

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

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**In the Matter of:**

**Nathaly Lagos,**

**Respondent.**

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**Board of Pharmacy**

**DECISION**

**I. INTRODUCTION**

This matter arose pursuant to a Notice of Administrative Hearing issued to Nathaly Lagos (“Respondent”) by the Board of Pharmacy (“Board”) on April 19, 2012. Pursuant to R.I. Gen. Laws § 5-19.1-1 *et seq.*, the Respondent applied for a pharmacy technician II license (“License”) and the Board denied the application for License. A hearing was held before the undersigned<sup>1</sup> on May 4, 2012. The parties rested on the record. The Board was represented by counsel and the Respondent was *pro se*.

**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 *Rules and Regulations of the Rhode Island Department of Health Regarding Practices and Procedures Before the Department of Health and Access to Public Records of the Department of Health* (“DOH Regulation”).

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<sup>1</sup> Pursuant to R.I. Gen. Laws § 5-19.1-5, a hearing officer may conduct hearings on behalf of the Board.

### **III. ISSUE**

Whether the Respondent should be denied a License pursuant to R.I. Gen. Laws § 5-19.1-21(a) and (b).

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

Patrick S. Kelly, PharmD, RPh ("Kelly"), Chief/Compliance and Regulatory for the Board, testified on behalf of the Board. He testified that that the Respondent submitted an application for License that indicated she had a DWI (driving while intoxicated) that had been expunged when the DWI had not been expunged and her birth date was different than the birth date on the police report for the DWI. He testified that the Respondent met with the Board and indicated she was under 18 for the DWI but then acknowledged she was an adult for the DWI.

Johnathan Mundy, RPh ("Mundy"), Chair of the Board, testified on behalf of the Board. He testified that the Board spoke with the Respondent prior to deciding to deny her application. He testified that the Board was concerned about the false information on her application and felt she had been concealing information about her criminal conviction. He testified that a pharmacy technician I license is tied to the licensee's employer but a pharmacy technician II license is portable and based on a national certification so the licensee can move between pharmacies. He testified that the denial was for the Respondent's pharmacy technician II application and the denial was consistent with past Board denials.

The Board called the Respondent to testify. She testified that she had DWI when she was eighteen (18) and she did write on one (1) application that she was born in 1988

instead of 1989 so she accidentally made a mistake over her birth year. She testified that she did not think she had misled the Board over her age at her DWI.

The Respondent testified on her behalf. She testified that she took a nine (9) month course at the Lincoln Technical Institute in pharmacy, performed an externship at CVS as a pharmacy technician I, and then obtained her national certificate as a pharmacy technician by passing the examination. See Respondent's Exhibit One (1) (copy of her national certification). She testified that the DWI was a misdemeanor.<sup>2</sup> She testified that she made a mistake about DWI as she thought it would automatically be expunged and also expressed confusion over the difference between expunged and disposed.

## 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

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<sup>2</sup> There was no dispute that this conviction was a misdemeanor.

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 licensees. – The board of pharmacy, with the approval of the director, may deny, suspend, revoke or otherwise discipline the licensee upon proof that:

(1) The license was procured through fraud, misrepresentation or deceit;

(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.

#### **D. Arguments**

In closing, the Board argued that it was appropriate to have concerns over the Respondent's application because of the incorrect information given and the Respondent should have remembered that she had just turned 18 prior to the DWI but that the undersigned should be fair in considering this matter. In closing, the Respondent admitted that she made an error but argued that she has demonstrated commitment to her career by becoming nationally certified and would like a chance to continue in the career.

#### **E. Whether the Respondent Should be Licensed**

Prior to the application for License by the Respondent that the Board is concerned with, the Respondent submitted an application to the Board to be a pharmacy technician I for her externship for her program at Lincoln Technical School. See Board's Exhibit Six (6). This application was received by the Board on February 7, 2011. Question 12 of the application asks as follows:

Have you ever been convicted of a violation, plead Nolo Contendere (sic), or entered a plea bargain to any federal, state or local statute, regulation, or ordinance or are any formal charges pending?

In response to that question, the Respondent wrote "misdemeanor/DUI/1<sup>st</sup> offense/disposed." She wrote that the DWI was in December, 2007 (the day is not asked for on the application). This is the correct month and year of the DWI arrest. See Board's Exhibit Five (5) (police report). In the February, 2011 application, the Respondent gave the correct year for her birth year, 1989.

A few months later in about May, 2011, the Respondent submitted another pharmacy technician I license application to the Board. See Board's Exhibit Three (3). In this application, the Respondent gave the wrong birth year (the month and day are

correct) of 1988 rather than 1989. She also wrote in response to question 12 regarding convictions, "DUI – expunged." She gave the same year and month for the arrest as her February, 2007 application which is the correct year and month. The Board forwarded the Respondent a letter dated June 21, 2011 indicating that the Board was denying her application based on the false information regarding her age and DWI conviction. See Board's Exhibit One (1) (June 21, 2011 letter).

In about February, 2012, the Respondent submitted another application but this time for a pharmacy technician II license as she is now nationally certified. See Board's Exhibit Four (4). On this application, the Respondent entered her correct birth year. In response to Question 12 regarding convictions, she wrote "RI-DUI" (but provides the wrong month and year as January, 2008 though that is presumably the date of arraignment rather than the arrest). She included in this application that she had been previously denied a license by the Board because of her alleged falsification in her response to the criminal conviction question. (Thus, the Respondent responded accurately to question 13(3) regarding previous license application denials). The Board issued a letter dated February 21, 2012 denying the License application (See Board's Exhibit Two (2)) and this hearing arose from said denial.

Said statute provides for denial of license on the basis of a felony conviction. The Respondent was not convicted of a felony so the DWI conviction itself is not grounds for denial of license. Thus, the Respondent cannot be denied the License pursuant to R.I. Gen. Laws § 5-19.1-21(2). However, the circumstances regarding her truthfulness of her applications raised understandable concerns from the Board pursuant to R.I. Gen. Laws § 5-19.1-21(1).

The Respondent testified that she accidentally put the wrong birth year down on her second application to the Board. While most people have their birth years ingrained in their mind, the Respondent's wrong year of 1988 did not make her younger at the time of the DWI but rather made her one (1) year older. She had the correct year in her first application in February, 2011 so had not initially made a mistake or tried to look younger.

More importantly is the issue of the DWI. The Board was concerned that the Respondent was concealing the DWI by writing it was expunged in her second application. However, her first application (that was granted) fully detailed the DWI and did not omit it. Presumably the first application would be the time to omit such information rather than the second application. In her second application, she wrote she had a DWI but that it was expunged. A person with an expunged conviction may legally answer "no" to any employment question application about a criminal conviction. See R.I. Gen. Laws § 12-1.3-4. Thus, if the Respondent really believed her conviction had been expunged, she could have answered "no" to question 12.

Instead, the Respondent answered "yes" but indicated it had been expunged when a few months earlier, she had written "disposed" on her application. Thus, while she indicated the wrong status of the conviction, she did reveal the conviction in her second application. It may be that she does not understand the difference between disposed or expunged or it could be that she thought the DWI was a traffic offense under R.I. Gen. Laws § 31-41.1-10 which are automatically expunged though her conviction for DWI would not fall under said provision. The fact remains that whatever her reasons for writing "expunged," she included the DWI in her second application.

In denying the Respondent's application for License, the Board was understandably concerned regarding the Respondent's answers on her second application. A pharmacy technician is required to have good character, work under the supervision of a licensed pharmacist, and assist the pharmacist. There is no dispute that the Respondent completed training required for a pharmacy technician I and II.<sup>3</sup> The completion of her pharmacy training and especially obtaining the national certification demonstrates a commitment to this career.<sup>4</sup>

In light of the Respondent's testimony at hearing and the evidence presented regarding her February, 2011 application and the fact that she included the DWI on the May, 2011 application although with the wrong status, the Respondent has demonstrated that she has met the criteria for licensing subject to the following conditions:<sup>5</sup>

1. Upon commencement of employment by the Respondent, the Respondent shall notify the Board within ten (10) days as to the name and address of her employer and the date she started her employment. If the Respondent changes employers during this probationary period, the Respondent shall notify the Board within ten (10) days as to the name and address of her new employer and the date she started her employment there.
2. Respondent shall inform the Department in writing within ten (10) days of any criminal charges brought against her.
3. The Respondent must pay all statutory or regulatory licensing fees, comply with all other statutory requirements, and submit an updated application, if determined to be necessary by the Board.

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<sup>3</sup> See the Department of Health's *Rules and Regulations Pertaining to Pharmacists, Pharmacies and Manufacturers, Wholesalers and Distributors*.

<sup>4</sup> Mundy testified that said national certification is not easily obtained.

<sup>5</sup> Upon questioning from the undersigned, Mundy testified that the Board has previously issued conditional licenses.

4. Assuming no change in the circumstances, the Respondent's probationary period will expire on June 30, 2013.

If additional information comes to the Board's attention regarding this matter that was not known at the time of this hearing, the Board may take action depending on the nature of the information.

If the Respondent fails to comply with these conditions of licensing, this may result in administrative action being taken against Respondent's License.

#### **VI. FINDINGS OF FACT**

1. On or about February, 2012, the Respondent applied for a pharmacy technician II license.

2. By letter dated February 21, 2012, the Board denied the Respondent's application for License.

3. A Notice of Administrative Hearing was issued on April 19, 2012.

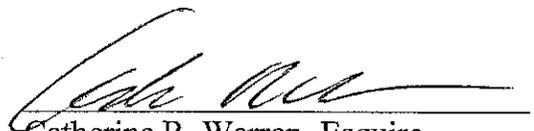
4. A full hearing on this matter was held on May 4, 2012 with the parties resting on the record.

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

#### **VII. CONCLUSIONS OF LAW**

Based on the forgoing, the Respondent demonstrated that she has met the criteria for licensing subject to the conditions set forth above.

Entered this day 21<sup>st</sup> May, 2012.

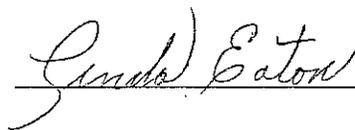
  
Catherine R. Warren, Esquire  
Hearing Officer

**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 21<sup>st</sup> day of May, 2012 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail to Ms. Nathaly Lagos, 130 Lincoln Avenue (3<sup>rd</sup> floor), Central Falls, RI 02863 and by hand-delivery to Stephen Morris, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.

  
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