

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF HEALTH
THREE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

_____	:	
Department of Health	:	
Health Services Regulation	:	
Board of Nursing Assistants,	:	Nursing Assistant
	:	File No. C14-0074
v.	:	
	:	
Theresa Bem,	:	
Respondent.	:	
_____	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an administrative notice of hearing (“Notice”) issued to Theresa Bem (“Respondent”) by the Department of Health (“Department”) on August 5, 2014. The Respondent holds a license as a certified nursing assistant (“CNA”) pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.* and also holds an endorsement as a medication aide (“Aide”) pursuant to the *Rules and Regulations Pertaining to Rhode island Certificates of Registration for Nursing Assistants, Medication Aides, and their Approval of Nursing Assistant and Medication Aide Training Programs* (“Licensing Regulation”). A hearing was held on September 4, 2014. The parties were represented by counsel who rested on the record.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-18-1 *et seq.*, R.I. Gen. Laws § 23-17.9-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and the *Rules and Regulations of the Department of Health Regarding Practices and Procedures Before the Department of Health and Access to Public Records of the Department of Health*.

III. ISSUE

Whether the Respondent violated R.I. Gen. Laws § 23-17.9-8 and the Licensing Regulation and if so, what is the appropriate sanction.

IV. TESTIMONY AND MATERIAL FACTS

The Respondent admitted to paragraphs one (1) to seven (7) of the Notice as amended by the parties at hearing. These admissions are summarized as follows:

1. The Respondent is a nursing assistant licensed to practice in the State of Rhode Island and is also licensed as an Aide.
2. At all times relevant, the Respondent was employed at an assisted living home (“Home”).
3. On or about January 12, 2014, the Respondent stole three (3) medication cards from the discarded medication drawer at the Home. The cards contained seven (7) Tramadol tablets.
4. On January 21, 2014, an administrator of the Home viewed the Respondent stealing such medication while reviewing surveillance video.
5. After the Respondent was confronted about the larceny, she admitted to the administrator that she stole seven (7) tablets of Tramadol and ingested two (2) tablets. The Respondent returned five (5) Tramadol tablets to the Home.
6. During the course of the criminal investigation into the larceny, the Respondent signed a statement admitting to stealing the cards of Tramadol to treat pain in her neck.

The parties agreed that Tramadol is a painkiller and at the time of the theft, it was not a controlled substance but required a prescription.

Marcia Durocher (“Durocher”) testified on behalf of the Department. She testified she owns and is the administrator of the Home and is also a CNA and an Aide herself. She testified that the Home provides assisted living for the elderly with mental or physical disabilities. She testified that Aides pass medication and she supervises the CNAs along with her sister who is a co-owner and a registered nurse. She testified that an Aide has access to any medication that is below a Schedule II drug. She testified that she saw on the security video the Respondent steal the medication and reported it to the Department as required by law. See Department’s Exhibit Two (2) (incident report, follow up, portion of the police report). She testified that after she saw the theft on the video, she telephoned the Respondent who admitted to the theft and that she asked the Respondent to return the remaining pills. She testified that stealing from the discard drawer was against the Home’s policy. She testified that there is a required procedure for discarding medicines so that discarded medicines are not just tossed in the garbage.

On cross-examination, Durocher testified that the discard drawer does not contain medicines for patients but rather contains medicines that have been discarded because of a patient moving out of the Home or being put on a new medicine, etc. On redirect examination, Durocher testified that the Aides and nurses have access to the discard drawer but access is limited and the drawer should be locked. On re-cross examination, she testified that there is an Aide and a personal care assistant on each shift though the latter might only be a partial shift.

Donna Valletta, Manager for the Nursing Assistant Board, testified on behalf of the Department. She testified that theft of medicine is unprofessional conduct. She testified that the Respondent responded to the complaint filed against her and in her response, she indicated that her prescription had run out and she was on duty that day so had taken the medicine so she could keep working. See Respondent’s Exhibit Two (2) (response letter).

The Respondent testified on her behalf. She testified she has been a CNA for 17 years with ten (10) years working at the Home usually on the 3:00 p.m. to 11 p.m. shift. She testified that the first and second shift have one (1) Aide who is responsible for all residents. She testified that she has had neck damage for four (4) years and has arthritis and she was waiting to have surgery. She testified that at the time of the incident she was on Vicodin three (3) times a day, 500 milligrams, but now is on Vicodin three (3) times a day at 750 milligrams. She testified that on the day of the incident she had run out of Vicodin and could not call in a refill but had to see the doctor. She testified that she was in great pain so took the seven (7) Tramadol and ingested two (2) pills. She testified she was going to go to the doctor the following week. She testified she did not take the pills to sell but for her own use. She testified that she knew the security camera was there and she admitted her theft to the police and pled *nolo contendere* to a misdemeanor. She testified that this is her only criminal charge. She testified that her ingestion of the Tramadol did not affect her care for her patients. See Respondent's Exhibits Four (4) (witness statement); Five (5) (criminal background check); and Six (6) (plea).

On cross-examination, the Respondent testified that at the time of incident, she did not have a Tramadol prescription. On redirect, she testified that she previously had a Tramadol prescription.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain

and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Standard of Review for an Administrative Hearing

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Statute and Licensing Regulation

R.I. Gen Laws § 23-17.9-8 provides as follows:

Disciplinary proceedings. – The department may suspend or revoke any certificate of registration issued under this chapter or may reprimand, censure, or otherwise discipline or may deny an application for registration in accordance with

the provisions of this section upon decision and after a hearing as provided by chapter 35 of title 42, as amended, in any of the following cases:

(2) Upon proof that the nursing assistant has violated any of the provisions of this chapter or the rules enacted in accordance with this chapter; or acted in a manner inconsistent with the health and safety of the patients of the home in which he or she is providing nursing assistant services

(5) Has engaged in conduct detrimental to the health, welfare and safety of patients/residents in his or her care.

Section 6 of the License Regulation provides as follows:

Pursuant to the statutory provisions of sections 23-17.9-8 and 23-17.9-9 of the Rhode Island General Laws, as amended, the Department may deny, suspend or revoke any registration issued hereunder or may reprimand, censure or otherwise discipline an individual who has been found guilty of violations of the Act or the rules and regulations herein, in accordance with section 23-17.9-8 of the Rhode Island General Laws, as amended, and upon decision and after hearing as provided pursuant to section 11.0 herein in any of the following cases:

b) upon proof that such nursing assistant and/or medication aide has violated any of the provisions of the Act or the rules and regulations herein; or acted in a manner inconsistent with the health and safety of the patients of the agency/home in which he or she is providing nursing assistant and/or medication aide services

e) has engaged in conduct detrimental to the health, welfare, and safety of patients/residents in his/her care.

f) has engaged in unprofessional conduct including, but not limited to, departure from, or failure to conform to, the standards of acceptable and prevailing practice.

D. Arguments

In closing, the Respondent admitted that the facts were undisputed that she took the pills and she has never has denied that. The Respondent argued that she did not take the pills for personal gain and did not deprive any patient of medicine. The Respondent argued while she was wrong to take the pills, the Department is seeking harsh sanctions as there was no evidence of a threat to any patient's safety and the sanctions sought are out of proportion to the criminal

resolution (one year filing). In addition, the Respondent noted that her Vicodin prescription has been adjusted since this incident. The Respondent requested a reprimand and monitoring.

The Department argued that R.I. Gen. Laws § 23-17.9-8 provides for a suspension or revocation and anything short of a suspension or revocation for the diversion of a prescription drug for which the Respondent did not have a prescription would be inappropriate as she would still have access to drugs. The Department argued that the Respondent was on-duty while under the influence of a drug for which she did not have a prescription and that could put patients at risk and such conduct is unprofessional. The Department argued that the Respondent was caught on video so she had no choice but to admit to the theft. The Department argued that the criminal case resolution is irrelevant as this matter involves the Respondent's statutory obligations as a Department licensee and the Department is concerned with the safety of the public.

E. Whether the Respondent Violated the Statute and Licensing Regulation

It is undisputed that the Respondent took the pills. While she did not divert a drug that was intended for the use of a patient, she used a drug for which she did not have a prescription and continued to perform her duties. While there is no direct evidence of any poor patient care, it is inconsistent with the health and safety of a patient for a CNA to be performing duties while taking a drug for which she does not have a prescription. In addition, such action could also be detrimental to the health and safety of patients. Finally, while the theft of the drug was from the discard drawer (rather than for the use of the patients), it is still unprofessional conduct by a CNA to divert drugs for which she does not have a prescription for her own use.

Thus, the Respondent violated R.I. Gen. Laws § 23-17.9-8(2) (inconsistent with the health and safety of a patient) and (5) (detrimental to the health and safety of a patient in her care). The Respondent also violated Section 6.1(b) (inconsistent with the health and safety of a

patient), (e) (detrimental to the health and safety of a patient in her care), and (f) (fails to conform to the standards of acceptable and prevailing practice) of the Licensing Regulation.

F. Sanction

In this matter, the Respondent admitted to the theft once confronted with the video evidence. She has been a CNA for 17 years without any prior discipline. While she wanted to continue to work that day and represented she was the only CNA on duty at the time, obviously diverting the drugs for her own use when she did not even have a prescription was an ill-considered approach to her situation. It would have been better for her to speak to her supervisor about coverage. It is also true that she did not divert drugs intended for patient use. At the same time, the Respondent diverted drugs and used medicine for which she had not been prescribed while on duty and caring for her patients.

The Department seeks a revocation of the Aide license for at least a minimum of five (5) years. Such a sanction has been imposed when a licensee stole from a patient and failed to appear at hearing. See *Department of Health v. Shakeila Harley*, DOH Case No.: C13-0565 (6/14/14). In this matter, the Respondent has been a CNA for 17 years, appeared at hearing, accepted responsibility, and provided an explanation, though flawed. The Respondent's actions constitute a very serious lapse in judgment regarding her duties and obligations as a CNA and Aide to her patients. However, considering the circumstances of this situation and past Department decisions, a sanction of a two (2) year suspension of the Aide license is appropriate.

VI. FINDINGS OF FACT

1. The Respondent is licensed as a nursing assistant pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*
2. A notice of hearing was sent by the Department to the Respondent on August 5, 2014 to the Respondent's address on record with the Department.
3. A hearing was held on September 4, 2014 with the parties resting on the record.
4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the forgoing, the Respondent violated R.I. Gen. Laws § 23-17.9-8(2) and (5) and violated Sections 6.1(b), (e), and (f) of the Licensing Regulation and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that Respondent's license as an Aide be suspended for two (2) years.

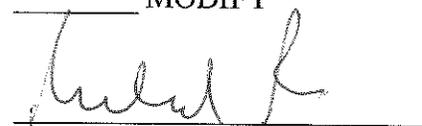
Entered this day 15th September, 2014.


Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

ADOPT
 REJECT
 MODIFY


Michael Fine, M.D.
Director

Dated: Oct 22 2014

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF HEALTH PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 23 day of ~~September~~^{OCTOBER}, 2014 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail to Per Vage, Esquire, Hanson Curran LLP, One Turks Head Place, Suite 550, Providence, RI and by hand-delivery to Amy Coleman, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.

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