

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,

C14-0546

v.

Donna J. Lecuivre,
Respondent.

DECISION

I. INTRODUCTION

This matter arose pursuant to an Immediate Compliance Order (“Order”)¹ issued on July 7, 2014 and a Hearing on Immediate Compliance Order (“Notice”) issued on July 18, 2014 to

¹ R.I. Gen. Laws § 23-1-20 provides as follows:

Compliance order. – Whenever the director determines that there are reasonable grounds to believe that there is a violation of any law administered by him or her or of any rule or regulation adopted pursuant to authority granted to him or her, the director may give notice of the alleged violation to the person responsible for it. The notice shall be in writing, shall set forth the alleged violation, shall provide for a time within which the alleged violation shall be remedied, and shall inform the person to whom it is directed that a written request for a hearing on the alleged violation may be filed with the director within ten (10) days after service of the notice. The notice will be deemed properly served upon a person if a copy of the notice is served upon him or her personally, or sent by registered or certified mail to the last known address of that person, or if that person is served with notice by any other method of service now or later authorized in a civil action under the laws of this state. If no written request for a hearing is made to the director within ten (10) days of the service of notice, the notice shall automatically become a compliance order.

R.I. Gen. Laws § 23-1-21 provides as follows:

Immediate compliance order. – Whenever the director determines that there exists a violation of any law, rule, or regulation within the jurisdiction of the director which requires immediate action to protect the health, welfare, or safety of the public or any member of the public, the director may, without prior notice of violation or hearing, issue an immediate compliance order stating the existence of the violation and the action he or she deems necessary. The compliance order shall become effective immediately upon service or within the time specified by the director in the order. No request for a hearing on an immediate compliance order may be made.

R.I. Gen. Laws § 23-1-22 provides as follows:

Donna J. Lecuire (“Respondent”) by the Department of Health (“Department”). The Respondent holds a registration (“Registration”) as a certified nursing assistant (“CNA”) pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.* The Order ordered Respondent to immediately cease and desist from acting as a CNA. A hearing was held on July 30, 2014. The Department was represented by counsel and the Respondent was *pro se*. The parties 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 § 23-17.9-8 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, whether the Immediate Compliance Order shall continue in force.

IV. TESTIMONY AND MATERIAL FACTS

Ashley Pietros testified on behalf of the Department. She testified that she has been a CNA for five (5) years and she worked for an agency (“Agency”) and as part of her duties, she

Hearing. – If a person upon whom a notice of violation has been served under the provisions of § 23-1-20 or if a person aggrieved by any notice of violation requests a hearing before the director within ten (10) days of the service of notice of violation, the director shall set a time and place for the hearing, and shall give the person requesting a hearing at least five (5) days written notice of the hearing. After the hearing, the director may make findings of fact and shall sustain, modify, or withdraw the notice of violation. If the director sustains or modifies the notice, that decision shall be deemed a compliance order and shall be served upon the person responsible in any manner provided for the service of the notice in § 23-1-20. The compliance order shall state a time within which the violation shall be remedied, and the original time specified in the notice of violation shall be extended to the time set in that order.

The Department issued an Immediate Compliance Order. No hearing can be requested on an Immediate Compliance Order. In this matter, the Department offered the Respondent a chance for a hearing. This matter will be treated as a hearing on a Compliance Order as well as an Immediate Compliance Order as the Department issued the Immediate Compliance Order ordering the Respondent to stop acting as a CNA.

assisted a disabled boy (“M.A.”) in the morning at his home. She testified that she cared for M.A. for two (2) years and helped him get up in the morning, shower and dress, and get ready for school. She testified that M.A.’s family consisted of parents, three (3) girls, and M.A. and one of the girls was also disabled. She testified that the Respondent worked for another agency and assisted the disabled girl (“N.B.”) in the morning. She testified that two (2) of the children were foster children and the mother’s name was Jackie. She testified that N.B. is unable to speak, communicates by crying, has limited mobility, and uses a wheelchair but is unable to control the wheelchair herself so someone has to push it. She testified that the Respondent was friendly with the N.B.’s foster mother, Jackie, and Jackie would babysit the Respondent’s baby.

Pietros testified that on June 24, 2014,² she arrived about 7:00 a.m. and the Respondent arrived about 7:15 a.m. She testified that when she arrived the mother, Jackie, was aggravated with N.B. because N.B. had been up all night crying. She testified that Jackie put a rag in N.B.’s mouth and N.B. cried. Pietros testified that she took M.A. to the bathroom and got him showered, dressed, and teeth brushed. She testified that when they came out of the bathroom, N.B. was in her wheelchair but the rag was still in her mouth. She testified that Jackie took the rag out of N.B.’s mouth but N.B. cried so that Jackie shoved it back in. Pietros testified that N.B. could not take the rag out herself because she cannot control her limbs. She testified that Respondent was there and probably helping her own baby. She testified that this occurred in the room that N.B. and M.A. share so she, M.A., Respondent, Jackie, and N.B. were all in the room. She testified that Jackie and the Respondent then took N.B. out of the wheelchair and put her on the blanket with the rag still in her mouth and N.B. started choking and vomited and the rag fell out. She testified that N.B. was positioned “Indian style” with her waist bent and her face went

² The parties agreed that the two (2) dates at issue are June 24, 2014 and June 25, 2014. Pietros may have referred to the two (2) dates as being in July but the parties agreed that they were in June.

in the vomit. She testified that Jackie did nothing but the Respondent moved N.B. out of the vomit. She testified that she thought the Respondent would report Jackie's mistreatment of N.B. to her agency as it was her patient's mistreatment.

Pietros testified that she went back to M.A.'s the next day and arrived about 7:00 a.m. and followed her same routine to assist M.A. She testified that the Respondent came at 7:15 a.m. and she (Pietros) was surprised to see the Respondent. She testified that Jackie was again aggravated with N.B. because N.B. had been up all night crying. She testified that N.B. was sleeping and Jackie and the Respondent rushed to get N.B. out of bed so they could put her downstairs in the cellar and Jacqui was yelling at N.B. She testified that she recorded Jackie's and Respondent's interactions with N.B. and identified the voices heard on the recording. See Department's Exhibit Two (2) (recording).

The recording was played at the hearing.³ On the recording, Jackie, the Respondent, N.B., the Respondent's baby, and the television can be heard. The dialogue includes as follows:

Jackie: She needs to know she is yelling at nothing. Give her something.

Respondent: I'll tell her to straighten her arms out.

Jackie: That's the way I look at it.

N.B. is crying during this and then Jackie says "That's it . . . now you have something to yell about." The Respondent's baby is crying and N.B. is crying and the television is on and then Jackie mentions getting something and putting "her" somewhere "and be all done with her." And then Jackie says something about she needs to have a reason to yell as "she yells for nothing at all."

³ The recording was played at about 21 minutes in the hearing recording.

Pietros testified that Jackie and the Respondent were trying to get N.B. out the bed and she was resisting. She testified that Jackie said she would give N.B. something to cry about and Respondent suggested straightening N.B.'s arms and Jackie straightened N.B.'s arms for the purpose of causing N.B. to cry and the Respondent was watching. Pietros testified that she realized they planned to put N.B. in the cellar so they did not have to listen to her when Jackie said to put her down and be all done with her. She testified that M.A. was in the room and witnessed this. She testified Jackie and Respondent carried N.B. to the top of the stairs and put her on the chairlift and took her downstairs and left her there with the doors shut and lights off. She testified it was about 8:10 a.m. and she stayed another 45 minutes until she was done and N.B. was downstairs the remainder of the time.

Pietros testified that she went back to work and reported what happened to her Agency, to the police, and the Department of Children, Youth, and Families ("DCYF"). She testified that she understood that she had a duty to report what happened as well she had been trained by her Agency to report abuse. She testified that she had a good relationship with Jackie and that she had been there two (2) years and if Jackie had been dissatisfied with her, she could have contacted the Agency and she (Pietros) would have been reassigned. There was no cross-examination.

Rosemary Sheets, Chief Investigator, testified on behalf of the Department. She testified that the Department received the Agency complaint, made an investigation, and issued the Immediate Compliance Order. See Department's Exhibits Five (5) (Immediate Compliance Order); Three (3) (Department complaint intake form), and Four (4) (Agency complaint).

The Respondent testified on her behalf. She testified that on June 24, 2014 she arrived at N.B.'s house at 7:00 a.m. and Pietros was not there. She testified that Pietros had not been

coming and Jackie had been complaining to Pietros' Agency about Pietros not showing up. She testified that N.B. does not cry but yells out for "attention or what but she does that all the time."⁴ The Respondent testified that on that day, she washed N.B. and put her in the hi-low chair to play with her toys and to watch television. She testified that N.B. can move when she wants to but is lazy. She testified that Pietros was late coming in and left early that day.

The Respondent testified that the next morning N.B. was sleeping and N.B. had to go to the doctor. She testified that they had to wake her up for the doctor. She testified that N.B. was in her bed when Pietros came out of the bathroom where she had been cleaning M.A. and Pietros said she thought M.A. needed to go the bathroom. She testified that Jackie pulled down M.A.'s pants and he had dried poop on his backside so Jackie yelled at Pietros for not cleaning M.A. She testified that Pietros left shortly after that and N.B. was not even out of her bed yet on that day. The Respondent testified that she and Jackie put N.B. in her chairlift and put her outside the house and N.B. watched the other two (2) children blow bubbles.

The Respondent testified that they do range of motion exercises with N.B. and she always moans and can move her arms since she is not contracted or anything. She testified that the week prior to the days in questions, Jackie and Pietros argued because Pietros was coming in late. She testified that DCYF did not indicate her for child abuse. See Respondent's Exhibit One (1) (DCYF letter that found she was unfounded for "institutional abuse and neglect/ other institutional neglect").⁵

On cross-examination, the Respondent testified that she provided care on June 24 and 25, 2014 to N.B. She testified that Pietros was there both days but she was late both days.

⁴ Approximately 37 minutes in the hearing recording.

⁵ The undersigned took administrative notice that such a notice indicates that DCYF found that Respondent's actions do not meet the definition of abuse for "institutional abuse and neglect/other institutional neglect."

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. 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:

(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;

(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 Licensing 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:

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

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. Arguments

In closing, the Department argued that Pietros had no motive to lie about the events. The Department argued that the recording showed Jackie saying she was going to give N.B. something to cry about and the Respondent participated in the abuse and witnessed it and did not report what she saw. The Department argued that the Respondent violated R.I. Gen. Laws § 23-17.9-8(2), (5), and (6) and Sections 12.1(b), (e), and (f) of the Licensing Regulation. The Department argued that the Order was issued because the Respondent was an immediate threat to the public and that after this hearing, the Order should be kept in effect until this matter can go before the Board of Nursing Assistants.

In closing, the Respondent argued that nothing happened and Pietros was just mad at Jackie because Jackie had called the Agency.

E. Whether the Respondent Violated R.I. Gen. Laws § 23-17.9-8

While the Respondent's action may not have fallen under the DCYF definition of institutional abuse, the issue is whether the Respondent's actions violated her statutory and regulatory obligations as a CNA and if so, whether these actions constitute a threat to the public.

The testimony at hearing is that Jackie stuffed a rag into her foster daughter's mouth to stop her crying and ignored her when the girl vomited and her face fell into the vomit. The Respondent's testimony did not address the rag testimony but rather was that Pietros was late to work and Jackie was mad at her. Thus, the Respondent's explanation of June 24th was that Pietros was getting back at Jackie.

The Respondent never addressed the recording made on the second day. While she testified that N.B. received range of motion exercises, the recording clearly was not of therapy being given to N.B. for movement of the limbs. Rather Jackie yelled that she was going to give

N.B. something to cry about, the Respondent suggested moving her arms, and Jackie did that saying that she was giving N.B. something to cry about and Jackie commented favorably when N.B. was crying. The Respondent provided no explanation of what was going on in the recording. Her failure to provide an explanation leads to the conclusion that she did not seem to think anything untoward was happening to N.B. Again her explanation of what happened was that Pietros was late that day and her accusation was to get back at Jackie.

It may be that Jackie did not like Pietros. However, Jackie had not asked the Agency to reassign Pietros. Pietros did not make up the recording that she made of Jackie, the Respondent, and N.B. The Respondent did not offer any explanation of the recording. The only explanation that can be inferred from the recording was that Jackie was mistreating N.B. and Respondent participated and failed to report it.

The Respondent's action of watching how Jackie treated N.B. in terms of the rag and then suggesting the arm straightening so that N.B. had something to cry about and watching Jackie and participating in the actions that were recorded and not reporting it violates R.I. Gen. Laws 27-17.9-8(2), (3), and (5) and Sections 6.1(c), (e), and (f) of the Licensing Regulation. The Respondent's actions violated the statute and Licensing Regulation because they are inconsistent with her patient's health and safety and are detrimental to her patient's health, welfare, and safety and fail to conform to the standards of acceptable and prevailing practice.

The Department has requested that the Immediate Compliance Order stay in effect because of the threat to the public safety. There was no explanation given at hearing by the Respondent to find otherwise. Thus, the Immediate Compliance Order should stay in effect until the Board has had a chance to meet and make a recommendation and any further administrative proceedings are concluded.


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 Department issued an Immediate Compliance Order on July 7, 2014.
3. A hearing notice on the Immediate Compliance Order was issued on July 18, 2014.
4. A hearing was held on July 30, 2014. The parties rested 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 violated R.I. Gen. Laws § 23-17.9-8(2), (5), and (6) and violated Sections 6.1(b), (e), and (f) of the Licensing Regulation. The Immediate Compliance Order should stay in effect until the Board has had a chance to meet and make a recommendation and any further administrative proceedings are concluded.


Entered this day 14th August, 2014.

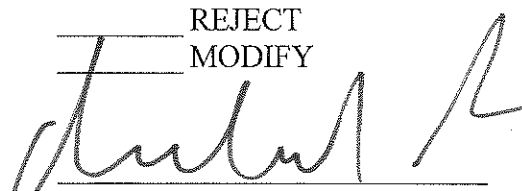

Catherine R. Warren, Esquire
Hearing Officer

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: 
15 August 2014


Michael Fine, 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 § 42-35-15, 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 18 day of August, 2014 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail to Ms. Donna Lecuire, 13 McNiff Street, West Warwick, RI 02893 and by hand-delivery to Amy Coleman, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.

ARLINE MARON