

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

SADONNA NAPIER,	:	
Petitioner,	:	
	:	Docket No.:
v.	:	OSAH-DCH-HFR-NAR-1433320-60-Brown
	:	
DCH, HEALTHCARE FACILITY	:	
REGULATION DIVISION	:	
Respondent.	:	

INITIAL DECISION

I. Introduction

Petitioner, Ms. Sadonna Napier, appeals the decision of the Department of Community Health, Healthcare Facility Regulation Division (hereinafter “DCH” or “Respondent”) to enter into the State Nurse Aide Registry a finding that Petitioner neglected a resident. The hearing on this matter was held on March 7, 2014 before the undersigned Administrative Law Judge at the Office of State Administrative Hearings in Atlanta, Georgia. Petitioner represented herself and Ms. Stacey Hillock, Esq. represented Respondent. For the reasons indicated herein, Respondent’s decision to enter into the State Nurse Aide Registry a finding that Petitioner neglected a resident is **REVERSED**.

This record is sealed to protect the name of any resident or the medical records of such a resident. Release of any documents other than this decision or the notice on the Nurse Aide Registry can occur only upon review and redaction of the record. Neither Petitioner nor Respondent is authorized to utilize any documents exchanged pursuant to this litigation without redaction of the name of any resident referenced therein.

II. Findings of Fact

1. Petitioner has been a certified nurse aide (CNA) since 1996. She was employed in this capacity at Sadie G. Mays Health & Rehabilitation Center (hereinafter “Sadie Mays”) until she was terminated following the incident at issue in this Decision. *Exhibit R-3; Testimony of Sadonna Napier.*

2. One of the residents under Petitioner’s care was “H.P.”, a sixty-seven year old woman who resided in Area D. H.P. was admitted to Sadie Mays on June 22, 2012. H.P. is a stroke victim and her diagnoses include hypertension, GERD, osteoarthritis, and depression. H.P.’s stroke affected her left side and staff members familiar with her care are aware that the left side of H.P.’s body is particularly susceptible to pain if mishandled. H.P. has a Brief Interview for Mental Status (BIMS) score of 14, which indicates that she suffers from no significant cognitive

impairment. She is alert as to person, place, and time. *Testimony of Dora Jackson; Exhibit R-3.*

3. On June 27, 2013, Ms. Dora Jackson, RN, Assistant Director of Nursing for Sadie G. Mays, was approached by two Job Corps students, who reported that they had witnessed one of the CNAs mistreat a resident. The two students—Ms. Priscilla Bess and Ms. Chantell Lawrence—told Ms. Jackson that, earlier that morning, they had witnessed Petitioner engage in physically and verbally abusive behavior toward HP. Based on these allegations, Ms. Jackson commenced an investigation and instructed the two students to prepare written statements. Petitioner was placed on suspension pending the outcome of the investigation. Ms. Jackson submitted a Facility Incident Report form on June 28, 2013. *Exhibits R-3, R-4, R-5; Testimony of Dora Jackson.*

4. In her written statement, Ms. Lawrence recounted the incident as follows:

- On the morning of June 27, 2013, she and Ms. Bess were providing routine care to H.P.
- Ms. Lawrence pressed the call light for Petitioner, the CNA assigned to care for H.P. that morning, so that she could assist her in turning H.P. onto her side.
- H.P. began crying as soon as Petitioner entered the room, at which point Petitioner asked of H.P. in a harsh tone: “What are you crying for? I’m here to help you not hurt you.”
- H.P. pointed at Petitioner and said “You don’t like me! You’ve never liked me!” to which Petitioner responded “I don’t have a problem with you, I don’t know why you feel that way!”
- Petitioner made several negative comments to H.P. concerning her weight as she moved to help turn the resident on her side.
- As Petitioner began to turn H.P. over, the resident began yell and complain of pain in her leg, at which point Petitioner turned HP “with force” onto her “weak side.”
- Petitioner undressed H.P. “without being gentle” and said: “I don’t know why they keep assigning this lady to me! I been stopped working with her!”
- Petitioner continued to make several disparaging comments to H.P. regarding her weight and repeatedly asked the crying H.P. how much she weighed.
- After Ms. Bess and Petitioner had placed H.P. into her wheelchair, H.P. asked for a tissue, at which point Petitioner became exasperated and said in a sarcastic tone: “Here, just take the whole box.”
- According to Ms. Lawrence, H.P. cried throughout the incident and was very upset.

Exhibit R-4.

5. In Ms. Bess’s written account of the incident, she recalled exiting H.P.’s room and going to find Petitioner for assistance. According to Ms. Bess, after she approached Petitioner and asked her for assistance with H.P.’s care, Petitioner was “very rude” and said to her: “I don’t know why people keep giving me [H.P.]. She is too f**king heavy.” Petitioner then left to assist Ms. Lawrence in H.P.’s room. According to Ms. Bess, when she entered H.P.’s room approximately ten minutes later, she saw that H.P. was in her wheelchair crying. H.P. would not respond to Ms. Bess’s inquiries as to why she was crying. *Exhibit R-5.*

6. On June 28, 2013, H.P. described the incident in her interview with Ms. Tonya White-Harris, Social Services Director at Sadie Mays. H.P. told Ms. White-Harris that, on the morning of June 27, Petitioner had entered her room to assist the Job Corps students in changing her brief. According to H.P., Petitioner pulled her over to the left side with such force that she would have fallen off the bed were it not for Ms. Porche Kinard, a second CNA, who held onto her. H.P. reported to the social worker that Petitioner had said “I don’t like being bothered with [H.P.] – no one likes being bothered with her.” Ms. White-Harris wrote down H.P.’s statements and submitted them in a report to the Director of Nursing. *Exhibit R-7; Testimony of Tonya White-Harris.*

7. On or about July 1, 2013, Ms. Jackson obtained a written statement from H.P. H.P. gave the following account of the incident:

- While one of the students was bathing H.P., a second student left the room to get Petitioner to demonstrate how to change H.P.’s brief.
- Petitioner entered the room and “snatched” the diaper off of H.P.
- Petitioner then pulled H.P. “over to the left side,” forcing the resident to grab onto the mattress to avoid falling off the bed.
- Another CNA, Porsche Kinard, grabbed H.P. to prevent her from falling.
- Petitioner then helped put Petitioner into her wheelchair.
- At one point, Petitioner told Ms. Kinard: “Porsche, help me with her because I don’t want to hurt her because she’ll go tell Mrs. Walker.”
- Petitioner then left the room and returned later that night to ask H.P. if her brief needed changing.

Exhibit R-6.

8. Porche Kinard, the second CNA present in H.P.’s room at the time of the alleged incident, also submitted her written statement. Ms. Kinard reported that H.P. became upset while she and Petitioner were administering care to her. However, Ms. Kinard recalled that, when she asked H.P. why she was upset, H.P. complained of the heat. According to Ms. Kinard, Petitioner seemed to become upset about her weight and said “I weigh a ton,” to which Petitioner responded by saying “I’m sorry but I can’t do you by yourself.” Ms. Kinard did recall that H.P. said something to the effect of “I don’t like you and you don’t like me” to Petitioner at some point, and wrote that Petitioner responded by saying “I do like you and I’m sorry you feel like that.” Ms. Kinard then assisted Petitioner in putting H.P. into her wheelchair and wiped away H.P.’s tears with tissue. Ms. Kinard gave no indication in her statement that Petitioner made the above-described comments regarding H.P.’s weight, or that Petitioner was in any way forceful with H.P.’s care. *Exhibit R-8; Testimony of Porsche Kinard.*

9. Ms. Jackson conducted verbal interviews of H.P. and the two Job Corps students, all of whom affirmed the facts expressed in their written statements. Sadie Mays staff members also

interviewed other residents of Area D, asking them about “their interactions with [Petitioner], her general attitude, and the care she provides.” The residents gave predominantly positive feedback and no resident reported that she had engaged in abusive behavior towards them. Ms. Jackson determined at the conclusion of her investigation that Petitioner had been “verbally, mentally, and physically abusive to [H.P.]” Petitioner was terminated on July 2, 2013. Ms. Jackson subsequently submitted a full report to DCH in which she conveyed the findings of Sadie Mays’ investigation into the June 27, 2013 incident. *Exhibit R-3; Testimony of Dora Jackson.*

10. On October 4, 2013, DCH notified Petitioner that it had made the determination that Petitioner had committed an act of neglect against a resident on June 27, 2013. Based on this determination, DCH informed Petitioner that her name, a description of the incident, and any written statement she may wish to make would be placed on the state’s nurse aide registry. *Exhibit R-1.*

11. Petitioner requested a hearing to dispute DCH’s determination in a letter dated October 29, 2013. In this letter, Petitioner recounted the June 27, 2013 incident. In her written account, Petitioner describes entering H.P.’s room to assist a Job Corps student with changing H.P.’s brief. Petitioner recalls H.P. being upset and crying about the heat. Petitioner proceeded to change H.P.’s brief, because the student had put the brief on H.P. incorrectly. At one point, according to Petitioner, H.P. became upset about her weight, saying that Petitioner was “acting like [she] weigh[ed] a ton.” Petitioner told H.P. that it was “ok if [she] gained a little weight.” Petitioner denied, however, ever making abusive comments to H.P. about her weight. She further denied having forcefully turned H.P. so that the resident was in danger of falling off the bed. *Exhibit P-1.*

12. H.P. repeated her account of the June 27, 2013. According to H.P., Petitioner entered the room and showed the Job Corps student how to take off H.P.’s brief. She testified that Petitioner then “snatched her,” and abruptly turned her over onto her left side. H.P. felt that she was in danger of falling, and grabbed onto the mattress to stabilize herself. Ms. Kinard was on the opposite side of the bed, and she held onto H.P., saying “I won’t let you fall.” H.P. testified that she was angry at Petitioner’s abrupt manner of handling her and began crying because of the pain in her left side. When H.P. complained of the pain, Petitioner said “there’s always something hurting on you, [H.P.]” and Petitioner and H.P. “laughed about it for a minute.” H.P. recalled making the “I don’t like you and you don’t like me” comment to Petitioner, who denied that was the case. H.P. also recalled Petitioner making comments regarding her weight to the effect of “you’re too heavy, [H.P.]” H.P. further testified that Petitioner was “a good CNA” and “worked real hard.” She opined that Petitioner probably had had a bad day, and was likely taking her frustration out on her. *Testimony of H.P.*

13. In her testimony, Ms. Kinard affirmed the contents of her written statement. She denied witnessing Petitioner engage in any abusive or neglectful conduct. According to Ms. Kinard, she and Petitioner rolled H.P. onto her right side because they were aware that H.P.’s left side was sensitive to pain. *Testimony of Porsche Kinard.*

14. Petitioner testified that, on the day of the incident, she entered H.P.'s room to assist the Job Corps students with changing H.P.'s brief and putting on H.P.'s pants. According to Petitioner, H.P. did not cry out in pain as she, the student, and Ms. Kinard turned her over onto her side. Petitioner denied commenting on H.P.'s weight or directing any abusive language toward H.P. *Testimony of Petitioner.*

15. Priscilla Bess and Chantell Lawrence, the Job Corps students who reported the June 27, 2013 incident, did not testify at the hearing.

III. Conclusions of Law

Nurse Aide Registry

1. Each state participating in the Medicaid program must establish and maintain a registry of all individuals who have satisfactorily completed a nurse aide training and competency evaluation program, or a nurse aide competency evaluation program. 42 U.S.C. § 1396r(e)(2)(A). The registry must include "specific documented findings by a state . . . of resident neglect or abuse, or misappropriation of resident property involving an individual listed in the registry, as well as any brief statement of the individual disputing the findings." 42 U.S.C. § 1396r(e)(2)(B).

2. Each state is required to have a process for the receipt, timely review, and investigation of allegations against a nurse aide accused of neglect, abuse, or misappropriation of resident property of those individuals who are residents of a nursing facility. 42 U.S.C. § 1396r (g)(1)(c); 42 C.F.R. § 483.156(c)(iv). The Department of Community Health is the state entity responsible for the administration of this process and does so through its Healthcare Facility Regulation Division. The federal act further requires that a nurse aide has the right to rebut any such allegations of neglect, abuse, or misappropriation of resident property at a hearing. 42 C.F.R. § 335(c)(iii).

Investigations

3. The state must investigate every allegation of resident abuse, neglect, or misappropriation of property. Then, after notice to the individual involved and a reasonable opportunity for a hearing for the individual to rebut the allegations, the state must make a finding as to the accuracy of the allegations. If the state substantiates the allegation, the state must notify the nurse aide and the registry of such finding. 42 U.S.C. § 1396r(g)(1)(C); 42 C.F.R. § 488.335(a)(1), (2). As applied, Respondent conducted an investigation and determined that Petitioner's name should be placed on the state's Nurse Aide Registry for neglect inasmuch as Petitioner allegedly turned a resident onto her afflicted side in a rough manner and directed abusive language toward her.

Allegations of Neglect

4. "Neglect" is defined as "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness." 42 C.F.R. § 488.301. This definition does not require

the state to prove a resident suffered an actual injury in order to sustain a finding of neglect. Id. Respondent has the burden of proof in this matter and the standard of proof is a preponderance of the evidence. GA. COMP. R. & REGS. 616-1-2-.07(1), 616-1-2-.21(4). Based on this record and the testimony of the parties and witnesses, Respondent has failed to prove by a preponderance of the evidence that Petitioner committed an act of neglect. See OSAH Rules 7 and 21.

5. The evidence on record is insufficient to support a finding that Petitioner neglected a resident. The written statements of Ms. Bess and Ms. Lawrence constitute hearsay, and, although admitted into the record, are not credible in the absence of the testimony of the declarants. Accordingly, the statements must be given significantly less weight than those of Petitioner, Ms. Kinard, and H.P. The remaining accounts of the incident are inconsistent from one another in many important respects. The specifics of the June 27, 2013 incident are essential to a finding that Petitioner's conduct constituted a "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness." But accounts of the incident vary with regard to the manner in which Petitioner turned H.P. onto her side, Petitioner's statements to H.P., and H.P.'s emotional state throughout the incident.

6. Both Petitioner and Ms. Kinard testified that they turned H.P. onto her right side and deny that she was in any danger of falling. Although H.P. testified that Petitioner abruptly turned her onto her right side and said that she feared that she might fall, she acknowledged that Ms. Kinard was present to assist Petitioner and prevent her fall. This, at the very least, detracts from Respondent's assertions that Petitioner placed H.P. in danger through her conduct and thereby failed to provide her services necessary to avoid physical harm. Respondent also failed to establish that the mere act of turning H.P. onto her side constituted neglect in the absence of evidence that such an act violated H.P.'s care plan or evidence that such an act could cause H.P. physical harm.

7. Respondent did not establish that Petitioner made statements to H.P. that amounted to neglect. The precise nature of Petitioner's statements to H.P. is unclear from the record. The statement Petitioner allegedly made to Ms. Bess regarding H.P.'s weight is irrelevant, since H.P. was not present and could not possibly suffer mental anguish from a statement made out of earshot. Moreover, Petitioner's response to H.P.'s statement to the effect of "you don't like me" was entirely benign by all accounts. Petitioner and Ms. Kinard characterize Petitioner's statements regarding H.P.'s weight as responsive to a self-deprecating statement made by H.P., and certainly not abusive.

8. DCH has submitted insufficient evidence to show that Petitioner neglected H.P. DCH has therefore failed to demonstrate that its determination that Petitioner's name should be placed on the Georgia Nurse Aide Registry is correct.

IV. Decision

Respondent's determination of neglect indicated in its October 4, 2013 notice to Petitioner is hereby **REVERSED**. Accordingly, Respondent is not authorized to place Petitioner's name and its finding of neglect on the Georgia Nurse Aide Registry.

SO ORDERED, this ____ day of March, 2014.

Barbara Brown
Administrative Law Judge