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

IN THE MATTER OF:	:	
Jennifer Ziegler-Fuscaldo,[1] NA28653	:	**A.H. File No. C12-414**
and Courtney Holland, NA37503	:	**A.H. File No. C12-415**
Respondents.	:	

DECISION

I. INTRODUCTION

The above-entitled matters came for a hearing before the undersigned[2] pursuant to an Administrative Notice of Hearing issued by the Department of Health ("Department") to Jennifer Ziegler-Fuscaldo ("Fuscaldo") on or about December 17, 2012 and an Administrative Notice of Hearing issued by the Department to Courtney Holland ("Holland") (collectively "Respondents") on or about December 6, 2012. Pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*, the Respondents are licensed as nursing assistants. The hearing was held on January 9, 2013. The matters were consolidated at hearing. At hearing, Holland did not appear. At hearing, Fuscaldo represented herself and the Board was represented by counsel. The parties rested on the record.

Prior to the hearing, Holland did not contact the Department, the Department's counsel, or the undersigned. Pursuant to Section 5.6 of the *Rules and Regulations of the Department of Health Regarding Practices and Procedures Before the Department of*

[1] The Administrative Notice of Hearing referred to her as Jennifer Fuscaldo-Ziegler but it should be Ziegler-Fuscaldo. See also https://healthri.mylicense.com/Verification/Details.aspx?agency_id=1&license_id=207597&.
[2] The undersigned was sitting as a designee of the Director.

Health and Access to Public Records of the Department of Health ("Hearing Regulation"), service may be made by hand-delivery or first class mail and service is complete upon mailing, even if unclaimed or returned, when sent to the last known address of the party. In this matter, notice was sent to the Holland's last known address by first class and certified mail.[3] The certified mail was returned to the Department by the United States Post Office as not deliverable. See Department's Exhibit One (1). As Holland was adequately notified of the time and date of the hearing, the hearing went forward. Additionally, Section 12.9 of the Hearing Regulation provides that a judgment may be entered based on pleadings and/or evidence submitted at hearing by a non-defaulting party.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and the Hearing Regulation.

III. ISSUE

Whether the Respondents violated R.I. Gen. Laws § 23-17.9-8 by engaging in conduct that is detrimental to the health, safety, and welfare of their patient, and if so, what is the appropriate sanction.

IV. MATERIAL FACTS AND TESTIMONY

Ronald Kandzerski ("Kandzerksi") testified on behalf of the Department. He testified he has been a nursing assistant for four (4) years and at the time in question was employed at Linn Health Care Center ("Linn"). He testified that on the night of the incident (December 8 to 9, 2011), he was working the third shift (11:00 p.m. to 7:00 a.m.)

[3] Donna Valletta, Nursing Assistant Board Administrator, testified that said notice sent to Holland was sent to her address on record with the Department.

on the third floor with Fuscaldo and the nurse on duty was called "B.J." He drew a diagram of the third floor (see Department's Exhibit Three (3)) and testified that the nurses' station was between where he was sitting and Mrs. W's ("Patient") room. He testified that he was about ten (10) feet from the nurses' station.

Kandzerski testified that the Patient walked out of her room after midnight. He testified that her room was about fifteen (15) feet from the nurses' station and the Patient walked with a limp and sometimes walked with assistance. He testified that at one point Fuscaldo had been sitting next to him but when the Patient came out Fuscaldo was with Holland and BJ at the nurses' station. He testified that Holland worked on the second floor but was visiting the third floor. He testified that he did not know how the conversation began but eventually the Patient became hysterical and kept asking for her hearing aid. He testified that he did not think anyone gave the Patient her hearing aid. He testified that the Patient was screaming and becoming hysterical and Fuscaldo was laughing at the Patient's demeanor, character, and behavior and he told Fuscaldo that was unacceptable. He testified that Fuscaldo did not respond to him.

Kandzerski testified that the Patient went back to her room and then came out a few minutes later and someone at the nurses' station commented "here she comes again" and Fuscaldo started laughing again. He testified that he does not remember what Holland said when the Patient came out but Holland had a piece of scotch tape (four (4) to six (6) inches long) and put it on the Patient's mouth when the Patient was upset and Fuscaldo's response was to laugh. He testified that he stood up and said you can't do that and he told BJ to do something and she said she would. He testified that the Patient tried to take the tape off and he could not remember if she or someone else took the tape

off. He testified that the Patient returned to her room on her own and was crying. He testified he did not help the Patient back to her room because she liked being independent and he was speaking to Fuscaldo and Holland.

Kandzerski testified that Stephanie, the Assistant Director, came onto the shift after his. He testified that he went home after his shift, fell asleep, and then that day (still the same day of the incident since it happened after midnight), he called Stephanie to report the incident and she told him she would take care of it. He testified that he made a statement in March 13, 2012 because he found out that there had no follow up to his complaint to Stephanie even though she had told him that she would take care of it. See Department's Exhibit Four (4) (Kandzerski's March, 2012 statement).

On cross-examination, Kandzerski testified that the laughing nursing assistant in his statement refers to Fuscaldo. He testified that he never tried to put the Patient in her room. He testified that he did not see Fuscaldo try to calm the Patient.

Beth Stringer-Benedetti ("Stringer-Beneditti"), RN, testified on behalf of the Department. She testified that she is currently employed at Linn and was the Director of Nursing there in December, 2011 and March, 2012. She testified she received information several months after the incident that the Patient had tape placed over her mouth by Holland. She testified that at that time she did not know about Fuscaldo's involvement, but she started an investigation and spoke to Kandzerski who made a statement to her about the incident. See Department's Exhibit Five (5) (report of her investigation). She testified that the appropriate person for Kandzerski to report what he saw was to Stephanie or herself.

Donna Valletta ("Valletta"), Administrator for the Nursing Assistant and Medication Aide Board, testified on behalf of the Department. She testified that the Department received the complaint about both Respondents on July 19, 2012 and she forwarded copies of the complaint to each Respondent but received no response from either Respondent. She testified that the Board recommended that a reprimand be issued for each Respondent. She testified that Fuscaldo had previously been reprimanded. See Department's Exhibit Six (6).

Fuscaldo testified on her behalf. She testified that on the night at issue, she worked the third shift at Linn and sat in front of the nurses' station since the lights were dimmed and did not sit near Kandzerski in the hallway because she would not have been able to see her paperwork. She testified that at around midnight, the Patient came out of her room and was screaming in her doorway and was trying to approach Kandzerski and saying that she had been waiting for him to return to take care of something. She testified that she asked Kandzerski what the Patient wanted but he indicated that he did not know. She testified that she left the Patient alone since the Patient was aggravated. She testified that the Patient tried to walk down the hallway so she (Fuscaldo) got the Patient's walker and went to her and asked her why she was upset and the Patient said she was waiting for Kandzerski to return. Fuscaldo testified that it was not unusual for the Patient to be upset. She testified that she sat the Patient by the nurses' station and asked if she wanted a drink but the Patient was under the impression that she (Fuscaldo) was trying to slip her something so she (Fuscaldo) let her (Patient) be.

Fuscaldo testified that while the Patient was sitting down, the Patient said she needed her hearing aid and she, Fuscaldo, told the Patient to speak to the nurse.

Fuscaldo testified that the nurse (BJ) told her to get the Patient back to her room and did not want the Patient to have her hearing aid as she would be walking around at risk for falling. She testified that the Patient was very stubborn and wanted her hearing aid. She testified that Kandzerski never tried to put the Patient back to bed but rather was not there or just sat there. She testified that this was going on to about 1:30 a.m. and the Patient had gotten very loud and screaming and was "starting to bang" so she (Fuscaldo) tried to calm her down but she (Fuscaldo) ended up becoming the "mean one" so she stopped trying to help the Patient.[4] Fuscaldo testified that the call lights were going off so she attended to the lights and when she returned to the nurses' station, Holland was there and the Patient was very upset saying she wanted to call her daughter and "this isn't right."[5] She testified that she did not see anything happen between Holland and the Patient.

Fuscaldo testified that she wondered why the Patient was crying and thought it must be because of the hearing aid. She testified that she thought the Patient should have gotten her hearing aid but it was not up to her. She testified that Holland came upstairs from the second floor to the third floor because of the noise and not to visit and when she came upstairs, Holland heard banging but she (Fuscaldo) had not heard banging because she was not in the area.[6] She testified that Holland came upstairs to find out what was going and she (Fuscaldo) told her that the Patient was upset.[7] She testified that she did not laugh at the Patient and instead was trying to help the Patient. She testified that the Patient would not go to Kandzerski or BJ.

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[4] 50-51 minutes on the recording of the hearing held on January 9, 2013.
[5] 51 minutes on the recording of the hearing held on January 9, 2013.
[6] 52 minutes on the recording of the hearing held on January 9, 2013.
[7] *Id.*

Fuscaldo testified that she was told about the incident in March, 2012 and made a written statement in March about what she had seen. She testified that she wrote she saw Holland on the floor but did not see the tape in question and the Patient was very upset. See Respondent's Exhibit One (1). She testified that she replied to the complaint forwarded to her by the Department and she did not know why the Department did not receive it. She testified that she never knew about her previous reprimand.

On cross-examination, Fuscaldo testified that Kandzerski was away at some point probably answering calls but was there when the Patient was looking for him. She testified the Patient was agitated on and off. She testified that the Patient never walked by herself and she (Fuscaldo) brought out a wheelchair for the Patient since the Patient had gotten so upset that she did not want the walker and did not want anyone near her. She testified that she brought the Patient about three (3) times that night to her room.

Fuscaldo testified that she answered a light and when she returned the Patient was crying. She testified that she did not testify on direct that before the Patient returned to her room, the Patient was saying, "that should not have happened." Fuscaldo testified that she did not remembering testifying that the Patient said that.[8] Fuscaldo testified that when she came from the call lights, the Patient was crying and Holland was there but she (Fuscaldo) did not see the tape but instead was coming in and wondering what was going on with the Patient but thought it was the hearing aid.

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

[8] Id. at one (1) hour and seven (7) minutes.

ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). 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. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (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. Relevant Statutes and Regulation

R.I. Gen. Laws § 23-17.9-8 provides in part 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:
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> ***
>
> (5) Has engaged in conduct detrimental to the health, welfare and safety of patients/residents in his or her care.

D. Whether the Respondents Violated their Statutory Obligations

The evidence from testimony and statements entered in as evidence at hearing is that the Patient had a tendency in general to get upset but that night was very upset for over an hour and a half because she wanted her hearing aid and for some reason, her request was ignored. What is in dispute is whether Holland put tape on the Patient's mouth and whether Fuscaldo laughed at the Patient.

Kandzerski testified that he saw Holland put tape on the Patient's mouth and Fuscaldo laughing and disrespecting the Patient and that he reported the incident the same day to Stephanie. Kandzerski's testimony that he reported the incident the same day is confirmed by Stringer-Benedetti's statement/investigation that Stephanie left a voicemail for Kandzerski on December 9, 2011 indicating that she had taken care of the incident and no written report was required. See Department's Exhibit Five (5). Kandzerski reported the incident to the appropriate person but unfortunately steps were not taken until March, 2012 to document the investigation of the matter. Thus, there was a delay by Linn in collecting written statements.

There is some discrepancy in the hearing testimony as well as statements taken at Linn. Kandzerski's testimony was that he did not interact with the Patient after the tape was placed on her mouth but in Stringer-Beneditti's investigation, Kandzerski helped calm the Patient down after the tape had been placed on her mouth. Kandzerski also testified that he did not remember how the incident began; though, Fuscaldo testified that the incident began with the Patient being mad at Kandzerski. Fuscaldo also testified that Holland came upstairs after the Patient became upset but Kandzerski testified that Holland was already upstairs visiting when the Patient came out of her room.

The investigation also included speaking to the Patient's daughter who apparently noticed a small red mark on her mother's mouth. See Department's Exhibit Five (5).

From the evidence at hearing, it is uncontested that Holland taped the Patient's mouth and the Patient was in her care. Holland's behavior violated R.I. Gen. Laws § 23-17.9-8(5) since such an action by a nursing assistant to a patient is obviously detrimental to the health, welfare, and safety of a patient.

Based on the forgoing, Holland violated R.I. Gen. Laws § 23-17.9-8 and pursuant to said statute, Holland is sanctioned with a reprimand on her nursing assistant license.

The remaining issue is whether Fuscaldo laughed at the Patient. Her testimony is that she tried to help the Patient and did not see Holland do anything to the Patient. Kandzerski testified otherwise. Neither Stephanie nor BJ who were also there that night testified. Fuscaldo's testimony was consistent with her statement (see Respondent's Exhibit One (1)) that she tried to help the Patient who was upset since she wanted her hearing aid. Her statement (Respondent's Exhibit Five (5)) did mention that the Patient

was banging the medcart. Fuscaldo testified at one point that she heard the Patient banging but at another point, she testified that she did not hear the Patient banging.

Fuscaldo testified on direct that the Patient said that she wanted her daughter and said "this isn't right." She then testified on cross-examination she did not testify on direct that the Patient said something about this should not happen. Cleary she did testify on direct that the Patient said "this isn't right." She also testified that when she came back from the call lights and saw Holland and the Patient, she wondered why the Patient was so upset but then figured it was because of the hearing aid. Fuscaldo's testimony is that the Patient had been agitated off and on for a long time and had been mad at Kandzerski and then was screaming about her hearing aid. Her testimony was that this situation was on-going for over an hour and half.[9] When Fuscaldo returned from the call lights and saw Holland, it would seem that the Patient being upset would not have been a new issue to wonder about.

Fuscaldo also testified that when Holland came up to see what the noise was, she (Fuscaldo) told her that the Patient was upset. However, Fuscaldo's testimony was that the first time she saw Holland was when Holland was with the Patient and the Patient was very upset and she (Fuscaldo) wondered what was going on. In the latter description, there is no time for Holland and Fuscaldo to discuss the Patient. Fuscaldo also testified that Holland heard banging but she (Fuscaldo) had not; though, earlier Fuscaldo testified that the Patient started to bang.

The Patient could have wanted her daughter because she felt that being denied her hearing aid should not happen. Or the Patient may have wanted her daughter because

[9] Kandzerski and Fuscaldo both testified that the Patient first came out of her room about midnight and was upset. Fuscaldo testified that the Patient was getting even more upset about 1:30 a.m.

being laughed at and tape put on her mouth should not happen. Or the Patient may have wanted her daughter because both issues – hearing aid and tape – should not happen. Regardless of the reason for what the Patient said, it is troubling that Fuscaldo denied testifying only minutes earlier about what the Patient said and offered no explanation for her change in testimony.

Based on the forgoing, I find that Fuscaldo tried to help the Patient before Holland came upstairs. The situation with the Patient was prolonged and Holland came up into a noisy and presumably frustrating situation and responded in an extremely inappropriate and unprofessional manner by putting tape on the Patient's mouth. Based on the finding that Holland put tape on the Patient's mouth, Kandzerski's testimony, and Fuscaldo's varying explanations about her own interactions with Holland and the Patient that night, I find that Fuscaldo laughed at the Patient.

Fuscaldo's laughing behavior violated R.I. Gen. Laws § 23-17.9-8(5) since a nursing assistant laughing at a patient is obviously detrimental to the health and welfare of a patient.

Based on the forgoing, Fuscaldo violated R.I. Gen. Laws § 23-17.9-8 and pursuant to said statute, Fuscaldo is sanctioned with a reprimand on her nursing assistant license.

VI. FINDING OF FACTS

1. The Respondents each hold a nursing assistant license pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*

2. A hearing was held in this matter of January 9, 2012.

3. Holland was properly notified of the hearing in this matter and failed to appear at hearing.

4. Fuscaldo appeared at hearing. The parties rested on the record.

5. During the night of December 8-9, 2011, the Patient at Linn was agitated and upset over a period of time. Holland placed tape on the mouth of said Patient who was in her care. Fuscaldo laughed at the Patient during this ongoing situation.

6. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the forgoing, the Respondents violated R.I. Gen. Laws § 23-17.9-8 and pursuant to R.I. Gen. Laws § 23-17.9-8, the Respondents are sanctioned with a reprimand on their respective license.[10]

Entered this 7th day of February, 2013.

Catherine R. Warren, Esquire
Hearing Officer

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.

[10] The reprimand will be identified in the Respondents' licensing file and on the Department's licensing website.

CERTIFICATION

I hereby certify on this 7th day of February, 2013 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt requested to –

Ms. Jennifer Ziegler Fuscaldo
345 Waterman Aveue, Apt. #1
East Providence, RI 02914

Ms. Courtney Holland
32 Burnside Avenue
Riverside, RI 02915

and by hand-delivery to Jennifer Sternick, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908, Donna Costantino, Chief, Health Professions Regulations, Department of Health, One Capitol Hill, Providence, RI 02908, and Donna Valletta, Board Administrator, Three Capitol Hill, Providence, RI 02908.

Linda Eaton

CERTIFIED MAIL™

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
Department of Administration
DIVISION OF LEGAL SERVICES
One Capitol Hill
Providence, RI 02908 - 5890

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Mailed 2/7/13

CONFIDENTIAL

Ms. Jennifer Ziegler Fuscaldo
345 Waterman Avenue, Apt. #1
East Providence, RI 02914

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
Department of Administration
DIVISION OF LEGAL SERVICES
One Capitol Hill
Providence, RI 02908 - 5890

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CONFIDENTIAL

Ms. Jennifer Ziegler Fuscaldo
345 Waterman Avenue, Apt. #1
East Providence, RI 02914

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Ms. Jennifer Ziegler Fuscaldo
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East Providence, RI 02914

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☐ Agent
☐ Addressee

B. Received by (*Printed Name*)

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Ms. Courtney Holland
32 Burnside Avenue
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Providence, RI 02908 - 5890

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Ms. Courtney Holland
32 Burnside Avenue
Riverside, RI 02915

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Ms. Courtney Holland
32 Burnside Avenue
Riverside, RI 02915

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☐ Agent
☐ Addressee

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