

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

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**Department of Health  
Health Services Regulation  
Board of Nursing Assistants,**

**v.**

**Diana Calderon,  
Respondent.**

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**DOH Case No.: C16-925**

**DECISION**

**I. INTRODUCTION**

This matter arose pursuant to a Notice of Charges and Administrative Hearing (“Notice”) issued to Diana Calderon (“Respondent”) by the Department of Health (“Department”) on September 8, 2017. The Respondent holds a license (“License”) as a certified nursing assistant (“CNA”) pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.* A hearing was scheduled for October 5, 2017 at which time the Respondent did not appear at the 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 delivered to Respondent’s last known address by first class and certified mail.<sup>1</sup> Since the Respondent was adequately noticed of hearing, a hearing was held before the undersigned on October 5, 2017.<sup>2</sup> Additionally, Section

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<sup>1</sup> See testimony below.

<sup>2</sup> Pursuant to a delegation of authority by the Director of the Department of Health.

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 § 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 § 23-7.9-8 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") and if so, what is the appropriate sanction.

## **IV. TESTIMONY AND MATERIAL FACTS**

Robert O'Donnell, Lead Investigator, testified on behalf of the Department. He testified that the Department received a complaint in 2016 from the nursing agency for whom the Respondent worked stating that the Respondent failed to report to work for four (4) days in July, 2016 and failed to call her employer. See Department's Exhibits One (1); Two (2); and Three (3) (complaint).

J. Michel Martineau, CNA Board Manager, testified on behalf of the Department. He testified that the Department tried several times to contact the Respondent prior to sending the Notice. He testified that the address used for the Respondent was the Respondent's most recent address on record with the Department. See Department's Exhibits Four (4) (Notice and cover letter); Five (5) (Department's file notes); Six (6) (Department's case notes), and Seven (7) (United States Post Office tracking sheet confirming delivery of Notice by certified mail).

Margaret Clifton, Manager of the Board of Nursing, testified on behalf of the Department. She testified that the Respondent's action of not appearing for work was unprofessional and violated State statute and regulation and constitutes what is termed "patient abandonment."

## **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 and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2s 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.2s 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).

### **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 130m 34 (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**

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:

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(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;

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

(6) Any other causes that may be set forth in regulations promulgated under this chapter.

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:

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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;

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

The Department argued that the Respondent violated R.I. Gen. Laws § 23-7.9-8 by not appearing for work for four (4) days and not contacting her employer. The Department sought a reprimand of Respondent's License.

Based on the pleadings and the undisputed evidence, the Respondent did not appear for four (4) days for work and did not contact her employer. The Respondent's actions violated R.I. Gen. Laws § 23-17.9-8(2) (inconsistent with the health and safety of a patient); R.I. Gen. Laws § 23-17.9-8(5) (detrimental to health and safety of patient); and (6) (violates Section 6.1(f) of Licensing Regulation). The Respondent's actions also violated Section 6.1(b) (inconsistent with the health and safety of a patient); Section 6.1(e) (detrimental to health and safety of patient); and Section 6.1(f) (fails to conform to the standards of acceptable and prevailing practice) of the Licensing Regulation.

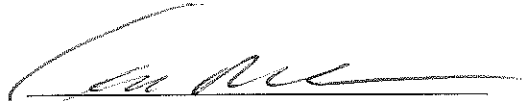
**VI. FINDINGS OF FACT**

1. The Respondent is licensed as a nursing assistant pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*
2. A Notice was sent by the Department to Respondent on September 8, 2017 to the Respondent's most recent address on record with the Department and it was delivered by the United States Post Office.
3. A hearing was scheduled for October 5, 2017 at which time the Respondent did not appear. As the Respondent had adequate notice of hearing, the undersigned held the hearing that day.
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 § 23-7.9-8(2), (5) and (6) and 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 a reprimand be imposed on Respondent's License.

Entered this day 16<sup>th</sup> October, 2017.

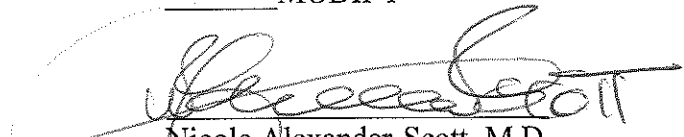
  
Catherine R. Warren, Esquire  
Hearing Officer

## **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

Dated: 11/14/17

  
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 § 42-15-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN 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 that on this 15 day of ~~October~~ November, 2017 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt request to Ms. Diana Calderon, 166 Garden Street, Number 3, Pawtucket, R.I. 02860 and by hand-delivery to Anita Flax, Esquire, and Michael Martineau, Board Manager, Department of Health, Three Capitol Hill, Providence, RI, 02908.