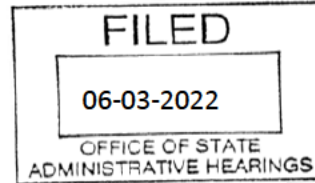


BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

STATE OF GEORGIA

MARTISHA ROSS,		Docket No.: 2223046
Petitioner,		2223046-OSAH-DCH-HFR-NAR-Brown
v.		
GEORGIA DEPARTMENT OF COMMUNITY HEALTH, HEALTHCARE FACILITY REGULATION,		
Respondent.		



INITIAL DECISION

Petitioner appealed Respondent’s decision to enter into the State Nurse Aide Registry a finding that Petitioner verbally abused a nursing home resident.

An evidentiary hearing was held in Tifton, Georgia at the Tifton Municipal Court on May 19, 2022. Petitioner appeared and represented herself. Shariyf Muhammad, Esq., represented Respondent. The following individuals testified: Ashley Alexander, CNA, Life Care Center, Fitzgerald, GA; Cindy Graham, Regional VP of Operations, and Interim Administrator, Life Care Center, Fitzgerald, GA; David Berrian, former employee of Life Care Center, Fitzgerald, GA, and Petitioner.

The undersigned Administrative Law Judge, after conducting an evidentiary hearing and considering arguments of the parties, concludes that Respondent is not authorized to place Petitioner’s name on the state’s Nurse Aide Registry for an incident that occurred on January 17, 2022. Accordingly, Respondent’s decision is **REVERSED**.

I. FINDINGS OF FACT

1. Life Care Center (Life Care or, the facility) is a skilled care nursing facility, located in Fitzgerald, GA. Life Care employs Certified Nurse Aides to assist residents with activities of daily living, such as grooming, feeding, and dressing. (Testimony of Cindy Graham)
2. Ms. Cindy Graham is the Interim Administrator at Life Care as the prior Administrator is no longer employed due to his failure to report abuse that was occurring at Life Care. (Testimony of Cindy Graham)
3. Life Care employed Petitioner as a Certified Nurse Aide (CNA) from May 16, 2012, through January 17, 2022. (Exhibit R-11) The facility provided to the Petitioner in-service training during her employ. Training is provided when a CNA is initially hired, and training is required to be given to employees about four times a year. The last training occurred on December 10, 2021. Petitioner

signed the register as an attendee of the training entitled, "Freedom of Abuse." (Exhibit R-10) (Testimony of Cindy Graham)

4. C.Y. is a resident of Life Care, who Ms. Graham knows "vaguely." Although the resident suffers from various physical limitations, she received a high score (15) on the Brief Interview of Mental Status (BIMS) evaluation. (Testimony of Cindy Graham)
5. According to Ms. Graham, verbal abuse is "disparaging language and how it is perceived by the resident, such as profanity." Ms. Graham testified that in the three or four years that she has known the Petitioner, she has never heard her use profanity. (Testimony of Cindy Graham)
6. On January 17, 2022, Petitioner was employed as a CNA, and was out in the hall with resident C.Y. standing in front of her. Another resident was on the other side of C.Y.. "Smoke breaks" occur at 9:00 AM at the facility, and C.Y. had her jacket on getting ready to go outside for her smoke break. She asked Petitioner to zip up her jacket. Petitioner testified that she responded: "If you can hold two cigarettes in your hand, you can zip your own jacket." Then she zipped up C.Y.'s jacket, and the resident walked out of the building. According to two witnesses, however, Petitioner said something somewhat more disparaging. (Testimony of Cindy Graham and Petitioner)
7. David Barrian is a former employee of Life Care. He was the account manager of the cleaning services company for two years. He was interviewed during the investigation and gave a statement concerning what he heard. (Exhibit R-7)
8. Mr. Barrian knew the Petitioner during the two years he worked at Life Care. On January 17, 2022, he was on the east hall making his rounds when he overheard Petitioner talking rudely to a resident, and say: "If your ass could smoke a cigarette you can button your own jacket. I'm not going to keep doing this shit for you." In that instance, Mr. Barrian indicated that Petitioner was speaking to C.Y. He continued in his statement that Petitioner "hollered at another resident I'm not sure who it was but that person was going in the pantry room to get a drink and she yelled if your ass get burnt its not my fault." (Testimony of David Barrian; Exhibit R-7)
9. When Petitioner questioned Mr. Barrian about what he overheard, he testified that he wrote in his statement what he heard said. However, when she asked him about their conversations during the two years they worked together, he admitted that he had never heard Petitioner disrespect a resident. (Testimony of David Barrian; Exhibit R-7)
10. Ms. Ashley Alexander is a CNA who is employed at Life Care. She has worked there since July 14, 2019. She was also interviewed during the investigation concerning Petitioner, and stated that she has known Petitioner since she began working at the facility in 2019. (Testimony of Ashley Alexander)

11. On January 17, 2022, Ms. Alexander was at the Nursing Station on East Hall, looking at the Shower Book to determine who would receive a shower that day, when she heard some commotion. About that time, she heard Petitioner say to C.Y.: "If your ass can hold a damn cigarette, you can zip your own jacket." Apparently, the statement was reported to the prior Administrator by someone, because subsequently, he asked Ms. Alexander for a statement. (Testimony of Ashley Alexander; Exhibit R-8)
12. Later, Petitioner contacted Ms. Alexander, as they had always been friends since they met at the facility. She talked to Petitioner about making the statement, but Petitioner vehemently denied that she said what Ms. Alexander stated that she heard. Petitioner has continued to deny that she made any such response to C.Y. (Testimony of Ashley Alexander)
13. Ms. Alexander testified that Petitioner is a great person and a great CNA. Further, they have worked together since 2019, and she has never heard Petitioner use profane language. Nonetheless, Ms. Alexander testified she is sure that is what she overheard. (Testimony of Ashley Alexander)
14. Lastly, Ms. Alexander testified that initially, she left out the words "ass" and "damn" from her written statement. But, when the Administrator at the time told her she would be "out the door," if she did not write the exact language she overheard, she re-wrote her statement. (Testimony of Ashley Alexander; Exhibit R-8)
15. The facility, as required by regulations, submitted a Facility Incident Report form to Respondent on January 17, 2022. (Testimony of Cindy Graham; Exhibit R-4)
16. Five days later, as required by regulations, the facility submitted its final investigative report to Respondent. (Testimony of Cindy Graham; Exhibit R-5)
17. After reviewing the Facility Incident Report form and the final investigative report, Respondent issued a Notice of Adverse Action, informing Petitioner of Respondent's intent to place her name, a written description of the incident, and any written statement she wished to make denying or explaining her conduct, or a brief summary of any such statement, in the State's Nurse Aide Registry. (copy of letter not included as evidence)
18. Petitioner testified that on January 17, 2022, she was in the hall with C.Y. standing in front of her. It was almost 9:00 AM, which is the time for the smoke break at the facility. There was another resident there, too. C.Y. asked Petitioner to zip her jacket, and Petitioner jokingly replied, "If you can hold two cigarettes in your hand, you can zip your own jacket up," but she proceeded to zip the jacket anyway. C.Y. smiled and was not at all agitated. She walked on a cane and left the building. (Testimony of Petitioner)

19. Petitioner continued to do rounds, and the Administrator approached her and told her about the “accusation of abuse.” Petitioner told the prior Administrator immediately that she did not say any such thing as had been reported to him, and stated further that her comment was stated in a “joking way.” She was somewhat dismayed that any testimony of David Barrian would be considered as he was terminated from Life Care for “harassment.” (Testimony of Petitioner)
20. However, the prior Administrator told her to write a statement, and then “clock out” for the day. She told the Administrator that she had a “witness” to what she said, a “Mr. Carl.” Two or three days later, she called the Administrator, who told her she had been terminated from employment. There was no indication from anyone that the prior Administrator ever contacted “Mr. Carl.” (Testimony of Petitioner; Exhibit R-2 and Exhibit R-9 (that cannot be read))

II. 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 is required to 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. In this matter, 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 a derogatory comment when asked to zip up her jacket.
5. Abuse is defined as “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.”¹ 42 C.F.R. § 488.301. Abuse is further defined by Georgia law to mean “any intentional or grossly negligent act or series of acts

¹ In the context of the Nurse Aide Registry law, the D.C. Court of Appeals has held that “willful” should be interpreted in such a way that “strikes a balance” between the need to protect elderly and infirm nursing home residents with the need to protect innocent nurses from false, career-destroying allegations. Hearns v. D.C. Dep’t of Consumer & Regulatory Affairs, 704 A.2d at 1183 (D.C. 1997).

or intentional or grossly negligent omission to act which causes injury to a resident, including, but not limited to, assault or battery, failure to provide treatment or care, or sexual harassment of the resident.” O.C.G.A. § 31-8-81.

6. Abuse has a “willful” component that is satisfied when one voluntarily engages in the act that is alleged to have been inflicted with resulting physical harm, pain or mental anguish. Whether the Certified Nurse Aide intended to harm or injure a resident is irrelevant to the determination of whether abuse occurred. “Rather, each [instance of abuse] is defined by its own set of factual circumstances. It is with respect to these circumstances, namely, the particular context in which the alleged abuse occurs, that a determination of abuse is made on a case-by-case basis.” Salmon v. Dep’t of Health and Addiction Servs., 788 A.2d 1199 (Supreme Ct. Conn., 2001).
7. Petitioner testified that she made a comment, which makes it willful, but, from a review of the record, Petitioner’s comment was not made for the purpose of inflicting injury, unreasonable confinement, intimidation, or punishment. Petitioner stated to the Administrator at the time, and testified at the hearing, that she was speaking in a “joking way.” Ms. Alexander and Mr. Barrian repeated similar statements they testified they heard Petitioner say, but they are no means the same statement made by two witnesses. Several of those words are what Petitioner stated to C.Y. Interestingly, however, there is no indication, and there was no testimony, as to what C.Y. thought about the comment. There was no testimony concerning the resident C.Y. at all, with the very short exception that Ms. Graham stated in her testimony that C.Y. had “physical limitations.” Although Exhibit R-5 contains the prior Administrator’s opinion on the topic, he did not testify, as he is no longer employed by the facility. There was certainly no testimony that C.Y. was non-verbal, or incompetent, and yet, C.Y. was not under subpoena to testify in this case, either in person or by telephone. Petitioner made a statement that although C.Y. was able to hold cigarettes in her hand she could not zip up her own jacket. However, Petitioner did zip up C.Y.’s jacket. According to Petitioner, C.Y. smiled and went on her way. No one refuted that testimony. There was no testimony from Ms. Alexander or Mr. Barrian (also a terminated employee), about what C.Y. said, if anything. Whatever was said, there is insufficient evidence that Petitioner’s statement/comment resulted in physical harm, pain or mental anguish to constitute abuse and authorize the sanctioning of placing Petitioner’s name on the State Nurse Aide Registry and effectively ending her career as a Certified Nurse Aide. In certain instances, mental anguish can be presumed. However, in this matter we have the direct testimony of the two “witnesses” that *others* made the report to the prior Administrator. There was no evidence that C.Y. reported the incident. There is no evidence that the resident felt distraught, depressed, anxious, fearful or otherwise as a result of Petitioner’s comment. There is no evidence of verbal abuse in this matter. (42 C.F.R. § 488.301)

III. DECISION

Respondent is not authorized to record Petitioner's name on the state's Nurse Aide Registry as having verbally abused or neglected a resident on January 17, 2022 at Life Care Center Fitzgerald. Accordingly, Respondent's proposed action is REVERSED.

SO ORDERED, this 3rd day of June, 2022.

Barbara

Barbara A. Brown
Administrative Law Judge

