

known address by first class and certified mail. The first class and certified mail were not returned. See Department's Exhibit One (1) (Notice). As the Respondent 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 Respondent violated R.I. Gen. Laws § 23-17.9-8 by engaging in conduct that is detrimental to the health, safety, and welfare of her patient, and if so, what is the appropriate sanction.

IV. MATERIAL FACTS AND TESTIMONY

Nikki Fontaine ("Fontaine") testified on behalf of the Department. She testified that she has been a Certified Nursing Assistant for five (5) years and on September 13, 2010, she was working at a nursing home facility on the 3:00 p.m. to 11:00 p.m. shift with the Respondent. She testified that there was an incident with a patient ("Patient") who always needed two (2) CNA's to interact with her because of the Patient's size and combative nature. She testified that the Patient liked to be washed before last rounds so at about 9:45 p.m. on that day, she and the Respondent went to the Patient's room. She testified the Patient was in a good mood and just had had her last snack.

Fontaine testified that the Patient had her call light attached to her johnny on her left side and when she and Respondent were getting the Patient ready to be washed, the Respondent was on the Patient's left side and rolled the Patient onto the Patient's left side to face her (Respondent) so that the Patient rolled onto the call light when she rolled over. She testified that the Patient said it hurt and the Respondent then told the Patient twice "to shut the F*** up" and threw a blanket and sheet over the Patient and said to Fontaine, "let's get the F*** out." Fontaine testified that she left with Respondent but then returned to finish the Patient by herself. She testified that she reported the incidence the following morning at 7:00 a.m. She testified that she made a written statement of the incident and the statement is an accurate account of the incident. See Department's Exhibit Two (2) (statement). She testified she had not worked with the Respondent since the day of the incidence since the Respondent was terminated the next day.

Donna Valletta ("Valletta"), Administrator for the Nursing Assistant and Medication Aide Board, testified on behalf of the Department. She testified that a complaint was received on October 6, 2010 regarding this incidence. She testified that the Department used the Respondent's last known address for the Notice. She testified that initially the Board planned to seek revocation but with the delay in bringing this matter there was a recommendation for a reprimand.

Valletta also testified that the Respondent's License expires June 30, 2012. She testified that the Respondent was scheduled to meet with the Board on March 6, 2012 and did not show up or contact the Board despite being noticed but she did reply to the complaint on November 10, 2010. See Department's Exhibit Three (3).

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, 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:

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

D. Whether the Respondent Violated her Statutory Obligations

The Respondent failed to appear at hearing and failed to meet with the Board to discuss the complaint. The Respondent did file a response with the Board regarding the complaint. In her response, the Respondent did not deny that she swore at the Patient but wrote that the Patient was constantly calling her racial names and had behavioral issues so that she (Respondent) was put in an unfair situation of having to take care of this Patient by herself. Her response implied that on the day of the incident, she was taking care of the Patient herself and the Patient had kicked her out of the room. However, Fontaine testified that they both had gone into the Patient's room to wash her and the Patient was in a good mood.

The complaint was filed on October 6, 2010 and the Respondent replied by November 12, 2010 and requested to meet with the Board. The Respondent was afforded

an opportunity to meet with the Board on March 6, 2012 but did not attend.² While it may have been preferable for a meeting with the Respondent to be scheduled earlier, the fact is that once the Respondent did not attend her Board meeting, a hearing was promptly scheduled on this matter. Any delay does not change the fact that while the Patient may have been an unpleasant person, the Respondent must meet her statutory obligations. The evidence shows that the Respondent was caring for the Patient with another CNA and when the Patient called out in pain, the Respondent swore at the Patient and threw a blanket and sheet over her.

The Respondent violated R.I. Gen. Laws § 23-17.9-8 by swearing at the Patient and throwing a blanket and sheet over the Patient. She then failed to appear at the Board meeting and at this hearing. On the basis of the forgoing, the Respondent's License shall be suspended.

VI. FINDING OF FACTS

1. The Respondent holds 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 May 3, 2012.
3. The Respondent was properly notified of the hearing in this matter and failed to appear.
4. The Respondent swore at a patient and threw a blanket and sheet over the patient.

² Administrative notice is taken that the Nursing Assistant Advisory Board meets approximately six (6) or seven (7) times a year. See http://sos.ri.gov/govdirectory/index.php?batchTemp=true&limit_start=0&limit=&url=http%3A%2F%2Frss.sos.ri.gov%2Frssonate%2FgetFeed%2F%3Ffeed%3D80029001109194847%26limit%3D5%26user0_0%3DNursing%2BAssistant%2BAdvisory%2BBoard

5. 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 and pursuant to said statute, the Respondent's License is suspended.³

Entered this 22nd day of May, 2012.


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.

CERTIFICATION

I hereby certify on this 22nd day of May, 2012 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. Kelsey George, 90 Prospect Street, second floor, Woonsocket, RI 02895 and by hand-delivery to Jennifer Sternick, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.


Linda Ector

³ In order to lift the suspension, the Respondent must petition the Board and meet any requirements imposed by the Board; though, if the Board and Respondent cannot reach an agreement regarding lifting the suspension then the Respondent would be afforded a hearing. There is no bar by statute or regulation to when the Respondent can apply to lift the suspension but there is no guarantee that the Board would agree to lift the suspension.