

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.: 18-0231B

v.

Kristen Smith,  
Respondent.

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DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of Hearing and Specification of Charges (“Notice”) issued to Kristen Smith (“Respondent”) by the Department of Health (“Department”) on November 19, 2018. 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 18, 2018 at which time the Respondent did not appear at the hearing. Pursuant to Section 4.6.1 of the 216-RICR-10-05-4 *Practices and Procedures Before the Rhode Island Department of Health* Regulation (“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 delivered to Respondent’s last known address by first class and certified mail.<sup>1</sup> Since the Respondent was adequately noticed of hearing, a hearing was held before the undersigned on December 18, 2018.<sup>2</sup> Additionally, Section 4.13.2 of

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<sup>1</sup> See Department’s Exhibit One (1) (United States Post Office showing certified mail delivery of Notice to the Respondent).

<sup>2</sup> Pursuant to a delegation of authority by the Director of the Department of Health.

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.

## 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”)<sup>3</sup> and if so, what is the appropriate sanction.

## IV. TESTIMONY AND MATERIAL FACTS

Linda Esposito, CNA board manager, testified on behalf of the Department. She testified that the Department received a complaint in February, 2018 from a nursing home where the Respondent was employed at the time. She testified that the complaint indicated the Respondent had received by cell phone a photograph that a co-worker had taken of a patient who had her underwear on over her clothes. She testified that the Respondent responded to the co-worker about the photograph, “LMAO” which stands for “laughing my a\*\* off.” See Department’s Exhibit Two (2) (said complaint describing the investigation and that the Respondent admitted to receiving the photograph and not reporting it and that it was inappropriate).

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<sup>3</sup> 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 place in December 30, 2017, this decision shall refer to the prior licensing regulation in effect at that time.

Margaret Clifton, Board of Nursing manager, testified on behalf of the Department. She testified that the Respondent's actions constituted unprofessional conduct.

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

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:

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

Based on the Respondent's actions, the Department requested a six (6) month suspension of the Respondent's License and that she be ordered to complete a training on patients' rights.

Based on the pleadings and the undisputed evidence, the Respondent received from her co-worker an inappropriate photograph of a patient taken by the co-worker. Rather the report the co-worker, the Respondent responded to the co-worker in a positive manner. The Respondent's

actions violated R.I. Gen. Laws § 23-17.9-8(5) (conduct detrimental to health and safety of patient) and Sections 6.1(e) (detrimental to health and safety of patient) and 6.1(f) (unprofessional conduct) of the Licensing Regulation.

## 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. A Notice was sent by the Department to Respondent on November 19, 2018 to the Respondent's most recent address on record with the Department.
3. A hearing was scheduled for December 18, 2018 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

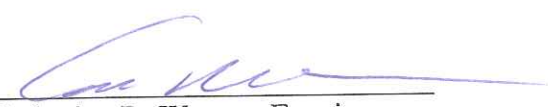
Based on the foregoing, the Respondent violated R.I. Gen. Laws § 23-7.9-8(5) and violated Sections 6.1(e) and (f) of the Licensing Regulation and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that the Respondent's License be suspended for six (6) months and that she complete a patients' rights training.<sup>4</sup> The Respondent must submit proof that she completed said training during the six (6) month period of suspension. If she fails to complete said training during her six (6) month suspension, the suspension of her License will continue until she provides proof of completion of such training. The six (6) month period will begin on the 31st day after the execution of this decision.<sup>5</sup>

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<sup>4</sup> The Respondent should contact the Department to ascertain the type of training that falls under patients' rights to ensure that she takes the appropriate required training.

<sup>5</sup> This allows the Respondent to file an appeal if she chooses. If she wishes the suspension to start earlier, she may contact the Department to agree to an alternative start date.

Entered this day 31<sup>st</sup> January, 2019.

  
Catherine R. Warren, Esquire  
Hearing Officer

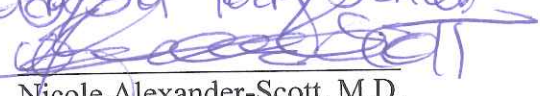
**ORDER**

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

Public reprimand with the type of training that falls under patient rights as noted in the text within 60 days of today's date.

Dated: 1/30/19

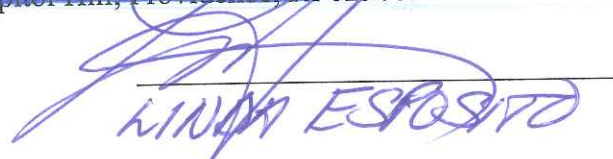
  
Nicole Alexander-Scott, M.D.  
Director

**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 §42-15-15, 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 31<sup>st</sup> day of January, 2019 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt requested and by electronic delivery to Kristen Smith, 1001 Great Road, Lincoln, R.I. 02865 Kristen.Smith.LAX@gmail.com and by hand-delivery to Anita Flax, Esquire, and Linda Esposito, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.

  
LINDA ESPOSITO