” or the “Registry”) upon screening of the allegation(s) and a determination that an investigation is required.

4. As a Health Care Personnel working in a health care facility at the time the incident occurred, Petitioner was subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. The Fifth Amendment privilege against self-incrimination does not mandate a stay of this contested case pending the outcome of Petitioner’s underlying criminal charges. While the privilege extends to civil proceedings, *see generally Herndon v. Herndon*, 368 N.C. 826, 829, 785 S.E.2d 922 (2016), it does not operate to effectively prevent the adjudication of civil, or in this case administrative, matters. Specifically, the Supreme Court of North Carolina has detailed the function of the privilege as follows:

Depending on whether a witness is compelled to testify or testifies voluntarily, the right against self-incrimination operates differently. This distinction, explored by the Supreme Court in *Brown*, arises from a need to balance the constitutional right to protect against self-incrimination with a party’s interest in attacking the credibility of a witness and the interest of the court in ascertaining the truth. *Brown*, 356 U.S. at 155-56, 78 S.Ct. at 627, 2 L.Ed.2d at 597. A compelled witness “has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.” *Id.* At 155, 78 S. Ct. at 627, 2 L.Ed.2d at 597. When the compelled witness’s privilege is triggered, the normal right of cross-examination becomes secondary to the constitutional protection against compulsory self-incrimination. *Id.* At 155, 78 S. Ct. at 627, 2 L.Ed.2d at 597. By contrast, a voluntary witness has the benefit of choosing whether to testify and “determines the area of disclosure and therefore of inquiry.” *Id.* At 155, 78 S. Ct. at 627, 2 L.Ed.2d at 597. For that reason, a voluntary witness cannot claim “an immunity from cross-examination on the matters he has himself put in dispute.” *Id.* At 156, 78 S.Ct. at 627, 2 L.Ed.2d at 597.

*Herndon v. Herndon*, 368 N.C. 826, 830, 785 S.E.2d 922 (2016).

6. As noted by the Supreme Court of North Carolina when discussing two parallel proceedings, one administrative and the other criminal:

One is a[n] [. . .] administrative [. . .] procedure [. . .] The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other.

*Joyner v. Garrett*, 279 N.C. 226, 238, 182 S.E.2d 553, 562 (1971); *see also Guzman v. Gore*, 206 N.C. App. 330 n.1 (2010) (unpublished) (affirming a hearing officer’s denial of a continuance in an administrative proceeding with a parallel criminal proceeding because an administrative hearing had no bearing on the criminal proceeding).



7. As a result, the Fifth Amendment privilege against self-incrimination and parallel criminal proceedings related to a contested case do not constitute bases for a stay or good cause for a continuance. 26 NCAC 03 .0118(a).

8. As Respondent reminded this Tribunal, Petitioner bears the burden of proving her case by a preponderance of the evidence that Respondent substantially prejudiced her rights and exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. §§ 150B-23, 150B-25.1.

9. Petitioner did not appear or testify at the hearing, but that does not negate the fact that Respondent prejudiced her rights and admitted to keeping her name on the Health Care Personnel Registry for over one year, which affected her ability to work in the health care field. In addition, Respondent admitted that it failed to use its own procedures and should have rescinded its screen-in decision and closed its case by April 11, 2022 (6 months) or at the latest by May 11, 2022 (7 months).

### **FINAL DECISION**

**NOW, THEREFORE**, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned **ORDERS** that:

1. Petitioner failed to meet her burden of proving that the allegations of abuse and neglect against, and entry of, her name on the Health Care Personnel Registry was improper as of October 13, 2021 until at the latest by May 11, 2022 (7 months).

2. From May 12, 2022 to present, Respondent failed to comply with its own Procedures and should have rescinded its screen-in decision of Petitioner's case. As of May 12, 2022, Respondent's screen-in decision of Petitioner's case is rescinded, thereby eliminating any ongoing controversy in this matter. Respondent may re-open this, however, if Petitioner is later adjudicated guilty of the criminal charges.

Therefore, this case was **MOOTED** as of May 12, 2022, and this matter is, therefore, **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

### **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 23rd day of November, 2022.



Stacey Bice Bawtinheimer  
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.

Nikkie Irene Harris  
1054 Ever Green Rd  
Robersonville NC 27871  
Petitioner

William Foster Maddrey  
NC DOJ  
wmaddrey@ncdoj.gov  
Attorney For Respondent

This the 23rd day of November, 2022.



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Jerrod Godwin  
Law Clerk  
N.C. Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, NC 27609-6285  
Phone: 984-236-1850