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.: C15-094**
v.	:	91 7199 9991 7032 8168 4340
Eunice Xavier, **Respondent.**	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Administrative Hearing Notice ("Notice") issued to Eunice Xavier ("Respondent") by the Department of Health ("Department") on December 2, 2015. The Respondent holds a license ("License") as a certified nursing assistant ("CNA") pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq*. A hearing was scheduled for December 22, 2015 at which time the Respondent did not appear at hearing. Pursuant to Section 5.6 of the *Rules and Regulations of the Department of Health Regarding Practices and Procedures Before the Department of Health* ("Hearing Regulation"), service may be made by hand-delivery or first class mail and service is complete upon mailing, even if unclaimed or returned, when sent to the last known address of the party. In this matter, the Notice was sent to the Respondent's last known address by first class and certified mail.[1] Since the Respondent was adequately noticed of hearing, a hearing was held before the undersigned on

[1] Arlene Hartwell, Board manager for Certified Nursing Assistants, testified that the Notice was sent to the Respondent's last known address with the Department. See Department's Exhibits Four (4) and Five (5) (Notice sent by first class and certified mail and United States Post Office online tracking sheet respectively).

December 22, 2015.[2] Additionally, Section 12.9 of the Hearing Regulation provides that a judgment may be entered based on pleadings and/or evidence submitted at hearing by a non-defaulting party. The Department was represented by counsel who rested on the record.[3]

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, what is the appropriate sanction.

IV. TESTIMONY AND MATERIAL FACTS

Robert O'Donnell, Investigator, testified on behalf of the Department. He testified that the Department received information that the Respondent had confessed to taking jewelry from a client and that she had provided a written statement to the police that she had taken jewelry from a client. He testified that the Respondent pled *nolo contendere* to larceny over $1500 in connection with these thefts which is a felony. See Department's Exhibits One (1)

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

[3] After the hearing was held, the Respondent appeared at the Department later in the day. At that time, both the Department's attorney and the undersigned spoke to her and indicated that a second day of hearing could be scheduled for her to testify or that she could speak to the Department's attorney about another type of resolution. On December 22, 2015, the Department contacted the undersigned in writing and asked her to confirm how she should would like to proceed by December 31, 2015. The Respondent did not contact the Department or the undersigned before December 31, 2015. On January 4, 2016, the Department's attorney again contacted the Respondent in writing asking her to confirm her intention by January 8, 2016. The Respondent did not contact the Department or the undersigned by January 8, 2016. To date, the Respondent has not contacted the Department nor the undersigned. Therefore, the decision is being issued on the basis of the hearing.

(Warwick police report); Two (2) (arrest report); and Three (3) (background criminal information for Respondent).

Arlene Hartwell, Board manager for Certified Nursing Assistants, testified on behalf of the Department. She testified that the Board and the Department recommended revocation of License.

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

a) upon proof that such nursing assistant and/or medication aide is unfit or incompetent by reason of negligence, habits or other causes;

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

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

In closing, the Department argued that the Respondent's actions of stealing jewelry from a patient in her care violated R.I. Gen. Laws 27-17.9-8 and Section 6.1 of the Licensing Regulation.

The undisputed evidence shows that the Respondent stole jewelry from a patient in her care. The Respondent's action of stealing money from a patient in her care violated R.I. Gen. Laws § 23-17.9-8(1) (unfit by reason of habits (theft)); (2) (inconsistent with the health and safety of a patient); (5) (detrimental to the health and safety of a patient in her care); and (6) (violates Section 6.1(f) of Licensing Regulation). The Respondent's action also violated Section 6.1(a) (unfit by reason of habits (theft)); (b) (inconsistent with the health and safety of a patient); (e) (detrimental to the health and safety of a patient in her care); and (f) (fails to conform to the standards of acceptable and prevailing practice) of the Licensing Regulation.

VI. FINDINGS OF FACT

1. The Respondent is licensed as a certified nursing assistant pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*

2. A Notice was sent by the Department to the Respondent on December 2, 2015 to the Respondent's most recent address on record with the Department.

3. A hearing was scheduled for December 22, 2015 at which time the Respondent did not appear. As the Respondent had adequate notice of hearing, the undersigned held the hearing that day.

4. 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(1), (2), (5), and (6) and violated Sections 6.1(a), (b), (e), and (f) of the Licensing Regulation and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that the Respondent's License be revoked.

Entered this 4th day of February, 2016.

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: 2/11/16

Nicole Alexander-Scott, 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 12 day of February, 2016 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt requested to Ms. Eunice Xavier, 13 Winter Street, Cumberland, RI 02864 and by hand-delivery to Colleen McCarthy, Esquire, and Arlene Hartwell, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.