

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,	:	
	:	
	:	DOH Case No.: 19-0897
v.	:	
	:	
Erika Mesa De Acosta,	:	
Respondent.	:	

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**DECISION**

**I. INTRODUCTION**

This matter arose pursuant to a Notice of Hearing and Specification of Charges (“Notice”) issued to Erika Mesa De Acosta (“Respondent”) by the Department of Health (“Department”) on August 13, 2019 and October 21, 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.* A hearing was held on November 19, 2019. 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 216-RICR-10-05-4 *Practices and Procedures Before the Rhode Island Department of Health Regulation*.

**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”) and if so, what is the appropriate sanction.

#### IV. MATERIAL FACTS AND TESTIMONY

Linda Esposito, the CNA Board (“Board”) manager, testified on behalf of the Department. She testified the Department received a complaint regarding the Respondent from the Respondent’s employer (a CNA agency) that employed the Respondent as a CNA. She testified the Department investigated the complaint and received a second letter from the employer and the police report. See Department’s Exhibits Four (4) (employer complaint); Five (5) (further information from employer); Six (6) (Providence Police report); and Seven (7) (Respondent’s patient’s statement).

The Respondent testified on her behalf. She testified that she had worked with the patient (“Patient”) since August, 2018, and she and the Patient did not get along and she, the Respondent, had asked her employer to change her hours. She testified that the Patient authorized her to make purchases at different stores, service payments, shipments to the Dominican Republic, rent payments, and to withdraw money from the bank. She testified that she did those tasks so that there would be no inconvenience between her and the Patient. She testified once the accusations happened about the Patient’s credit card, she was fired from the agency and questioned. She testified she told the police that she never touched the Patient’s credit card without the Patient’s authorization. She testified she agreed to pay the money back to the Patient to avoid any charges and she thought it would ensure she would keep her job and not lose her license. She testified she is to pay \$20 a week to the Patient, and she has paid \$280 so far. She testified that she was accused of charging PayPal and Groupon to the Patient as listed on the bank statement contained in the police report. She testified that she is paying the Patient back because she did not want to lose her job, not because she took the money. See Respondent’s Exhibit One (1) (her explanation provided to Department prior to hearing).

## 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;

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(3) Upon proof that the nursing assistant has been convicted in a court of competent jurisdiction, either within or without this state, of a felony;

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(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:

1. Upon proof of any of the cases stated in R.I. Gen. Laws §§ 23-17.9-8(1) through 23-17.9-8(5)

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.

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6. Upon proof that the nursing assistant or medication aide has participated in a physical or financial relationship with a patient. Consent of the patient shall not constitute a defense against the violation of § 22.6(A)(10) of this Part.

**D. Arguments**

The Department argued that the Respondent was not credible as she told the agency a different story than she told the police. See Department's Exhibit Five (5). The Department argued that the Patient said she never allowed the Patient to use her credit card. The Respondent argued that she did not steal and wants to keep her license.

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

The Notice stated that "the conduct described in paragraph three [unauthorized charges by Respondent] constitutes conduct subject to disciplinary proceedings pursuant to R.I. Gen. Laws § 23-17.9-8(3) and the Rules and Regulations promulgated thereunder." R.I. Gen. Laws § 27-17.9-8(3) provides that a licensee may be disciplined for being convicted in a court of competent jurisdiction of a felony. The Respondent has not been convicted of felony so there are no grounds under R.I. Gen. Laws § 27-17.9-8(3) to impose discipline on the Respondent. The Notice also cited that the Respondent's conduct was subject to discipline pursuant to the rules and regulations promulgated thereto. That would be the Licensing Regulation which references that violations of the disciplinary statute are regulatory violations as well prohibiting financial relationships between a CNA and a licensee. *Supra*.

The Patient never appeared on behalf of the Department nor did any witness appear who had actually spoken to the Patient testify. Instead, the Department submitted a written statement from the Patient stating that she never allowed the Respondent to have access to her bank account for her personal use or allowed her to make Groupon or PayPal purchases. See Department's Exhibit Seven (7).

The Respondent testified that all the items that she paid/purchased were on behalf of the Patient. The Patient's statement indicated that the Patient did not give permission for the

Respondent to use the credit card for her personal use. There was no evidence that the Respondent had not been allowed to use the card to pay for items for the Patient. The items for which the Respondent is reimbursing the Patient are PayPal charges (two (2)) of \$226.00<sup>1</sup> and Groupon charges (four (4)) of \$396.19 for a total of \$622.19. See Department's Exhibit Six (6). The Respondent testified that she has so far paid \$280.00. Therefore, she still owes the Patient \$342.19. At \$20.00 at week, she should complete the payments within approximately four (4) months.<sup>2</sup>

The employer complaint indicated the Patient received items in the mail that she had not ordered and she checked her bank statement and found unauthorized charges so she reported it to the CNA agency and that the Respondent first denied making the charges and then admitted to making the charges. The complaint further stated that the Patient did not want to press charges and accepted reimbursement instead. See Department's Exhibits Four (4) and Five (5).

The Respondent's testimony was that any payments she made using the Patient's bank card were approved by the Patient. It is hard to evaluate the Patient's account of the events without either the Patient or someone who spoke to the Patient. However, the documentation is that the Patient did not authorize the Groupon and Paypal payments that the Respondent is currently repaying.

The Department argued that it would be a violation if the Respondent had taken gifts from the Patient even if authorized by the Patient. See Section 22.6(A)(6) of the License Regulation. The Respondent testified that she was authorized to make payments on behalf of the Patient. The Respondent testified that all the charges were authorized by the Patient. She apparently told the

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<sup>1</sup> A review of the bank charges showed two (2) PayPal charges that total \$225.89 which must have been rounded off to \$226.00 for purposes of repayment. The police report indicates a total of \$723.81 charges; however, the CNA agency complaint stated that the Patient found \$622.19 in unauthorized charges which is the total of the PayPal and Groupon charges.

<sup>2</sup> The Respondent testified that she is supposed to pay \$20.00 a week, but due to her financial circumstances has paid the Patient as she can afford it. However, assuming the Respondent paid on the weekly schedule since the hearing, she would be finished within about four (4) months (17 payments) of the hearing.

police she did not touch the Patient's credit card but then admitted she made the charges. However, it is unclear whether her explanation to the police was that she did not touch the credit card because she believed she never made unauthorized charges on the card or if she meant she never made any charges and then changed her story to making authorized charges. It is also unclear if she meant that the Patient had authorized her to make those charges for the Patient's use or for her, the Respondent's, use. If the Patient had authorized those charges for the Respondent's use even with the Patient's consent that would be a financial relationship with the Patient by the Respondent so would be in violation of Section 22.6(A)(6) of the License Regulation.

While the Respondent has not been charged and is making restitution to the Patient, it can be inferred from the evidence that there was unprofessional behavior by the Respondent. The Patient apparently allowed the Respondent to make payments for the Patient on the card. But the Respondent either believed that she could use the card for herself when there was in fact no permission to do so (and even if there was permission, it is a regulatory violation to use it for herself) or she availed herself to the card knowing she should not use it. Thus, the Respondent is in violation of Section 22.6(A)(2) by engaging in unprofessional behavior.

**F. What is the Appropriate Sanction**

A review of prior Department discipline finds a variety of sanctions on a CNA depending on the type of circumstances relating to theft or misappropriation of property or fraudulent use of a credit card or bank check.

In some circumstances, suspension of a CNA registration of various lengths was imposed. For theft (jewelry and jewelry and cash respectively) a three (3) year suspension of license was imposed. *Rachel A. Gervais*, C16-424 (6/17/16); and *Sandra A. Blais*, C15-1260 (6/29/16). For the theft of a wallet, credit card, and subway tickets, a CNA was suspended for two (2) years but

that was lifted after approximately one (1) year and she was reinstated with a one (1) year probation license with reporting requirements and could not work at community facilities. *Suzanne Billington*, C07-708 (7/28/08). The theft of a wallet resulted in a five (5) year suspension. *Yolanda Denson* (4/4/03). The theft of over \$3,000 from a patient resulted in a three (3) year suspension of registration. *Deborah Ann Carter*, C09-558 (11/12/09). A CNA who admitted to using a patient's card to purchase \$1,200 worth of items for herself received six (6) months suspension, then one (1) year of probation with the condition of supervised work and no working in home care and no overnight shifts. *Carleen Mosca*, C07-672 (4/8/09). In *Cassandra Lee Gonzalez*, C13-476 (3/10/14), a CNA who stole three (3) blank checks from a patient's check book and cashed approximated \$1,600 received a two (2) year suspension as did *Angela Kelly*, CO07-215 (6/29/07) for forging and cashing a patient's check for a total of \$1,225. A CNA who stole jewelry and a cell phone received a three (3) year suspension. *Daniel Leonard Pepper*, C09-713 (1/15/100). A CNA who used a patient's credit card to fraudulently charge \$11,000 to \$12,000 received a two (2) year suspension of license. *Celena Alexis McClinton*, C07-425 (1/28/08). A CNA who pled *nolo contendere* to larceny of less than \$500 for the theft of \$220 from a patient received a one (1) year suspension. *Norma L. Stomberg*, C07-599 (7/28/08). The theft of a patient's ring resulted in at least a six (6) month suspension and one (1) year probation. *Melody Soria*, C07-297 (9/30/08).

In some situations, instead of suspension, the CNA was placed on probation. A CNA who pled *nolo contendere* to taking \$50 from a patient was place on probation for one (1) year and prohibited from working in home care and required to work under supervision and take continuing education. *Stacy Lynn DelBonis* A.H. C12-670 (3/28/13). The misappropriation of property of an employer resulted in one (1) year of probation with the condition of taking certain remedial continuing education and providing work performance reports. *Iola Caranda* (5/4/98). For



another case of misappropriation of property of a patient, the same conditions but two (2) years of probation were imposed for *Violet Williams* (12/14/99). For *Vito Traskauskas* (11/29/99), the misappropriation of property from a patient resulted in three (3) years of probation and certain continuing education requirements and no home care work. In *Pamela Beaver*, (12/1/99), the CNA misappropriated property from a patient and the three (3) year suspension was stayed for three (3) years of probation subject to providing performance evaluations, working under supervision, and taking certain continuing education classes. A CNA that was charged with a felony of obtaining money under false pretenses was put on two (2) years of probation subject to working under supervision and no working in home care and providing work reports. *Dawn Chappell*, C07-053 (8/7/07). A CNA who was charged with embezzlement received one (1) year of probation conditioned on no home care and providing quarterly reports. *Maria Fernandes*, (7/16/04). In *Nicole Santagata*, C06-346 (8/7/07), the CNA was given a credit card to buy merchandise at the market (for the patient) and purchased gas for herself. She pled *nolo contendere* to fraudulent use of a credit card. She received two (2) years of probation subject to working with supervision and no home care and had to provide reports.

Other cases resulted in reprimands and no probation. In *Ana Paula Silva*, C13-480 (1/6/14), the CNA received a reprimand for taking \$20 from a patient and admitting to it. A CNA who twice stole money from a patient received a reprimand and the requirement that she work in a supervised environment and no home care work. *Kathryn Louise Tucker*, C08-425 (1/29/09).

In other matters, CNA registrations have been revoked when a theft is proven and the licensee fails to appear to contest the action. *Amanda LaChappelle*, C17-2-71; C18-098 (9/20/19); and *Jessica Dutra*, AH File No. (HSR) 2005-24 (9/8/05). However, in *Robin D. Pinkerton*, A.H.

File No. (HSR) 2005-6 (5/25/05), the CNA did not contest the matter and received a two (2) year suspension for stealing \$75.00 from a patient's room.

More recently, a CNA who made unauthorized withdrawals from a patient's account and was found by the state police to be in possession of the patient's check book received a six (6) month suspension of license and was required to complete continuing education in legal rights, patient rights, and ethics as approved by the Board and provide proof of completion before she would be allowed to renew her registration. *Jenay Amos*, C18-0584 (7/9/18). Additionally, a CNA who took a winning lottery ticket in the amount of \$300.39 from her patient and cashed it received a 90 day suspension. *Breanna Northup*, C19-0982 (10/16/19).

In reviewing these various sanctions, many of them were agreements between a licensee and the Department wherein the licensee admitted to the violations. Nonetheless, they are instructive in structuring the appropriate sanction for the Respondent.

Here the Respondent has been licensed since 2017. See Department's Exhibit One (1). There was no evidence introduced of any prior sanctions. The Respondent has not been licensed that long and it important she understand her role as a CNA. The Respondent disputed that her actions had not been authorized. It is important that the Respondent understand her role going forward as a CNA. She has agreed to repay the disputed charges. In structuring the appropriate sanction, matters *Amos*, *Northup*, and *Santagata* provide a basis for imposing the following sanctions:

1. The Respondent shall take continuing education in Legal Rights, Patient's Rights, and Ethics from a provider approved by the Board. The classes shall total at least 12 hours. These classes shall be in addition to any in-service/continuing education class required to renew the Respondent's Registration.

2. The Respondent's Registration shall be suspended for at least 90 days from the execution of the date of this decision.

3. The Respondent's Registration can be reinstated upon proof to the Board of the following:

- a. Completion of the continuing education classes.
- b. Completed repayment to the Patient.
- c. Completion of the 90 day suspension. If the Respondent cannot comply with "a" and "b" prior to 90 days, the suspension shall run until both those requirements are met.

4. Upon renewal of her registration, the Respondent shall be on probation for one (1) year during which time she must provide monthly reports by the first of each month to the Department indicated where she is employed.

#### **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 August 13, 2019 and October 21, 2019 to the Respondent.


3. A hearing was held on November 19, 2019. The Department were represented by counsel. The Respondent was *pro se*. The parties rested on the record.

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

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

Based on the foregoing, the Respondent 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 the discipline as outlined above be imposed on the Respondent's Registration

Entered this day 12<sup>th</sup> December, 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: 12/16/19

  
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 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<sup>th</sup> day of December, 2019 that a copy of the within Decision and Notice of Appellate Rights was sent by electronic delivery and by first class mail and certified mail, return receipt requested to Ms. Erika Mesa De Acosta, 90 Potters Avenue, Apt. 3, Providence, R.I. 02905 and by hand-delivery to Anita Flax, Esquire, and Linda Esposito, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.

  
LINDA ESPOSITO