

**STATE OF RHODE ISLAND
DEPARTMENT OF HEALTH
THREE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908**

In the Matter of:

Napoleao Pina Vieira,

Respondent.

:
:
:
:
:
:
:

Complaint No. 20-0992

DECISION RE: SUMMARY SUSPENSION

I. INTRODUCTION

This matter arose pursuant to a Compliance Order Summary Suspension of Nursing Assistant License (“Summary Suspension”)¹ issued pursuant to R.I. Gen. Laws § 42-35-14² and R.I. Gen. Laws § 23-1-20 to Napoleao Pina Vieira (“Respondent”) by the Department of Health (“Department”) on July 16, 2020. The Respondent holds a license (“License”) as a certified nursing assistant pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.* The Respondent requested a hearing on the Summary Suspension and a prehearing conference was held on August 25, 2020. A hearing on the issue of whether the Summary Suspension should have been issued was held on September 4, 2020. The Department was represented by counsel and the Respondent was *pro se*. The parties rested on the record.

¹ See Department’s Exhibit One (1).

² R.I. Gen. Laws § 42-35-14 provides in part as follows:

Licenses.

(c) *** If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

II. JURISDICTION

The 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 Department had grounds to issue the Summary Suspension.

IV. MATERIAL FACTS

Robert O'Donnell, investigator, testified on behalf of the Department. He testified that the Department received a complaint and investigatory materials from the nursing home that employed the Respondent as a nursing assistant. See Department's Exhibit Two (2) (investigation indicated that the Respondent had sexual relations with a patient).

Margaret Clifton, Director of Nursing Board and advisor to Nursing Assistant Board, testified on behalf of the Department. She testified that it is unprofessional for a nursing assistant to engage in sexual relations with a patient.

The Respondent testified on his behalf. He testified he understood that he had done something "bad" and did not dispute he had sexual contact with a patient.³

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

³ The Department's Exhibit Two (2) indicated that the patient told investigators that the sexual contact was consensual.

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;

(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 22.6 of 216-RICR-40-05-22 *Nursing Assistants, Medication Aides, and the Approval of Nursing Assistant and Medication Aide Training Programs* 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:

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.

D. Whether the Summary Suspension Should Stay in Place Pending Completion of any Disciplinary Proceedings

Based on the evidence and the testimony at hearing, the Respondent engaged in sexual contact with a patient.

However, the issue before the undersigned is not whether the Respondent committed specific statutory violations but whether the Summary Suspension should continue pending any further disciplinary action by the Department. The Department requested that the hearing only address whether there were grounds for the issuance of a Summary Suspension and the Department did not seek revocation of the License at hearing.

Based on the foregoing, the Department had grounds to issue a Summary Suspension because of its finding that the Respondent engaged in sexual relations with a patient which constituted a danger to the public.

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 Summary Suspension of License was issued to the Respondent on July 16, 2020 to the Respondent.
3. A hearing was held on September 4, 2020.
4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSION OF LAW

Based on the foregoing, the Department issued a Summary Suspension of License to the Respondent pursuant to R.I. Gen. Laws § 42-35-14.

VIII. RECOMMENDATION

Based on the foregoing, the Summary Suspension should stay in effect pending any further disciplinary action and the completion of such action. However, such action, when taken, needs to be instituted promptly so that a hearing, if necessary, can be held on such an action.

Dated: September 15, 2020

|s| *Catherine R. Warren*


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:

 X ADOPT
 REJECT
 MODIFY

Dated: 9/16/2020



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 day of September, 2020 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 request to Mr. Napoleao Pina Viera, 1049 Main Street, Pawtucket, R.I. 02860 and by electronic delivery to Anita Flax, Esquire, and Linda Esposito, Board Manager, Department of Health, Three Capitol Hill, Providence, RI 02908.
