

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,	:	
	:	DOH Case No.: 18-1291
v.	:	
	:	
Debra Good,	:	
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of Hearing and Specification of Charges (“Notice”) issued to Debra Good (“Respondent”) by the Department of Health (“Department”) on December 12, 2018 and February 8, 2019. The Respondent holds a registration (“Registration”) as a certified nursing assistant (“CNA”) pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.* On January 3, 2019, the Department issued a Compliance Order and Summary Suspension of Nursing Assistant License to the Respondent.¹ A hearing was held on June 12, 2019 with both parties represented by counsel who rested on the record. The Respondent appeared for the hearing but left before the start of the hearing choosing to allow her lawyer to represent her at hearing.

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 216-RICR-10-05-4 *Practices and Procedures Before the Rhode Island Department of Health Regulation*.

¹ See Department’s Exhibits Seven (7) and 11 (Notices) and Exhibit Nine (9) (Summary Suspension).

III. ISSUE

Whether the Respondent violated R.I. Gen. Laws § 23-17.9-8 and 216-RICR-40-05-22 *Nursing Assistants, Medication Aides, and the Approval of Nursing Assistant and Medication Aide Training Programs* (“Licensing Regulation”)² and if so, what is the appropriate sanction.

IV. MATERIAL FACTS AND TESTIMONY

The Respondent’s patient (“Patient”) testified on behalf of the Department.³ She testified that she is paralyzed from the chest down so has no feeling from the chest down. She testified she has some feeling in each arm. She testified that she cannot tell if someone is touching her from the chest down unless she sees it. She testified that the Respondent worked as a CNA for her from May to July, 2018. She testified that on one occasion in July, 2018, she and the Respondent went to the movies and the Respondent took her (Respondent) shoes off and with her bare feet went up and down her (Patient) legs and whispered to her like they were on a date. She testified that she could see her legs being rubbed by the Respondent’s feet. She testified that the Respondent would not let her pay for the movie.

The Patient testified that while Respondent was her CNA, the Respondent tried to kiss her including trying to kiss her on the mouth with her tongue, but she, the Patient, turned her head away so it would land on her cheek. She testified that the Respondent told her, the Patient, that she, the Respondent, loved her. She testified that she told the Respondent that she was not interested as her husband just died and she was not interested in women and the Respondent told her she had not tried it. She testified that the Respondent gave her clothes and money.

² This regulation was amended and recodified pursuant to R.I. Gen. Laws § 42-35-5 effective July 12, 2018. The actions in this matter took place from May to October, 2018. There is no difference in the substance of the current and prior regulation’s provision prohibiting unprofessional conduct.

³ For privacy, the Respondent’s patient and witness in this matter shall be referred to by Patient in this decision.

The Patient testified that when the Respondent would give her a sponge bath, the Respondent told her to shut her eyes and relax and no other CNA told her that. She testified one time she opened her eyes and the Respondent's head came up from her (Patient) breast and she (Patient) could not understand how the Respondent's head had gotten there. She testified that when the Respondent bought herself a new bra, the Respondent had taken it off and jiggled her breasts at her. She testified one time when the Respondent had cleaned her peri area, there was bleeding and she never had that with any other CNA. She testified another time when she was having a sponge bath, she opened her eyes and her arm was on the Respondent's chest and there would be no reason for why it was there. She testified that once another CNA shaved her in the pelvic area, and the Respondent got mad because someone else had done that.

The Patient testified that she told another CNA about the Respondent's behavior and that that CNA told the CNA agency, and the Respondent was dismissed. After the Respondent was dismissed, the Patient testified that the Respondent came to her house and begged for a second chance and she (Patient) said no. She testified that she reported this behavior because the Respondent might do this type of behavior with someone who could not speak and she was concerned about her safety.

On cross-examination, the Patient testified that the Respondent's actions that she described she saw with her own eyes. She testified that when they went to the movies, they were in the front and the Respondent was in the chair next to her and the Respondent could not have accidentally bumped her with her feet. She testified that she could not remember what the Respondent whispered. She testified that when she told the other CNA about the Respondent's actions, she did not mention the kissing or the movie since she did not tell her everything. She testified that the Respondent came about once a week on Fridays for a total of about 20 times. She testified that

the Respondent wanted her to visit the Respondent at her home. She testified that for the sponge baths, the Respondent did not ask her to close her eyes right away but did as time went by. She testified that other CNAs do sponge baths in parts so that one is not totally naked the entire time in that they will do the top and then put the clothes back on and then do the bottom. She testified that the Respondent would have her be totally naked for the sponge baths. She testified that the Respondent used rubbing lotion on her which is when the head and breast incident occurred, and the Respondent did not need to get close to her like that to put on the lotion as her (Patient) bed rises. She testified that the breast incident occurred after the movie outing.

The Patient testified that she has eight (8) CNAs in a week and it is very hard to replace them as the agency does not have CNAs to do what she needs done. She testified that when the Respondent's actions got too bad, she complained. She testified that the bleeding occurred after she was cleaned by the Respondent, and she noticed it later and that had never happened before. She testified that she did not have a rash because she is checked several times a day for a rash. She testified that she did not report the bleeding and does not know what happened. She testified that she did not remember asking the agency about what to report to the police.

Margaret Clifton, Director of Nursing, testified on behalf of the Department. She testified that based on the Patient's testimony, the Respondent overstepped her boundaries. She testified that a CNA is to take care of a patient and not develop personal relations with patients, take them out, or buy gifts for them. She testified that kissing, gift giving, and entering a romantic relationship were all unprofessional and that would have been taught at CNA training. She testified that the Department learned on January 2, 2019 that the Respondent was looking for another job which is why the Department issued the Summary Suspension. On cross-examination, she testified that there were boundary issues and there are differences between some of those issues and sexual

assault. She testified that a CNA should maintain a professional relationship and the Department's role is to protect the public. See Department's Exhibits One (1) (Respondent's licensing history); Two (2) and Three (3) (complaints from CNA agency about Respondent filed with Department on October 10, 2018); Four (4) (October 16, 2018 Pawtucket Police report); Five (5) and Six (6) (Department forwarded complaint to Respondent and her reply); and Eight (8) (complaint from RI District Court, pretrial services, January 2, 2019). See also Respondent's Exhibit One (1) (audio recording of Patient's interview with Department).

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. Relevant Statute and Regulation

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:

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

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

Section 22.6 of the Licensing Regulation provides as follows:

A. Pursuant to R.I. Gen. Laws §§ 23-17.9-8 and 23-17.9-9, and upon a decision after a hearing as provided in accordance with the Rhode Island Administrative Procedures Act and the Rules and Regulations Pertaining to Practices and Procedures Before the Rhode Island Department of Health (Part 10-05-4 of this Title), the Department may deny, suspend, or revoke a license issued under this Part, or may reprimand, censure, or otherwise discipline an individual who has been found guilty of violations of the Act or this Part in any of the following cases:

2. Upon proof that the nursing assistant or medication aide 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. Arguments

The Department argued that it proved by a preponderance of evidence that the Respondent engaged in unprofessional conduct including initiating a personal relationship, attempting to kiss the Respondent, and providing gifts to the Respondent. The Department argued that it is not trying to prove sexual assault but rather unprofessional conduct. The Department argued that the absence of the Respondent at hearing worked to her disadvantage. The Department seeks a two (2) year suspension of the Respondent's Registration and in order to be reinstated, the Respondent would have to see a psychiatrist within 60 days of any decision and to follow any of the psychiatrist's recommendations (e.g. counseling, therapy).

The Respondent argued that she had been a CNA for over 17 years. She argued that the Patient's testimony was inconsistent with her interview with the Department and her statements to the CNA agency and police. She argued that the Respondent denied any wrongdoing and was just trying to be nice to the Patient. The Respondent argued that a suspension is too harsh, but she would be willing to undergo counseling and the Registration should be reinstated.

E. Whether Respondent Violated R.I. Gen. Laws § 23-17.9-8 and/or Licensing Regulation

The parties stipulated that the Respondent pled not guilty to two (2) counts of felony sexual assault and one (1) count of misdemeanor simple assault. However, the Department's Notice is not predicated on whether the Respondent is convicted of such charges but whether the Respondent engaged in unprofessional conduct. It may be that some of the Respondent's actions could be considered criminal but the hearing is concerned with whether the Respondent violated statutory and regulatory requirements.⁴

⁴ While the Department issued a Summary Suspension after the Notice was issued, the issue is not whether the Summary Suspension should have been issued but whether as stated in the Notice, the Respondent violated the relevant statute and regulation and if so, what should be the sanction.

The Patient testified at hearing that when she first mentioned the Respondent's actions to another CNA, she did not explain everything that happened. During her interview with the Department, she indicated that she did not say everything that happened when she first reported it to the agency because it was hard to think about it. Her interview with the Department contained the same information she testified to at hearing: the Respondent telling the Patient that she loved her, Respondent attempting to kiss the Patient, the gifting of clothes by Respondent, the Respondent lifting her shirt and jiggling her breasts, the cleaning of the peri area and the bleeding but not knowing why, the naked sponge baths and closing of eyes and opening her eyes to see the Respondent's head coming up from her breasts, Respondent being mad that someone else shaved the Patient's peri area, and the trip to the movies where Respondent rubbed the Patient's legs. See Respondent's Exhibit One (1). The testimony is also consistent with the police report. See Department's Exhibit Four (4).

The fact that the Patient did not explain everything that happened when she first mentioned what was happening to another CNA does not make her testimony inconsistent. Rather her testimony was consistent with her prior statements and she explained more when she was asked about it. In her interview, she explained how she had not been as explicit at first because it was hard to think about. The Respondent's testimony was not contradicted by any other testimony at hearing.

The United States Constitution's Fifth Amendment privilege against self-incrimination may be properly invoked in a civil proceeding regardless of whether there is a pending criminal matter arising out of the same set of factual circumstances. *Tona v. Evans*, 590 A.2d 873 (R.I. 1991), citing *Kordel*, at 7-8. See also *Simeone v. Charron*, 762 A.2d 442 (R.I. 2000); and *Pulaski v. Pulaski*, 463 A.2d 151 (R.I. 1983). However, a negative inference may be drawn against a party

who refuses to testify. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Furthermore, “an inference may be drawn against a party in a civil case who declines to answer questions or to testify in a civil case.” *Pulawski v. Pulawski*, 463 A.2d 151, 156 (R.I. 1983). See also *Flint v. Mullen*, 499 F.2d 100 (1st Cir. 1974), *cert. den.* 419 U.S. 1026 (1974); and *Rhode Island v. Cardillo*, 592 F. Supp. 655 (R.I. 1984).

The Respondent did not testify at the hearing. She appeared at the Department prior to the hearing but left at the start of the hearing. Thus, while she did not assert her Fifth Amendment rights, she chose not to appear at the hearing and for her attorney to proceed without her. Thus, a negative inference may be drawn from her failure to testify.⁵

Based on the foregoing, the Respondent violated R.I. Gen. Laws § 23-17.9-8 and the Licensing Regulation by engaging in such activities as telling the Respondent she loved her, trying to kiss her, rubbing her legs without consent, gifting clothes and money, and exposing herself.

F. Conclusion

The Respondent’s actions violated R.I. Gen. Laws § 23-17.9-8(1) (unfit or incompetent because of negligence, habits, or other causes) and (5) (conduct detrimental to health and safety of patient). The Respondent’s actions also violated Section 22.6.1(A)(2) (unprofessional conduct) of the Licensing Regulation.

The Respondent provided in-home care to a partially paralyzed patient. She crossed numerous professional boundaries with the Patient from taking her to the movies to gifting clothes

⁵ The drawing of a negative inference from the Respondent’s failure to testify is also supported by the “Empty Chair Doctrine” which can be invoked in a civil matter but not in a criminal proceeding. *State v. Taylor*, 581 A.2d 1037 (R.I. 1990). It is a rule of jurisprudence that states that if a party in a contested legal proceeding fails to call a readily available witness who would normally be expected to testify to a material issue, the fact-finder may presume that if the witness did testify, the evidence would have been prejudicial to the party’s cause. *Belanger v. Cross*, 488 A.2d 410 (R.I. 1985); and *Retirement Board of Employees’ Retirement System v. DiPrete*, 845 A.2d 270 (R.I. 2004). See also *Benevides v. Canario*, 301 A.2d 75 (R.I. 1973) (doctrine is to be applied with caution so that as a condition precedent to its invocation there must be a showing of the missing witness’s availability to the person who would be expected to produce the witness).

and money to rubbing her legs and trying to kiss her and saying she loved her. Her activities cannot be explained by a misplaced attempt at friendship as it was more than just going to a movie (which is not allowed for a CNA to patient) or the giving of gifts of clothes and money to a patient (also not allowed) but also included the Respondent trying to kiss the Patient and touching the Patient when unwarranted by any care needs.

The Department sought a two (2) year suspension of Registration and the requirement for the Respondent see a psychiatrist within 60 days of any decision and to follow any recommendations (e.g. counseling, therapy) in order to be reinstated. However, in light of the nature of the Respondent's violations (especially against a very vulnerable patient in her own house), I recommend that the Respondent's Registration be revoked. If the Respondent, in future, seeks to re-apply for a CNA registration, the Respondent will have to provide proof of a psychiatric evaluation to the Department and show whether the psychiatrist made any recommendations and whether she followed such recommendations.⁶

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. The Notice was issued by the Department to Respondent on December 12, 2018 and February 8, 2019 to the Respondent.
3. On January 3, 2019, the Department issued a Compliance Order and Summary Suspension of Nursing Assistant License to the Respondent.
4. A hearing was held on June 12, 2019. Both parties were represented by counsel who rested on the record. The Respondent appeared for the hearing but left before the start of the

⁶ At the time of any future application, the Department may request any other information it feels is necessary to make a decision regarding licensure and it could decide to deny the application or grant the application with conditions, etc.

hearing choosing to allow her lawyer to represent her at hearing.

5. The Patient's testimony was uncontradicted at hearing.

6. The Respondent's actions included trying to kiss the Patient, touching her without consent when not needed for care, telling her she loved her, and gifting her clothes and money.

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

VII. CONCLUSIONS OF LAW

Based on the foregoing, the Respondent violated R.I. Gen. Laws § 23-7.9-8(1) and (5) and violated Section 22.6(A)(2) of the Licensing Regulation and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that Respondent's Registration be revoked. If the Respondent, in future, seeks to re-apply for a CNA registration, the Respondent will have to provide proof of a psychiatric evaluation to the Department and show whether the psychiatrist made any recommendations and whether she followed such recommendations.⁷

Entered this day 18th July, 2019.



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: July 9th, 2019


Ana Novais, ^{Deputy} ~~Acting~~ Director
~~Director~~

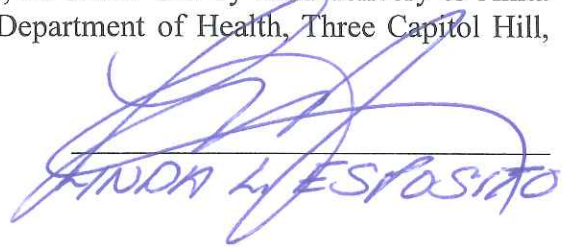
⁷ *Id.*

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 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 10th day of July, 2019 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail to Felicia A. Manni-Paquette, Esquire, Azzinaro, Manni-Paquette, PC, 353 Armistice Blvd., Pawtucket, RI 02861 and by hand-delivery to Anita Flax, Esquire, and ~~Linda Esposito, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.~~


LINDA L. ESPOSITO