

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

In the Matter of:	:	
	:	
Ephrain Rosario,¹	:	Board of Pharmacy
	:	
Respondent.	:	
	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of Hearing issued to Ephrain Rosario (“Respondent”) by the Department of Health (“Department”) on December 30, 2015. At the time of the incident discussed in this decision, the Respondent held a pharmacy technician II license (“License”) pursuant to R.I. Gen. Laws § 5-19.1-1 *et seq.* A hearing was scheduled for January 20, 2016 at which time the Respondent did not appear at hearing. Pursuant to Section 5.6 of the *Rules and Regulations of the Department of Health Regarding Practices and Procedures Before 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, the Notice was sent to the Respondent’s last known addresses by first class and certified mail.² Since the Respondent was adequately noticed of hearing, a hearing was held before

¹ The spelling of the Respondent’s first name is corrected from the Notice of Hearing. This correction reflects the spelling found on the Department of Health’s licensing website.

See http://209.222.157.144/RIDOH_Verification/Details.aspx?agency_id=1&license_id=310828& and Department’s Exhibit Seven (7) (licensing history).

² Scott Campbell, Chief Compliance Officer, testified that the Respondent’s last known address was used for the Notice and any licensee is required to maintain an up-to-date address with the Department. See Department’s Exhibits Seven (7) (licensing history) and Eight (8) (United States Post Office tracking).

the undersigned on January 20, 2016.³ 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. The Department was 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 § 5-19.1-1 *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 § 5-19.1-21 and if so, what sanction(s) should be imposed.

IV. TESTIMONY AND MATERIAL FACTS

Scott Campbell, Chief Compliance Officer, testified on behalf of the Department. He testified that a report was received regarding the Respondent stealing the drug, carisoprodol, in the amount of over 10,000 pills from the pharmacy where he worked. He testified that the pharmacy investigation included videoing the Respondent stealing said pills. See Department's Exhibits Two (2) (report of theft or loss of controlled substance by pharmacy to the Drug Enforcement Agency; Three (3) (chronology of the pharmacy's investigation into the thefts); and Four (4), (Pawtucket police department investigation and arrest report). He testified that the Respondent pled *nolo contendere* to a larceny misdemeanor in connection to the theft of the pills. See Department's Exhibit Five (5) (criminal history record). He testified that the Respondent's license expired on June 30,

³ Pursuant to R.I. Gen. Laws § 5-19.1-5, the Board of Pharmacy ("Board") delegated its authority to hear this matter to the undersigned.

2015, but that the Board's investigating committee and the Department both recommended revocation of License.

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. Statutes

R.I. Gen Laws § 5-19.1-21 provides in part as follows:

Refusal, suspension and revocation of licenses. – The board of pharmacy, with the approval of the director, may deny, suspend, revoke or otherwise discipline the licensee upon proof that:

(2) The licensee has violated any of the laws of this state or the United States relating to the practice of pharmacy, drugs, controlled substances, cosmetics, or nonprescription drugs, or has violated any of the rules and regulations of the board of pharmacy or has been convicted of a felony;

(6) The licensee's conduct is incompetent, or negligent which shall include, but not be limited to, any departure from or failure to conform to the minimal standards acceptable and prevailing pharmacy practice as determined by the board;

(8) The licensee has violated or permitted the violation of any provision of any state or federal law, rule or regulation governing the possession, use, distribution or dispensing of drugs, including, but not limited to, the violation of any provision of this chapter, chapter 28 of title 21, chapter 31 of title 21, or rule or regulation of the board;

(11) The licensee has engaged in unprofessional conduct by failing to maintain the standards of practice or by such other conduct as prescribed in regulation.

R.I. Gen. Laws § § 21-28-3.02 provides in part as follows:

Registration requirements. – (a) Every person who manufactures, distributes, prescribes, administers, or dispenses any controlled substance within this state or who proposes to engage in the manufacture, distribution, prescribing, administering, or dispensing of any controlled substance within this state, must obtain annually a registration issued by the director of health in accordance with his or her rules.

R.I. Gen. Laws § 21-28-3.12 provides as follows:

Records of controlled substances used in professional practice. – Every practitioner or other person who is authorized to administer or professionally use controlled substances shall keep a record of controlled substances received by him or her, and a record of all controlled substances administered, dispensed, or professionally used by him or her; other than by prescription.

D. Whether the Respondent Violated R.I. Gen. Laws § 5-19.1-21

Based on the pleadings, testimony at hearing, and exhibits at hearing, the following findings can be made. It is undisputed that the Respondent stole over 10,000 carisoprodol pills, a controlled substance, from the pharmacy where he worked. It is undisputed that the Respondent did not have a registration issued pursuant to R.I. Gen. Laws § 21-28-1 *et seq.* to dispense controlled substances. Thus, the Respondent violated R.I. Gen. Laws § 21-28-3.02 by not having a registration to dispense controlled substances when he stole over 10,000 carisoprodol pills. It is undisputed that the Respondent did not keep any records of said pills so he also violated R.I. Gen. Laws § 21-28-3.12.

Based on the Respondent's actions, he is in violation of R.I. Gen. Laws § 5-19.1-21(2) (violated laws related to practice of pharmacy), (6) (failure to conform to minimal standards by stealing said pills), (8) (violated provisions of R.I. Gen. Laws § 21-28-1 *et seq.*), and (11) (unprofessional conduct by stealing said pills).

VI. FINDINGS OF FACT

1. This matter arose pursuant to a Notice of Hearing issued to the Respondent on December 30, 2015 by Department.

2. A hearing was scheduled for January 20, 2016 at which time the Respondent did not appear at hearing.

3. As the Respondent was adequately notified of hearing, the hearing went forward. The Department rested on the record.

4. The Respondent stole over 10,000 carisoprodol pills from the pharmacy where worked.

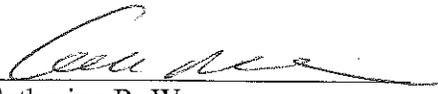
5. The Respondent's License expired on June 30, 2015.

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

VII. CONCLUSIONS OF LAW

Based on the forgoing, the Respondent's License has now expired; however, if the Respondent in future applies for another license, the facts and conclusions of this decision shall be considered in a decision to grant or deny such an application.

Entered this 4th day of February, 2016.

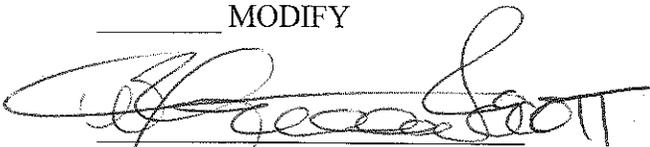

Catherine R. Warren
Hearing Officer

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

Dated: 2/11/16


Nicole Alexander-Scott
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 12 day of February, 2016 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail to Mr. Ephrain Rosario, 20 Lucas Street, Pawtucket, RI 02860 and by hand-delivery to Colleen McCarthy, Esquire, and Scott Campbell, Chief Compliance Officer, Department of Health, Three Capitol Hill, Providence, RI 02908

