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**STATE OF TENNESSEE
DEPARTMENT OF HEALTH**

IN THE MATTER OF:

**LANA JO BROWN,
Respondent**

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DOCKET NO. 17.38-057902J

ORDER

This case was heard on July 6, 2005, before Anthony Adgent, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Health (State). Gerry Crownover, Assistant General Counsel for the Tennessee Department of Health, represented the State. The Respondent was represented by attorney John Miles.

This matter concerns the State's allegations of violation by the Respondent, Lana Jo Brown, of T.C.A. 68-11-1001, et seq. and T.C.A. 71-6-102, 42 U.S.C.A. § 1396(r) and 42 C.F.R. 488.335. The State alleges that the Respondent did inflict pain, injury or mental anguish to and on the person of the individual referenced in their Notice Of Charges as M.N. and therefore should be placed on the registry containing the names of any person who has been determined to have abused or neglected an elderly or vulnerable individual.

After consideration of the entire record and the arguments of the parties, it is DETERMINED that the Respondent, Lana Jo Brown, should not be placed on the registry for violations of the various statutes listed in the Notice Of Charges by the State.

This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Respondent was employed as a Certified Nurses Assistant (CNA) at Beverly Health Care Center. (Beverly) in Union City, Tennessee from October, 2002 through May, 2003, when she was terminated.
2. The Respondent was charged with verbal and physical abuse of a resident, identified as M.N., on May 2, 2003, during her employment at Beverly.
3. Ms. Bettie Evans Parker testified that she was employed at Beverly at the time of the alleged incident and working with Ms. Brown when the incident in question occurred. She stated that Ms. Brown was assisting MN with her shower at the time of the incident. She said that she observed Ms. Brown strike MN on the back of her hand and shout at her “Stop that right now”.

Ms. Parker further testified that MN was ninety-nine years old at the time and hard of hearing. She stated that MN had a history of being combative and a fear of showering which often lead her to cry and strike out and a history of falling.

When asked to show the actual force of the “slap” she witnessed, Ms. Parker’s demonstration could be described as a “tap” or a “pat”, but certainly not a “slap”. She also testified that the contact caused no injury or mark on MN.

Ms. Parker stated that she believed Ms. Brown’s conduct to be a violation of policy and immediately reported the incident to management of Beverly.

4. Ms. Kim Land testified next for the State. Ms. Land’s testimony was along the same lines as Ms. Parker’s. Ms. Land, however, did not see Ms. Brown strike MN. She did hear Ms. Brown shout at MN. She testified that she was upset by the incident and felt that Ms. Brown’s conduct was not appropriate.

She further testified that she had never seen Ms. Brown violate any policies before and considered her to be hard working and dependable and a CNA who loves her patients.

5. Ms. Brown testified in her own behalf. Her testimony generally corresponded with the previous witness. She confirmed the circumstances of the incident. She testified that she was attempting to give MN a shower and that MN was fighting her and crying. She said that MN has a history of such behavior. She stated that she did shout at MN but only because there was water running in the shower and MN is hard of hearing and it was necessary to shout in order to be heard.

She further testified that she did hit MN on the back of the hand but she characterized the contact as a “tap” not a “slap”. She stated that her intent was not to cause any harm but to get MN’s attention and to try to get her to stop fighting her... There was no physical harm from the contact such as redness or bruising. After the incident she completed giving MN her shower without further incident.

Ms. Brown said that she could not leave MN alone in order to ask for assistance because of MN’s physical condition.

6. Ms. Shirley Swaim, Ms. Gail Morris Morgan and Ms. Gloria Sharpe testified that Ms. Brown had provided care for relatives of theirs. Each testified to her competence and ability and praised the care she had provided. Each said that they would not have a problem with Ms. Brown caring for loved ones.

CONCLUSIONS OF LAW

1. **T.C.A. 68-11-1004. Prerequisites to including name on registry – Notice to alleged perpetrator – Removal of name from registry. – (a)(1) The**

Department of Health shall include the name of an individual on the registry when it receives notification from an agency of Tennessee state government that the individual has been found by the agency, pursuant to that agency's procedures and definitions, to have abused, neglected or misappropriated the property of a vulnerable person who is under eighteen (18) years of age, or who, by reason of advanced age or other physical or mental condition, is vulnerable to abuse, neglect, or misappropriation of property, and who was at the time of such determination, in the care of:

- (A) A state agency
- (B) An entity which is licensed or regulated by a state agency; or
- (C) An entity under the provisions of a contract between that entity and a state agency.

(2) Such notification shall consist of a copy of a final administrative order, a judicial order, or other evidence indicating that the agency has afforded the alleged perpetrator an opportunity for an administrative due process hearing pursuant to the requirements of the Uniform Administrative Procedures Act, complied in title 4, chapter 5, part 3, or equivalent judicial or administrative procedures; provided, that nothing in this part shall require the state agency to establish any new procedures or to modify any existing procedures it may use for the provision of due process to an alleged perpetrator.

2. T.C.A. 71-6-102. Part definitions.

As used in this part, unless the context otherwise requires:

(1) “Abuse or neglect” means the infliction of physical pain, or mental anguish, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult or a situation in which an adult is unable to provide or obtain the services which are necessary to maintain that person’s health or welfare. Nothing in this part shall be construed to mean a person is abused or neglected or in need of protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone in accordance with a recognized religious method of healing in lieu of medical treatment.

2. **42 C.F.R. 488.335** states in relevant part: (2)(f) Report of findings. If the finding is that the individual has neglected or abused a resident or misappropriated resident property or if the individual waives the right to a hearing, the State must report the findings in writing within 10 working days to

(5) The nurse aide registry for nurse aides.

3. **42 U.S.C.A. § 1396 (r)** provides that:

“By no later than January 1, 1989, the State shall establish and maintain a registry of all individuals who have satisfactorily completed a nurse aide training and competency program, or a nurse aide competency evaluation program, approved under paragraph (1) in the state, or any individual described in subsection(f)(2)(B)(ii) of this section or in subparagraph (B), (C), or (D) of section 6901 (b) (4) of the Omnibus Budget Reconciliation Act of 1989.”

“The registry under subparagraph (A) shall provide (in accordance with regulations of the secretary) for the inclusion of specific documented findings by a State under subsection (g)(1)(C) of this subsection 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.”

ANALYSIS AND CONCLUSION

I found the Respondent and the witnesses who testified on her behalf to be credible and persuasive.

The witnesses for the State corroborated the circumstances of the incident in question. However Ms. Brown’s conduct under the circumstances considered in the context of the particular situation do not rise to the level of physical or mental abuse. The demonstration by State’s witness, Bettie Parker Evans, of the force of the contact between Ms. Brown and MN would under no circumstances be characterized as a “slap”.

The testimony of all witnesses from Beverly confirmed that MN was hard of hearing and that water was running in the shower area. Ms. Brown’s testimony that these circumstances made it necessary to shout are quite believable.

Additionally, the conduct alleged, based on testimony presented by several witness, is totally out of character for Ms. Brown. She was described as competent, caring, professional, and loving and a CNA who has never violated any policies or displayed any conduct such as suggested in this case.

After consideration of all of the evidence presented I find that the State did not carry the burden of proof by the required standard in this matter.

Therefore it is **ORDERED** that Ms. Lana Jo Brown’s name **NOT BE PLACED ON THE REGISTRY** as requested by the Tennessee Department of Health.

This Order entered and effective this 29th day of
 July 2005.

Anthony Adgent
Administrative Judge

Filed in the Administrative Procedures Division, this 29th day of July ,
2005.

Charles C. Sullivan, II, Director
Administrative Procedures Division
Office of the Secretary of State