

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.: 17-1160
v.	:	
	:	
Margarita Martinez,	:	
Respondent.	:	
	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Amended Notice of Hearing and Specification of Charges (“Notice”) issued to Margarita Martinez (“Respondent”) by the Department of Health (“Department”) on November 4, 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 20, 2019 with both parties 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 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(1) and (3) and if so, what is the appropriate sanction.

IV. MATERIAL FACTS

Neither party presented witnesses. The Department relied on the criminal information that was filed against the Respondent and others and the Respondent's request to enter a plea of *nolo contendere* and the judgment and disposition against Respondent. See Department's Exhibits Three (3) (criminal information); Four (4) (request to enter plea of *nolo contendere* dated May 13, 2019); and Five (5) (judgment and disposition dated May 30, 2019). The Respondent pled *nolo contendere* to conspiracy and two (2) counts of obtaining property by false pretenses and personation under \$1,500. The conspiracy charge is listed in the judgment as a felony. Those were counts Eight (8), Nine (9), and Ten (10) of the criminal information. Count Eight (8) charged that the Respondent conspired to obtain money under false pretenses and Counts Nine (9) and Ten (10) charged that the Respondent obtained money through false pretenses from the Rhode Island Medical Assistance Program. However, the request to enter plea stated that Counts Nine (9) and Ten (10) "Amend to obtain money under false pretenses over \$5,000 RIGL § 11-41-4, 11-41-51(a)(2) (sic)." The Respondent was given an 18 month deferred sentence and restitution.

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

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;

(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.

D. Arguments

The Department argued that the Respondent was convicted of a felony and that even though this was a deferred sentence, it is still considered a felony under *Reis v. Hittner*, 2000 WL 220777 (R.I. Superior Court). The Department argued that like the applicant in *Reis*, the Respondent is in the midst of her sentence. The Department argued that the statute applies to all felonies and does not differentiate on kinds. The Department sought revocation of the Respondent's Registration.

The Respondent argued that with the amended plea, she did not plea to Medicaid fraud but pled to conspiracy and the misdemeanor of obtaining money under false pretenses. The Respondent argued that this is a deferred sentence so it remains open for 18 months and after 18 months the case will be sealed. The Respondent represented that the restitution order has been paid. The Respondent requested a suspension of Registration until the deferred sentence expires or to defer this matter until the deferred sentence expires. The Respondent also argued that the Department did not introduce any independent facts over what transpired and only relied on deferred judgment without any evidence of what happened.

E. Whether Respondent Violated R.I. Gen. Laws § 23-17.9-8(1) and (3)

As discussed in *Reis v. Hittner*, R.I. Gen. Laws 12-8-3¹ provides that a plea of *nolo contendere* followed by a deferred sentence is a conviction. R.I. Gen Laws § 23-17.9-8(3) provides

¹ R.I. Gen. Laws 12-8-3 provides in part as follows:

Plea of *nolo contendere* followed by probation – Effect. (a) Whenever any person shall be arraigned before the district court or superior court and shall plead *nolo contendere*, and the court places the person on probation pursuant to § 12-18-1, then upon the completion of the probationary period, and absent a violation of the terms of the probation, the plea and probation shall not constitute a conviction for any purpose. Evidence of a plea of *nolo contendere* followed by a period of probation, completed without violation of the terms of the probation, may not be introduced in any court proceeding, except that records may be furnished to a sentencing court following the conviction of an individual for a crime committed subsequent to the successful completion of probation on the prior offense.

(b) This section shall not apply to any person who is sentenced to serve a term in the adult correctional institutions or who is given a suspended or deferred sentence in addition to probation. ***

that a registration may be revoked if convicted of a felony.

The Department also relied on R.I. Gen Laws § 23-17.9-8(1) that the Respondent was unfit or incompetent by reason of negligence, habits, or other cause. While the Department did not provide testimony regarding the Respondent's actions, she pled and agreed that there were sufficient facts to substantiate the charges against her related to her plea. In other words, there were facts that showed she conspired with others to obtain money under false pretenses. Even without the conviction, the facts were that the Respondent engaged in a scheme with others to obtain money that she did not have a right to. Such actions show dishonesty. While the Respondent may not have pled to Medicaid fraud, the facts separate from any plea show dishonest behavior.

The Department has the burden to demonstrate it has grounds to revoke the Registration. The Department demonstrated that the Respondent was convicted of a felony and engaged in dishonest behavior. The Respondent did not testify on her behalf or provide an explanation of her actions and/or convictions.² Her licensing history shows she has been a CNA for at least ten (10) years without incident. See Department's Exhibit One (1) (Respondent's licensing history). Nonetheless, the Respondent has engaged in felonious and dishonest acts.

² The Respondent did not appear at the hearing but was apparently available. In some instances, licensees or applicants choose not to testify and rely on the fifth amendment rights; though, in this situation, the criminal case has been completed. Nonetheless, the United States Constitution's Fifth Amendment privilege against self-incrimination may be properly invoked in a civil proceeding regardless of whether there is a pending criminal matter arising out of the same set of factual circumstances. *Tona v. Evans*, 590 A.2d 873 (R.I. 1991). However, a negative inference may be drawn against a party who refuses to testify. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

Since the Respondent did not appear, she did not assert her fifth amendment rights. Nonetheless, a negative inference can still be drawn from the Respondent's failure to testify is also supported by the "Empty Chair Doctrine" which can be invoked in a civil matter but not in a criminal proceeding. *State v. Taylor*, 581 A.2d 1037 (R.I. 1990). It is a rule of jurisprudence that states that if a party in a contested legal proceeding fails to call a readily available witness who would normally be expected to testify to a material issue, the fact-finder may presume that if the witness did testify, the evidence would have been prejudicial to the party's cause. *Belanger v. Cross*, 488 A.2d 410 (R.I. 1985); and *Retirement Board of Employees' Retirement System v. DiPrete*, 845 A.2d 270 (R.I. 2004). See also *Benevides v. Canario*, 301 A.2d 75 (R.I. 1973) (doctrine is to be applied with caution so that as a condition precedent to its invocation there must be a showing of the missing witness's availability to the person who would be expected to produce the witness).

Based on the foregoing, the Respondent violated R.I. Gen. Laws § 23-17.9-8(1) and (3) because of her dishonest actions and felony conviction. On the basis of the evidence, the Department demonstrated that the Respondent's Registration should be revoked.


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 November 4, 2019 to the Respondent.
3. A hearing was held on November 20, 2019. Both parties were represented by counsel who 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 R.I. Gen. Laws § 23-7.9-8(1) and (3) and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that Respondent's Registration be revoked.³

Entered this day 12th December, 2019.


Catherine R. Warren, Esquire
Hearing Officer

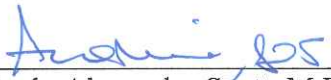
³ Nothing in this decision precludes that Respondent from re-applying or applying for a new registration in future at which time the Department would evaluate such an application to determine whether to deny or grant it.

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

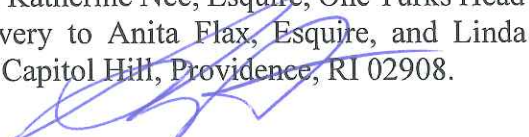

Nicole Alexander-Scott, M.D., M.P.H.
Director

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 18TH day of December, 2019 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail to Katherine Nee, Esquire, One Turks Head Place, 1440, Providence, RI 02903 and by hand-delivery to Anita Flax, Esquire, and Linda Esposito, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.


LINDA. ESPOSITO