



Department of Health
Three Capitol Hill
Providence, RI 02908-5097
TTY: 711
www.health.ri.gov

Ms. Karen Tucker
40 Fairview Avenue
Cumberland, RI 02864

Re: Nursing Assistant License Application

March 2, 2018

Dear Ms. Tucker:

Attached is the Decision of Administrative Hearing Officer Catherine Warren dated March 1, 2018. Pursuant to R.I. Gen. Laws § 23-17.9-8, the Rhode Island Department of Health (RIDOH) accepts the Decision and grants your application for licensure with the following modifications:

1. Your license will be subject to a two-year probationary period during which your employer will be required to complete and submit quarterly Job Performance Progress Reports to RIDOH. The Report Form will be forwarded under separate cover.
2. You must complete three hours of continuing education courses. Additional requirements will be forwarded under separate cover.
3. You must advise RIDOH if you are arrested in any state for any reason.

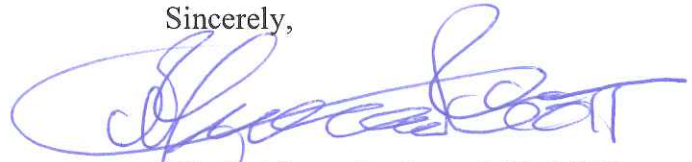
These modifications are based on a finding that there is substantial evidence in the record to support proof by a preponderance of the evidence that your explanation of the circumstances surrounding your arrest contradicted the corresponding police report. In addition, there is substantial evidence in the record to support proof by a preponderance of the evidence that you did not notify RIDOH of your conviction for driving on a suspended license on your license application. A plea of nolo contendere is an admission of guilt, and when you pled nolo contendere on April 24, 2015, you admitted sufficient facts to substantiate the charges in the police report.

As a physician, I have reservations about your performance as a nursing assistant because truthfulness is paramount in providing proper patient care. These modifications will allow RIDOH to monitor your job performance for your first two years of licensure to ensure patient safety.

This letter will serve as proof that you are now licensed as a nursing assistant.

If you have any questions, please contact Linda Esposito at 401-222-4998.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Nicole Alexander-Scott', with a large, stylized initial 'N'.

Nicole Alexander-Scott, MD, MPH
Director
Rhode Island Department of Health

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

Department of Health
Health Services Regulation
Board of Nursing Assistants,

v.

Karen Tucker,
Respondent.

DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of the Rhode Island Department of Health ("Notice") issued to Karen Tucker ("Respondent") by the Department of Health ("Department") on February 21, 2018 in response to the Respondent's application for a certified nursing assistant ("CNA") license ("License") pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*¹ A hearing was held before the undersigned on February 26, 2018.² The parties were represented by counsel and rested on the record.

¹ On January 26, 2018, the Department by letter informed the Respondent that her application had been denied, but the letter gave no basis for the denial except a generic statutory cite and informed the Respondent that she could request a hearing. See Department's Exhibit Six (6). Said letter stated, "[i]f desired, you may request a formal hearing, in writing, which will be conducted in accordance with the RI Administrative Procedures Act, R.I. Gen. Laws § 42-35-9." It should be noted that pursuant to R.I. Gen. Laws § 23-17.9-8 and R.I. Gen. Laws § 42-35-15, the Respondent as well as any applicant for a CNA license has a right to a hearing on a denial of application. Thus, the letter could have been more specific regarding the fact that an applicant has a right to a hearing and that a hearing would be scheduled on request and notice given in accordance with the requirements of a contested case in R.I. Gen. Laws § 42-35-9. Of course, the Department could choose in future to issue a denial in the form of a notice of intent to deny license application and provide notice of the denial and reasons for the denial and schedule a hearing without first issuing the generic denial letter.

² Pursuant to a delegation of authority by the Director of the Department of Health.

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 of the Department of Health Regarding Practices and Procedures Before the Department of Health* ("Hearing Regulation").

III. ISSUE

Whether the Respondent should be granted a License.

IV. TESTIMONY AND MATERIAL FACTS

Linda Esposito ("Esposito"), CNA Board Manager, testified on behalf of the Department. She testified that since the Respondent answered "yes" on her License application to the question about convictions or pleading to charges, the Department requested the Respondent come for a meeting. See Department's Exhibit Seven (7). She testified that there was a concern that the Respondent pled after a drug related arrest and CNA's interact with vulnerable people. She testified that Margaret Clifton who is the manager of the Nursing Board was at the meeting. She testified that the Respondent told them that she is no longer hanging around a bad crowd. She testified that the Respondent did not mention at the meeting driving on a suspended license and that was one of the charges she pled to. Esposito testified that the Respondent told her that cocaine had been found in her pocketbook and her passenger had put it there prior to her arrest. Esposito testified that after the meeting, she obtained a copy of the police report detailing Respondent's arrest in 2014 and it showed that the cocaine was found on her person and not in her pocketbook. She testified that the Respondent's application was mainly denied because she was not truthful about the arrest. She testified that truthfulness is very important because if one makes a mistake on the job, one needs to tell the truth so that licensing the Respondent could put patients at risk.

On cross-examination, Esposito testified that the Department denied the License application because \$20 cocaine was found on the Respondent's person and not in her pocketbook. She testified that at the meeting, the Respondent did not mention the suspended license and she, Esposito, listens for omissions. She testified that when she met with the Respondent, she, Esposito, had the criminal background check ("BCI") that showed the suspended license plea. She testified that she did not speak with the police officer who wrote the report. On questioning from the undersigned, she clarified that her testimony was that she had the Respondent's BCI prior to the meeting, and she did not ask the Respondent about the suspended license plea at the meeting.

Margaret Clifton ("Clifton"), Board of Nursing Manager, testified on behalf of the Department. She testified that because of the Respondent's positive BCI, the Respondent was asked for an explanation. She testified that after she and Esposito met with the Respondent, they saw the police report and the Respondent's story did not agree with the police report. She testified that after looking at the police report, they decided to deny the application as a CNA needs to be truthful about patients.

On cross-examination, Clifton testified that she did not speak to the police officer who wrote the report. She testified that she saw the suspended license charge when she met with the Respondent, but did not ask her about that because usually suspended licenses are not known about until the person is pulled over. She testified that she would agree when one has people involved in an incident, one would want to hear from everyone involved.

The Respondent testified on her behalf. She testified that in 2014, she was pulled over by the police and after being charged, she ended up pleading *nolo contendere* to two (2) misdemeanor charges. She testified that she had worked ten (10) 10 to 12 years in the healthcare field with no complaints. She testified that she was working as a home healthcare aide at a nursing home, and

took training classes after work to become a CNA. She testified that she enjoys working with the elderly and helping them and can do more with a CNA license. She testified that she did not lie at the meeting with the Department. On cross-examination, she testified that gave out aspirin as a home care health care aide.

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 (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 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:

- (1) Upon proof that the nursing assistant is unfit or incompetent by reason of negligence, habits, or other causes.

D. Arguments

The Department argued that the Respondent's license application should be denied because the purpose of the Department is to protect patients and not to let people fulfil their dreams. The Department argued that there is a discrepancy between the police report and the Respondent's story. The Department argued that this is not about drugs, but the Respondent's credibility.

The Respondent argued that the statutory basis for the denial is a catchall provision and there is no proof of lying. She argued that no one at the Department spoke to the police officer and just because her version is different does not make her a liar. The Respondent argued that she has not been convicted as she pled *nolo contendere* to a misdemeanor followed by probation³ and medication aides can receive licenses even with felony drug convictions.⁴

³ See R.I. Gen. Laws § 12-18-3.

⁴ While the Respondent has not applied for a medication aide endorsement and has not been convicted of a felony involving controlled substances, this argument by analogy referred to Section 3.2(d) of 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") which allows the Department to grant medication aide licenses within its discretion to those with felony drug convictions.

E. Whether Respondent Should be Granted a License

On November 9, 2017, the Respondent submitted her application for a CNA license. She disclosed her arrest and plea to the Department on her CNA application. See Department's Exhibit One (1). After receiving her application, the Department emailed her on January 10, 2018, asking her to come in to discuss her application. The Department did not indicate in its correspondence that it was concerned over her arrest or plea, but merely asked her to come in to discuss her application. See Department's Exhibit Seven (7). At the time of the meeting, the Department had in its possession the Respondent's BCI showing the plea to the misdemeanor charges and knew that she had pled *nolo contendere* to driving on a suspended license, but did not ask her about that charge. After the meeting, by letter dated January 26, 2018, the Respondent was informed her application was denied and she could request a hearing. See Department's Exhibit Six (6).

The Respondent currently holds a temporary license as a CNA which is due to expire on March 3, 2018. She is currently employed as a CNA by a nursing home.⁵ On her application for a job at that nursing home, the Respondent disclosed her arrest and plea. See Respondent's Exhibit A-1. The nursing home has employed her as a CNA and its staff submitted letters of recommendation on her behalf. See Respondent's Exhibits D-1, D-6, and D-7 (letters from nursing home staff attesting to the Respondent's abilities and professionalism).

The Respondent pled *nolo contendere* to two (2) misdemeanor charges: visiting a common

⁵ After the hearing, the Respondent requested that the Department extend her temporary license or issue a revocable license or that an interlocutory order be entered pending a full decision being entered. The Department indicated that there was no statutory authority to extend the temporary license and refused to issue a conditional license in relation to the Respondent's application for License pending the issuance of the decision. The Department argued that the Respondent's motion was not allowed by Section 7.2 of the Hearing Regulation; however, such a request is allowed by Section 8.4 of the Hearing Regulation. Rather than issue an interlocutory order, the undersigned chose to issue this full decision.

nuisance⁶ and driving with a suspended license.⁷ She was given one (1) year of probation and ordered to be screened for substance abuse and 25 hours of community service for the common nuisance and fined for the suspended license.

The Notice provided two (2) reasons that the Department denied the License. The Notice indicated in paragraph seven (7) that the Respondent's explanation at the meeting with the Department contradicted the police report where the cocaine had been found and the Department indicated in paragraph eight (8) that the Respondent failed to include her criminal conviction for driving with a suspended license in her explanation attached to her application and during her meeting.

While the Respondent pled to visiting a common nuisance, she had been arrested for the possession of two (2) pieces of \$20 rock cocaine. See Department's Exhibit Two (2) (police report). The police report indicated that the cocaine was found in the Respondent's sweatshirt. The police report indicated that marijuana was found in the Respondent's pocketbook. The Respondent told the Department that the cocaine was in her pocketbook. The Respondent explained in her application that the cocaine was put in her pocketbook by a passenger in the car.

⁶ R.I. Gen. Laws § 21-28-4.06(b)(3) provides in part as follows:

Prohibited acts F — Places used for unlawful sale, use, or keeping of controlled substances.
(a) Any store, shop, warehouse, building, vehicle, aircraft, vessel, or any place which is used for the unlawful sale, use, or keeping of a controlled substance shall be deemed a common nuisance.

(b) Any person who violates this section with respect to:

(3) Knowingly visiting a common nuisance as described in subsection (a) for the purpose of using or taking in any manner any controlled substance may be imprisoned for not more than one year and fined not more than five hundred dollars (\$500).

⁷ R.I. Gen. Laws § 31-11-18(a) provides in part as follows.

Driving after denial, suspension, or revocation of license.

(a) Any person who drives a motor vehicle on any highway of this state who never applied for a license, or who drives after his or her application for a license has been refused, or after his or her license has expired, or who otherwise drives without a license, or at a time when his or her license to operate is suspended, revoked, or cancelled, for reasons other than those provided for in § 31-11-18.1, may be guilty of a misdemeanor.

On the basis of the issue of where the cocaine was found, the Department concluded that the Respondent would lie about her patients.

The Department did not speak to the police officer. The police report mentions marijuana being found in the Respondent's pocketbook. It could be that the police accidentally switched where the cocaine and marijuana were found in the police report or it could be that the Respondent switched in her memory where the drugs were found. Whichever is the explanation, the Department is missing the bigger picture.

Question 10 of the Department's application (Department's Exhibit One (1)) asks as follows:

Have you ever been convicted of a violation, plead (sic) *Nolo Contendere*, or entered a plea bargain to any federal, state or local statute, regulation, or ordinance or are any formal charges pending?" **If you answer yes and do not provide a detailed explanation, your application will not be processed.**

R.I. Gen. Laws § 23-17.9-8(3) provides that the Department may deny a CNA application for a felony conviction. The Department's application asks a broader question about conviction or pleas to any charges. The Respondent does not have a felony conviction. She pled *nolo contendere* to State misdemeanor charges. In determining the fitness of an applicant for license, administrative agencies routinely consider whether an applicant has pled *nolo contendere* to criminal charges regardless of the disposition of the charges. And indeed, in some licensing statutory schemes, consideration can be given by an agency to the criminal conduct underlying the action regardless of whether there was a conviction in determining the fitness of an applicant. See *Reis v. Hittner*, 2002 WL 220777 (R.I. Super. 2002). However, in this matter, the Department is not concerned with the underlying actions - the drugs - but rather the credibility of the Respondent and based its denial on her explanation of those charges.

The Respondent did not hide her arrest or charges or plea. She did not lie on her application

to the Department on question ten (10) even if she could have argued that it was not a felony conviction as required by statute. She did not lie on her application to her current employer regarding her plea and answered "yes" when asked if she ever had been convicted of a crime.

Esposito testified that since the Respondent did not mention the suspended license plea at the meeting, there was a problem of credibility. The Respondent did not hide the suspended license issue which occurred at the same time as the arrest in 2014. Both pleas arose out of the same traffic stop about which she provided information on her application. The Department had a copy of the BCI at the meeting and did not ask about the suspended license. Presumably at the meeting, the Respondent spoke of what she considered the more serious charge regarding drugs. The Department could have asked her about the suspended license, but chose not to. One Department witness thought that the suspended license was important and the other witness did not think it was important.

Because there is a discrepancy between the written police report and the Respondent's representation of where the drugs were found, the Department argued that the Respondent was not truthful. However, the Respondent was truthful on her application to the Department and disclosed her BCI activity and *nolo contendere* pleas. She was truthful on her application to her nursing home employer regarding her pleas. The Respondent did not conceal or hide in 2014 arrest or her *nolo contendere* pleas from the Department. In addition, the Respondent provided references from her former and current employees as to her commitment, professionalism, and abilities.

Based on the foregoing, the Department did not demonstrate by preponderance of evidence that the Respondent's credibility is an issue. The Department did not demonstrate by a preponderance of evidence that the Respondent was unable to perform the duties of a CNA.⁸

⁸ At hearing, the Department raised other issues regarding what it perceived as credibility issues even though none of these reasons were detailed in the Notice. The Department raised the issue of whether the Respondent still owed any fees to the Court. The Respondent testified that she thought that the fees had been waived. The Department provided evidence of a payment plan going into 2019 between the Respondent and the Court for payment of fees. See Department's Exhibit Nine

The Department argued that if the License is granted then conditions should be imposed. However, the reasons for denial were credibility and the Department has not proved by a preponderance of evidence that the Respondent is untruthful. Since there is no evidence that the Respondent is untruthful, there is no reason to grant a License with conditions.

Based on the foregoing, the Department did not prove that the Respondent's application for License should be denied.

VI. FINDINGS OF FACT

1. The Respondent applied to be licensed as a certified nursing assistant pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*
2. A Notice was forwarded to the Respondent on February 21, 2018.
3. A hearing was held on February 26, 2018. The parties were represented by counsel who rested on the record.
4. The facts contained in Section IV and V are reincorporated by reference herein.


(9). There was no evidence that the Respondent had any overdue fees to the Court. The police report did not contain the names of the passengers in the car (they were redacted) and the Department attempted to argue that the Respondent was still hanging around with this crowd despite what she said at the meeting. The Department also argued that the Respondent was living with a convicted drug dealer. "Other reasons" in R.I. Gen. Laws § 23-17.9-18(1) is a catchall in the denial statute and certainly the Department can deny an applicant who is untrustworthy, but the Department's arguments regarding a "bad crowd" is not a statutory reason for denial and is purely speculative. The Department also raised the issue at hearing of the Respondent's description in her application to the nursing home in which she mentioned her job duties as a home health care aide included dispensing medicine (a medication aide endorsement on a CNA license is required to dispense medicine. See R.I. Gen. Laws § 23-17.9-2 and Licensing Regulation). The Respondent testified that she was referring to handing out aspirin and such when she worked as a home health care aide. There was no evidence that the Respondent's actual tasks when working as a home care health aide were activities for which a medication aide endorsement is required.

In addition, the Department raised the issue that in testimony at hearing the Respondent referred to being pulled over for a suspended license which was the charge resulting from the traffic stop rather than being pulled over for expired plates. See Department's Exhibit Two (2) (police report). Such colloquial language in describing the traffic stop does not make the Respondent untruthful.

VII. CONCLUSIONS OF LAW

Based on the foregoing, the undersigned recommends that Respondent be granted the License.

Entered this day 15th March, 2018.


Catherine R. Warren, Esquire
Hearing Officer

ORDER

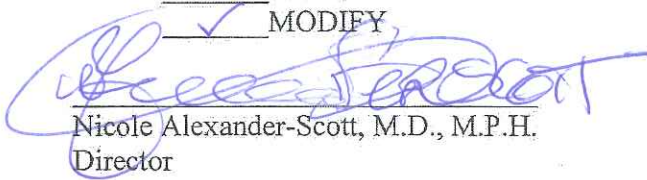
I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

 ADOPT

 REJECT

 ✓ MODIFY

Dated: 3/2/18


Nicole Alexander-Scott, M.D., M.P.H.
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 ____ day of March, 2018 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and electronic delivery to Scott J. Summer, Esquire, Calart Tower, Suite 3A, 400 Reservoir Avenue, Providence, RI 02907 (sjs@lawyerscollaborative.com) and by electronic delivery to Anita Flax, Esquire, Department of Health, Three Capitol Hill, Providence, RI, 02908.