

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,	:	C18-0557A,B,C,D
	:	
v.	:	
	:	
Francisco Rodrigues,	:	
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to a Summary Suspension of Nursing Assistant License (“Summary Suspension”) dated May 9, 2018 and Notice of Hearing dated June 13, 2018 and issued to Francisco Rodrigues (“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.* A hearing was held on November 8, 2018 in regard to whether the Summary Suspension should have been issued. A decision was issued on December 4, 2018 finding that the Summary Suspension should stay in effect pending any further disciplinary action. On January 30, 2019 a Notice of Hearing and Specification of Charges was issued the Respondent by the Department in regard to the violations alleged in the Summary Suspension. A full disciplinary hearing was held on January 30, 2019. Both parties were represented by counsel and 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 216-RICR-10-05-4 *Practices and Procedures Before the Department of Health*.

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”)¹ and if so, what is the appropriate sanction.

IV. TESTIMONY AND MATERIAL FACTS

The Board rested on its testimony from the Summary Suspension hearing. That testimony is summarized as follows.

Margaret Clifton (“Clifton”), Director of the Board of Nursing, testified on behalf of the Department. She testified that the Department received four (4) separate complaints from four (4) patients at Rhode Island Hospital (“Hospital”) who were in a psychiatric ward at the same time. See Department’s Exhibit One (1). She testified that the reports included that the Respondent masturbated in front of a patient and another was that he engaged in inappropriate touching of his genitals. She testified that this constituted unprofessional conduct and that even though the Respondent did not touch any patients, the patients were confined to their room and his actions were boundary violations. She testified that after the Summary Suspension was issued, the Department received further information regarding the Hospital’s own investigation as well as

¹ This regulation was amended and recodified pursuant to R.I. Gen. Laws § 42-35-5 as 216-RICR-40-05-22 *Nursing Assistants, Medication Aides, and the Approval of Nursing Assistant and Medication Aide Training Programs* Regulation effective July 12, 2018. As the actions in this matter took May, 2018, this decision shall refer to the prior licensing regulation in effect at that time.

information that the Department received via subpoena to the Hospital and police reports. See Department's Exhibits Three (3) (additional investigative reports from the Hospital); Five (5) (information received under subpoenas) and Six (6) (police report). She testified that based on the further information, the Summary Suspension was still appropriate. She testified that the lead department investigator interviewed two (2) of the complaining patients, the 38 year old female patient and the 55 year old female patient. See Department's Exhibits Nine (9) and Ten (10) (map of ward layout for each interviewed patient) and 11 and 12 (the two (2) recorded statements).²

On cross-examination, Clifton testified that the Hospital's report (Department's Exhibit Three (3)) indicated that the Respondent was upset that night when accused of this behavior and when asked about the allegations by the Hospital, he said how could he have done what he was accused of since he had the clipboard in his hands.³ She testified that one complaint (22 year old male) indicated that the Respondent was in his room for 30 minutes. She testified that constant observation ("CO") is when someone is sitting in patient's room or outside the patient's room observing the patient.

While the Respondent had testified at the Summary Suspension hearing, the Respondent testified again at the full hearing on his behalf. At the full hearing, he testified that he has been a CNA for ten (10) years and that he was a floater the night in question (May 4, 2018) and badged in and was assigned to the psychiatric ward and arrived between 11:05 and 11:08 p.m. He testified that between 11:12 p.m. and 11:15 p.m., he took the "board"⁴ from another CNA. He testified that there was a young female patient lying on her bed reading a mixed martial arts magazine and

² Except for Department's Exhibit Two (2), all the Department's Exhibits and the Respondent's Exhibit One (1) are ordered sealed and confidential due to the nature of the information (patient information) contained.

³ It was agreed by the parties at the Summary Suspension hearing that this ward would assign CNA's to the "board," the board being a clipboard with a piece of paper listing the patients in the ward and how often they needed to be checked in their rooms by the CNA. E.g. every five (5) or ten (10) or 15 minutes.

⁴ *Id.*

he did not go in her room 20 times. He testified that he recorded observations of patients for whether they were awake or sleeping on the board and the board tracks when he was in the patients' rooms. He testified that the two (2) male patients that complained were roommates and he was not in their room for 30 minutes because he was on the board from about 11:06 p.m. to 11:35 p.m. and that would have been noticed. He testified that an older female patient came out onto the hall at about 11:35 p.m. and called him by the wrong name and started following him and complaining so he called his supervisor. He testified he gave the board to another CNA and went on constant observation for the rest of his shift. The Respondent testified that the older female patient kept saying things so he asked to be taken off the floor. He testified that the floor was very quiet and the older patient was speaking very loudly. He testified that the ward has common TV room where the patients congregate. He testified that when he called his manager the next day, he found out about complaints about him. He testified that his unemployment hearing ruled in his favor.

On cross-examination, the Respondent testified that he relied on the board notes and his memory to remember the times that night. He testified that the older female patient told him that she did not like the way he touched himself (his penis) and called him unprofessional. He testified that no one questioned that patient's roommate. He testified that he had been told previously that he would have problems with that patient since she did not like male CNAs. He testified that he believed that the patients congregated the next day in the common room and discussed the incident and spread information about him but he had no personal knowledge about that.

After suspending the Registration, the Department received further reports and interviewed two (2) of the complainants. None of the patients testified at the full hearing. The witness statements and interviews were admitted into evidence.

The 55 year old woman stated in her recorded interview by the Department that she saw the Respondent in the 38 year old woman's room talking and laughing and then he came into her room and put his hands down his pants and played with himself. She stated she confronted him in hallway and told a nurse that night and told her doctor the next morning.

The 38 year old woman stated in her recorded interview by the Department that the Respondent was in and out of her room and seemed at first to be trying to flirt but then kept saying inappropriate things like looking at her chest and commenting, picking up her blanket, lifting up his shirt, asking about yoga and saying he could show her submissive moves, showing an erection, and making sexual comments about things. She stated she saw him in the hall with his back to her and did not realize what he was doing but next day found out he had done similar things to other people.

The hospital's investigatory records and statements show the following:

The allegations relate to the night of May 4, 2018. The 47 male patient was admitted May 2, 2018 as was the 38 year old female patient. The 55 female patient was admitted April 28, 2018 and the 22 year old male patient was admitted April 26, 2018.

The 47 year old male patient reported that the Respondent masturbated in his room. The patient stated that at first he thought the Respondent was just adjusting himself but then he (patient) realized he (Respondent) was masturbating so he (patient) pretended to be asleep. He said in his statement he did not report it that night and that the Respondent did not touch him or his roommate and was in the room for about two (2) minutes.

The 22 year old male patient stated that the Respondent masturbated in his room for 30 minutes.

The 55 year old female patient who was also interviewed by the Department stated that the Respondent came into his room and touched his penis so she confronted him saying his behavior was inappropriate. The medical notes for this patient on May 5, 2018 indicated that she was delusional and paranoid and hostile to staff.

The 38 year old female patient who was also interviewed by the Department stated that the Respondent made comments about her body, talking about yoga, and lifted his shirt to reveal an erection under his pants and was in and out of her room about 20 times. The medical notes for this patient indicated that she reported the inappropriate comments by the Respondent (about yoga, working out together, and lifting his shirt and grabbing his penis).

A CNA on duty that night said that on that night Respondent told her that he was being accused of things by a patient which he had not done. She stated that it is hard to be accused of touching yourself when you are on the board as you are holding a board and pen so your hands are not free.

The CNA who took the board from the Respondent said that he heard Respondent had been accused of something so he got the board and finished the rounds without an issue.

The Respondent made a statement that he was a floater but not new to the ward. In his statement he said the older female patient came out and accused him of touching his penis and confronted him so he went to his supervisor. In his statement, the Respondent denied ever touching himself while with the patients and that he only introduced himself and spoke nicely to the patients.

A nurse on duty that night said she saw the Respondent going in and out of the rooms like he was supposed to be doing. She said she did not see any interaction with the patients.

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).

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. 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;

(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:

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;

d) upon proof that the nursing assistant and/or medication aide has otherwise violated the provisions of the Act;

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

The Department argued that it received four (4) complaints from four (4) separate patients all in the same ward at the same time regarding inappropriate sexual behavior by the Respondent. The Department admitted that the patient who said that the Respondent had been in his room for 30 minutes would be mistaken about the time, but that both male patients said the Respondent was in their room masturbating. The Department admitted that the Respondent could not have been in and out of one room 20 times. The Department argued that while the complaining patients did not testify, it could be inferred that they did not want to see the Respondent again. The Department sought a one (1) year suspension of the Respondent's License from the date of the decision and re-training.

The Respondent argued that he has been a CNA for over ten (10) years without any discipline. The Respondent argued that the actions he was accused of were not consistent with the time that he was on the board and the difference between two (2) and 30 minutes is substantial. The Respondent argued that the assertion that he was in a room 20 times is not reasonable based on the timing he was on the board. The Respondent argued that he was the only one who testified as to what happened that night and he reported the charges that night and tried to fix it. He argued that the suspension be lifted.

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

An administrative hearing has relaxed rules of evidence. R.I. Gen. Laws § 42-35-10. See *DePasquale v. Harrington*, 599 A.2d 314 (R.I. 1991). None of the patients testified. The Department argued an inference could be made that they did not want to testify since they would have to see the Respondent again but there was no evidence that they were even asked to testify.

On the night of the allegations, the Respondent denied that he did any of the actions of which he was accused. He testified that he asked to see the see a supervisor and was on CO the rest of the night. He raised issues regarding the timing of what he was accused of as compared to how long he was on the board in the ward.

The Respondent was accused of masturbation by two (2) patients who were roommates. One of the patients said he was in the room for 30 minutes. Based on the evidence of how long he was on the board and the nurse's statement that he was going in and out of patients' rooms as expected, the Respondent could not have masturbated for 30 minutes.

The Respondent was accused of going in one (1) room 20 times. Based on the evidence of how long he was on the board and the nurse's statement that the Respondent was going in and out of patients' rooms as expected, the Respondent did not go into the 38 year old female patient's room 20 times.

A patient said he touched his penis while in her room and another patient said he showed her an erection under his pants and made various sexual comments. One male patient (roommates with the other male patient) said that Respondent masturbated for two (2) minutes (rather than the 30 minutes that roommate said). Thus, the Respondent was accused by three (3) patients of at least touching himself inappropriately. A nurse stated that he was going in and out of patients' rooms as expected. However, the Respondent would have had time to be in a room and touch himself inappropriately and say inappropriate things.

The older female patient was recorded by staff as delusional and hostile to staff. The Respondent felt the other patients somehow conspired to support the older female patient's initial accusations. There was no evidence of a conspiracy.

The accusations were made by four (4) patients and not just one (1) patient. At the same time, none of them testified but there are relaxed rules of evidence and the standard of proof is a preponderance of evidence.

What can be concluded based on the complaints – even ignoring the patient who based on the hospital notes is hostile to staff and delusional – was that the Respondent was not meeting boundary expectations regarding how he interacted with the patients in terms of comments made, suggestions made, and physical behavior. Based on the evidence in terms of timing and the nurse’s statement regarding the Respondent’s going in and out of rooms, a finding cannot be made that he masturbated. However, he acted in an unprofessional sexualized manner in violation of R.I. Gen. Laws § 23-17.9-8(1), (2), (5), and (6) and Section 6.1(a), (b), (d), (e), and (f) of the Licensing Regulation.

The Respondent’s License has been suspended for almost ten (10) months. The Department requested a further one (1) year suspension of Registration and re-training. Since there is not enough evidence to find that the Respondent committed everything of which he was accused, a further suspension is not warranted. Rather the suspension shall be lifted once the Respondent completes the re-training requested by the Department. The re-training shall be an online continuing education class entitled Ethics and Boundaries in Healthcare (1313AD)⁵ and shall be taken at the Respondent’s own expense, and he shall provide proof of completion prior to the reinstatement of his Registration.

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.*

⁵ <https://reliasacademy.com/rls/store/browse/productDetailSingleSku.jsp?&productId=c172946>.

2. The Department issued a Summary Suspension of Respondent's Registration on May 9, 2018.

3. A hearing notice on Summary Suspension was issued on June 14, 2018.

4. A hearing was held on November 8, 2018.

5. A decision finding that the Summary Suspension should stay in effect was issued on December 4, 2018.

6. A Notice of Hearing and Specification of Charges for a full disciplinary hearing was issued on January 30, 2019.

7. A full disciplinary hearing was held on January 30, 2019 with the parties represented by counsel and resting on the record.

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


VII. CONCLUSION OF LAW

Based on the foregoing, the Respondent violated R.I. Gen. Laws § 23-17.9-8(1), (2), (5), and (6) and Section 6.1(a), (b), (d), (e), and (f) of the Licensing Regulation due to his acting in an unprofessional sexualized manner.

VIII. RECOMMENDATION

Based on the foregoing, the Respondent has engaged in statutory and regulatory violations and his current suspension of Registration shall be lifted after he completes and provides proof of completion of the re-training detailed above.

Dated: February 27, 2019

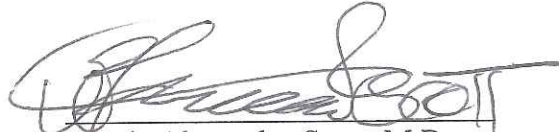

Catherine R. Warren, Esquire
Hearing Officer

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: 3/5/19


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 5th day of March, 2019 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and by electronic delivery to Brian R. Furgal, Esquire, Rhode Island Legal Services, 56 Pine Street, Suite 400, Providence, R.I. 02903 by ~~hand-delivery~~ email to Anita Flax, Esquire, Department of Health, Catherine Warren Administration Three ^{one} Capitol Hill, Providence, RI 02908.