

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

Department of Health	:	
Health Services Regulation	:	91 7199 9991 7032 8168 4333
Board of Nursing Assistants,	:	DOH Case No.: C14-137
	:	DOH Case No.: C15-668
v.	:	
	:	
Joanne Torem,	:	
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Administrative Hearing Notice (“Notice”) issued to Joanne Torem (“Respondent”) by the Department of Health (“Department”) on October 26, 2015. Pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*, the Respondent holds a license (“License”) as a certified nursing assistant (“CNA”). A hearing was held on December 18, 2015 and January 21, 2016. The parties were represented by counsel and they 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 Pertaining to Rhode Island Certificates of Registration for Nursing Assistants, Medication Aides, and the Approval of Nursing Assistant and Medication Aide Training Program* (“Licensing Regulation”).

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

Marcia Durocher (“Durocher”) testified on behalf of the Department. She testified that she is the owner and administrator of an assisted living home (“Home”) and is licensed as a nursing home administrator. She testified that the Respondent was employed for approximately one (1) year at the Home as a CNA and medication aide.¹ She testified that the Respondent admitted to her that she had taken medication that was intended for a resident (“PL”) but that PL had offered the pill to her. She testified that the Respondent had told her that she had taken a Tramadol. Durocher testified that she spoke to PL and asked her in general whether the Respondent had ever asked her for medicine. Durocher testified that PL informed her that the Respondent had motioned to PL’s Vicodins and that she (PL) had offered the Respondent a Vicodin and Respondent took a Vicodin pill. She testified that PL made a written statement. See Department’s Exhibit Three (3) (PL’s statement made on January 8, 2015). Said statement indicated that the pill incident occurred in the Summer or Fall of 2014.

Durocher testified that after the Respondent was terminated,² she discovered that the Respondent had borrowed money from patients and staff. She testified that patient JC told her that the Respondent had confided to her about financial issues and that patient RR had given the Respondent money for bills with the understanding that JC would pay half of it back to RR. She testified that JC also told her that she had lent money to the Respondent for a gym

¹ The Department’s licensing website indicates that the Respondent is licensed as a CNA and holds a medication aide endorsement which is only available with a CNA license. See http://209.222.157.144/RIDOH_Verification/SearchResults.aspx

² December, 2014. See Department’s Exhibit Five (5).

membership. She testified that RR told her that he had given money to the Respondent but would not make a written statement. See Department's Exhibit Four (4) (statement by JC indicating giving the money for the gym membership and about RR giving money). She testified that she filed an incident report with the Department as required by law about these incidents. See Department's Exhibits One (1) and Two (2) (complaint filed with Department); and Five (5) (notification to Department by Home of Respondent's termination). She testified that PL does not have dementia and has no memory loss. See Department's Exhibit Six (6) (PL's medical record).³ Durocher testified that she was not able to speak to the Respondent about the incidences of borrowing money because she only found out after the Respondent was terminated and the Respondent did not return her telephone calls.

On cross-examination, Durocher testified that overall Respondent was a good employee except when she brought some of her personal issues to work. She testified the Respondent told her that she took Tramadol, but she reviewed PL's medicine and she was not taking Tramadol. She testified it was after the Respondent was terminated that people came forward about the money. She testified that there were no videotapes of any incidents as any videotape is only kept for one (1) week. On redirect examination, she testified there are no cameras in the residents' rooms because of privacy concerns.

Robert O'Donnell, investigator, testified on behalf of the Department. He testified that he conducted the investigation for the Department regarding the complaints received regarding the Respondent and that he reviewed the prescription monitoring database ("PMP") for 2014 and that PL was prescribed Vicodin during that period but not Tramadol. On-cross examination, he testified that he did not speak personally to the patients PL, RR, or JC.

³ By agreement of the parties, Department's Exhibit Six (6) was sealed as well as Department's Exhibit One (1).

Scott Campbell, chief compliance officer, testified on the Department's behalf. He testified that he is responsible for pharmacy inspections. He testified that he reviewed the PMP which contains all controlled medicine dispensed to a particular person, and PL's PMP for 2014 showed she had Vicodin prescriptions but not Tramadol. He testified that both Vicodin and Tramadol are pain relievers and there are Federal regulations on every controlled prescription and they only can be used by the person for whom they are prescribed. He testified that he also received the medication administration record which records medicine given to a patient and PL's for 2014 showed she received Vicodin but not Tramadol.

Arlene Hartwell, board manager, testified on behalf of the Department. She testified that the Board and the Department both recommend revocation of the License. On cross-examination, she testified that the complaint was initially received on December 29, 2014 and the Respondent was first notified on September 1, 2015. She testified that the Respondent has been licensed for almost 20 years without any public discipline. On redirect examination, she testified that in terms of the Department's investigatory process, after a complaint is filed, an investigation is conducted and it is reviewed by the Board and the Board only meets every other month so an investigation takes time.

The Respondent rested without presenting any witnesses.

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 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. Whether the Respondent Violated R.I. Gen. Laws § 23-17.9-8

In closing, the Department argued that the evidence showed the Respondent gained access to a prescription drug from a resident in her care and borrowed money from residents which violated the statute and the Licensing Regulation.

In closing, the Respondent argued that the Respondent had been licensed for almost 20 years without any discipline and the Department's case is based on hearsay, which while allowed in an administrative hearing, the Department did not prove its case. The Respondent

argued in terms of borrowing money, one of the residents refused to make a statement, and it only came out in other resident's statement and these allegations had only come out after the Respondent had been terminated. The Respondent argued that the delayed reporting indicated that there is nothing there, and that revocation is an extreme sanction and not warranted.

Durocher testified that the Respondent admitted to taking said pill from PL. PL made a written statement about giving the pill to the Respondent. Durocher testified that she spoke to JC and RR about Respondent borrowing money and RR refused to make a statement but JC made a statement. The Respondent herself did not appear at hearing. The undisputed evidence was that the Respondent took a Vicodin pill from a resident in her care. The undisputed evidence was that Respondent borrowed money from patients JC and RR. While the Respondent has been licensed 20 years without issue, she did not testify as to the incidents or to any mitigation or explanation regarding the incidents. During a civil proceeding, an adverse inference may be drawn from the refusal to testify. Thus, a hearing officer can draw an adverse inference from a party's refusal to testify during an administrative proceeding for any reason including a constitutional one. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976);⁴ *Powers v. State*, 734 A.2d 508 (R.I. 1999).⁵

⁴ In *Baxter*, a prisoner was informed that he had a right to remain silent during his prison disciplinary hearing but that if he remained silent his silence would be held against him. The prisoner remained silent. He did not invoke his Fifth amendment right. *Baxter* found that an adverse inference could be drawn from an inmate's silence at his disciplinary proceedings. The Court found as follows:

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a Civil cause." (citation omitted). *Id.* at 318.

The Court noted, "[t]hus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Id.* at 319.

⁵ In addition, the "Empty Chair Doctrine" is a rule of jurisprudence that states that if a party in a contested civil proceeding fails to call a readily available witness who would normally be expected to testify to a material issue, the fact-finder may presume (but does not have to) that if the witness did testify, the evidence would have been

However, even without the adverse inference of the Respondent not testifying on her behalf, there is a preponderance of evidence to find that the Respondent took a prescription pill from a patient and borrowed money from patients. Such behavior is inconsistent with and detrimental to the health and safety of patients and fails to conform to the standards of prevailing practice.

The Respondent's actions of taking a patient's prescription medicine and borrowing money from patients in her care violated R.I. Gen. Laws § 23-17.9-8 (2) (inconsistent with the health and safety of patients) and (5) (detrimental to the health and safety of patients in her care). The Respondent's actions also violated Section 6.1(b) (inconsistent with the health and safety of patients); (e) (detrimental to the health and safety of patients in her care); and (f) (fails to conform to the standards of acceptable and prevailing practice) of the Licensing Regulation.

The Respondent has been licensed for 20 years without discipline. While this could be weighed in determining a sanction, the Respondent presented no testimony or evidence to dispute the allegations or for mitigation of the sanction requested. Therefore, it is recommended that the Respondent's License be revoked.

VI. FINDINGS OF FACT

1. The Respondent is licensed as a certified nursing assistant and medication aide pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*

prejudicial to the party's cause. *Retirement Board of Employees' Retirement System v. DiPrete*, 845 A.2d 270 (R.I. 2004); *Belanger v. Cross*, 488 A.2d 410 (R.I. 1985). "This empty-chair doctrine, however, must be applied with great caution. *Id.*; see also *Avarista v. Aloisio*, 672 A.2d 887, 892 (R.I.1996). Before a negative inference may be drawn in such a situation, it must be demonstrated that the missing witness was available to the person who would be expected to call the witness." *Belanger*, 488 A.2d at 412-13. *Avarista* declined to apply the rule if either party could have called the witness; however, *DiPrete* phrased the issue of which party would be expected to call the witness. In this matter, the Department did not call the Respondent and instead relied on testimony of staff. The Respondent did not appear at the hearing and did not testify on her behalf. From the failure of Respondent to testify, it can be presumed that testimony from the Respondent would not have assisted her case.

2. A Notice was sent by the Department to the Respondent on October 26, 2015 to the Respondent's most recent address on record with the Department.

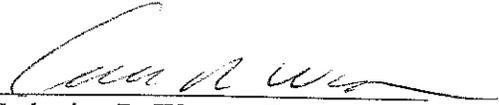
3. A hearing was held on December 18, 2015 and January 21, 2016 with the parties represented by counsel and resting on the record.

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 the Respondent's License be revoked.

Entered this 12th day of February, 2016.

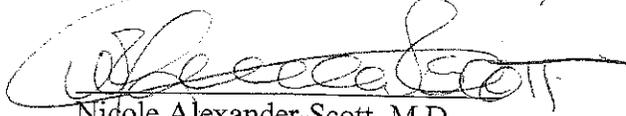

Catherine R. Warren, Esquire
Hearing Officer

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 revoke for 2 years

Dated: 2/18/16


Nicole Alexander-Scott, M.D.
Director

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 19 day of February, 2016 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail to Brian Furgal, Esquire, RI Legal Services, 56 Pine Street, 4th floor, Providence, RI 02903 and by hand-delivery to Colleen McCarthy, Esquire, and Arlene Hartwell, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.

