

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

CHRISTY ALEXANDER,

Petitioner,

v.

DEPARTMENT OF COMMUNITY
HEALTH, HEALTHCARE FACILITY
REGULATION DIVISION,

Respondent.

Docket No.
OSAH-DCH-HFR-NAR-1500988-57-KENNEDY



FILED
OSAH

SEP 3 2014

INITIAL DECISION

INTRODUCTION

K. Westray

Kevin Westray, Legal Assistant

Petitioner appeals Respondent's decision to enter into the State Nurse Aide Registry a finding that Petitioner verbally abused a resident.

An evidentiary hearing was held in Rome, Georgia on August 1, 2014. Petitioner appeared *pro se*. Stacey Hillock, Esq., represented Respondent. The following individuals testified: Margaret Geho, Fifth Avenue Health Care Administrator; Joseph Payne, Fifth Avenue Health Care Social Services Director; Renee Vines, Licensed Practical Nurse; Mildred Moore, Registered Nurse; Carol Tillery, Certified Nurse Aide; and Misti Walters, Certified Nurse Aide.

The undersigned Administrative Law Judge concludes that Respondent is authorized to enter a written description of an incident of verbal abuse next to Petitioner's name on the State's Nurse Aide Registry.¹ Accordingly, Respondent's adverse action is **AFFIRMED**.

¹ Petitioner may submit a written statement denying or explaining her conduct to be included as well. Respondent may include the statement as written, or may include a brief summary of any such statement.

FINDINGS OF FACT

1.

Petitioner has held a Certified Nurse Aide (CNA) certification since May 29, 2012. (Respondent's Exhibit 2)

2.

North Georgia Care Services d/b/a Fifth Avenue Health Care Center (facility) employed Petitioner as a CNA from June 28, 2013 through December 18, 2013. (Testimony of Geho; Petitioner's Exhibit 1)

Resident S.S.

3.

S.S. is a resident of the facility. She has been diagnosed with multiple sclerosis. She is alert and oriented, but she is paralyzed from the neck down. S.S. requires extensive assistance with her Activities of Daily Living (ADLs) as a result of her diagnosis and medical condition. (Testimony of Payne; Testimony of Geho; Respondent's Exhibits 2, 4, 5)

4.

S.S. is known to be verbally abusive toward staff. (Testimony of Payne; Testimony of Tillery; Testimony of Walters; Petitioner's Exhibit 2; Respondent's Exhibits 2, 4)

Incident

5.

On December 14, 2013, S.S. provoked Petitioner into engaging in a verbal altercation by making disparaging remarks about Petitioner's children. (Testimony of Tillery; Respondent's Exhibits 2, 8, 11)

6.

On the night in question, CNA Carol Tillery asked Petitioner to assist her in providing incontinence care to S.S. during their last rounds for the 2nd shift that ended at 11:00 p.m. (Testimony of Geho; Testimony of Tillery; Respondent's Exhibits 2, 7, 8)

7.

Petitioner, in turn, asked Misti Walters to also assist in providing care to S.S. that evening because S.S. was saying cruel and mean things toward Petitioner. (Testimony of Tillery; Testimony of Misti Walters, CNA; Petitioner's Exhibit 2; Respondent's Exhibits 2, 7, 8)

8.

S.S. made negative remarks about Petitioner's children while CNA Tillery, CNA Walters and Petitioner provided her care. (Testimony of Tillery; Testimony of Walters; Petitioner's Exhibit 2)

9.

Petitioner was hurt and upset about the verbal abuse from S.S., and asked S.S. "do you ever wonder why you are in this predicament?" Petitioner then told S.S. it was because she was mean. During the conversation, Petitioner also told S.S. she was going to go to hell. (Testimony of Tillery; Testimony of Walters; Respondent's Exhibit 6, 8)

10.

S.S., who was easily agitated, was upset by Petitioner's comments and asked her to leave the room. CNA Tillery also repeatedly told Petitioner to "shut up" and to leave the room. (Testimony of Tillery; Testimony of Walters; Respondent's Exhibits 8, 11)

Reporting of Incident

11.

When Licensed Practical Nurse (LPN) Renee Vines entered S.S.'s room to administer medications later that evening, S.S. reported what Petitioner had said to her earlier that evening. S.S. told LPN Vines that she did not want Petitioner to provide her care in the future because Petitioner had told her to go to hell. LPN Vines later informed Registered Nurse (RN) Moore of the incident. (Testimony of Vines; Testimony of Moore; Respondent's Exhibit 9)

Investigation of Incident by Facility

12.

The facility submitted an initial report of the incident to Respondent on December 16, 2013. The facility then completed an investigation of the incident and filed a final report of the incident with Respondent on December 20, 2013. In the meantime, the facility terminated Petitioner's

employment on December 18, 2013, after substantiating the complaint filed against Petitioner by S.S. (Testimony of Payne; Testimony of Geho; Respondent's Exhibits 2, 6, 13)

13.

As part of its investigation, Joseph Payne, the facility's Social Services Director, interviewed S.S. about the incident. Mr. Payne observed that S.S. was upset about the verbal altercation that had occurred between her and Petitioner. (Testimony of Payne).

14.

As part of its investigation, the facility also obtained a written statement from CNA Tillery.² In her statement, CNA Tillery indicated that on Saturday, December 14, 2013, Petitioner and S.S. "began disagreeing with each other" while Petitioner, CNA Walters, and CNA Tillery were changing S.S. CNA Tillery could not recall the conversation that occurred word for word, but recalled that she told Petitioner several times to "shut up." Sometime later, the facility requested that CNA Tillery write another statement that contained more details. The second statement states that Petitioner and S.S. argued. It further states that at one point in the argument Petitioner and S.S. discussed religion, and that Petitioner told S.S. she would go to hell and that her condition was the result of her being mean in her past. The second statement also reiterated that "so much was said" CNA Tillery could not recall the whole conversation. (Testimony of Payne; Respondent's Exhibit 8)

15.

The facility also obtained a statement from Misti Walters. CNA Walters statement was written on December 16, 2013. According to CNA Walters, Petitioner and S.S. argued, and both individuals said "some things that either person probably should have not said." CNA Walters could not remember exactly what was said, but recalled that religion came up during the argument and that Petitioner was asked several times to be quiet. At the hearing, CNA Walters recalled that S.S. said disparaging remarks about Petitioner's children, and that Petitioner asked S.S. if she ever wondered why she was in this predicament and then told S.S. it's because she is mean. Despite this incident, CNA Walters has found Petitioner to be a "hard worker and a great CNA . . . [who also] has a great personality and is great to be around and to work with." (Testimony of Payne; Petitioner's Exhibit 2; Respondent's Exhibit 11)

² The initial statement was written on December 15, 2013.

Adverse Action by Department of Community Health

16.

On March 6, 2014, Respondent notified Petitioner of its intent to place Petitioner's name on the State Nurse Aide Registry along with a written description of the incident that occurred on December 14, 2013 in which Petitioner argued with a resident and told her she was going to hell and that her multiple sclerosis was because she was mean. Respondent further notified Petitioner that she could include a written statement denying or explaining her conduct, or a brief summary of any such statement. (Respondent's Exhibit 1)

Appeal of Adverse Action

17.

Petitioner timely appealed Respondent's Notice of Adverse Action. Petitioner maintains that she did not say any negative remarks toward S.S. Instead, in her statement made in December 2013, she asserted that she "was disagreeing with [S.S.] to the point [she] was crying and had to leave the room." In a separate statement made in December 2013, Petitioner asserted that S.S. told her to get her "ass out" and that Petitioner replied "I will get my ass out but good night sweet dreams and may God bless you." (Respondent's Exhibits 6, 7)

CONCLUSIONS OF LAW

1.

Respondent bears the burden of proof in this matter. OSAH Rule 616-1-2-.07. The standard of proof is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

2.

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).

3.

The state must investigate every reported 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) and (2).

4.

Respondent seeks to place Petitioner's name on the state's Nurse Aide Registry based on its determination that Petitioner verbally abused a resident by making disparaging remarks to her.

5.

Abuse is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301. The State Operations Manual, Appendix PP – Guidance to Surveyors for Long Term Care Facilities, further provides in section 483.13(b) that "verbal abuse" is the "use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability."

6.

Petitioner's statements to S.S. that she suffered from multiple sclerosis because she was mean, and telling her she was going to go to hell, were willful and done with the purpose of intimidating or punishing S.S. for being verbally abusive toward Petitioner. Petitioner's actions were, more likely than not, a result of her immaturity in response to the hurtful statements made by S.S. rather than evil intent. However, her immaturity does not excuse her behavior, nor does it cause her actions to fall outside the definition of verbal abuse. Moreover, Petitioner's statements resulted in mental anguish for S.S. as set forth in the findings of fact, above.

7.


In light of the record as a whole, this Court concludes that Respondent has carried its burden of proof in demonstrating that Petitioner verbally abused a resident so as to authorize that her name be placed on the State's Nurse Aide Registry with a notation of the incident. Petitioner's actions in choosing to tell Petitioner that she suffered from multiple sclerosis because she is mean and telling S.S. she would go to hell was unprofessional and resulted in mental anguish for S.S.

DECISION

Respondent is authorized to record Petitioner's name on the state's Nurse Aide Registry as having verbally abused a resident by telling her she suffered from multiple sclerosis because she was mean and by telling the resident she was going to go to hell. Accordingly, Respondent's proposed action is **AFFIRMED**.

Petitioner shall have the right to have included a written statement denying or explaining her conduct, or a brief summary of any such statement. If Petitioner wishes to submit a written statement, she shall provide it to Respondent within thirty (30) calendar days of her receipt of this decision.

SO ORDERED, this 2nd day of September, 2014.



Ana Kennedy
Administrative Law Judge