

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

In the Matter of:	:	
	:	
Tracy Famulari,	:	DOH Case Nos.:
	:	C19-1619; C22-0244
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of Hearing and Specification of Charges (“Notice”) issued to Tracy Famulari (“Respondent”) by the Department of Health (“Department”) on March 3, 2023. Pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*, the Respondent holds a registration as a nursing assistant. Pursuant to R.I. Gen. Laws § 23-17.9-2(a)(3) and 216-RICR-40-05-22 *Nursing Assistants, Medication Aides, and the Approval of Nursing Assistant and Medication Aide Training Programs* (“Licensing Regulation”), the Respondent is also licensed as a medication aide. A hearing was held on August 30, 2023. The Department was represented by counsel, and the Respondent was *pro se*. The parties rested on the record. The record was left open to September 6, 2023 for the Respondent to submit further exhibits but none were submitted.

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 and the Licensing Regulation and if so, what is the appropriate sanction.

IV. MATERIAL FACTS AND TESTIMONY

On February 15, 2023, the Respondent pled *nolo contendere* to 12 felony counts of exploitation of an elder of over \$500 and under \$100,000. On March 16, 2023, she was sentenced to five (5) years of probation and ordered to pay restitution of \$19,444 with \$8,000 of the restitution to be paid up front. Department's Exhibits Eight (8) (criminal information); Nine (second part of the criminal information); Ten (10) (request to enter plea of *nolo contendere* or guilty), and Eleven (11) (judgment). The counts of exploitation of an elder arose out of the Respondent's employment at a nursing home. She was charged and convicted of taking money from patients' personal accounts, and said patients were in her care and all suffered from dementia, Alzheimer's, or another form of memory loss. Department's Exhibits Eight (8) and Nine (9).

The Respondent testified on her behalf. She testified that she pled *nolo contendere* to the charges because of financial issues, and all the documents submitted to the court were from the nursing home administrator. She testified that any of the funds withdrawn from the patients' personal accounts were not for a malicious purpose. She testified that she had receipts for the withdrawals but was unable to access them. She testified that the court documents make her look like a bad person, but really she did not have the money to prove her innocence. She testified that she is currently employed as a nursing assistant and cannot access any money; though, she is not working right now due to an accident which requires surgery. She testified that she has almost paid half of the restitution. She testified that based on what her lawyer told her, she did not think her plea was necessarily a conviction, and it would be able to be expunged.

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 and Regulation

The relevant felony statute that the Respondent pled *nolo contendere* to is R.I. Gen. Laws § 11-68-2. Department's Exhibits Eight (8), Ten (10), and Eleven (11). Said statute provides as follows:

Exploitation of an elder person. (a) A person is guilty of exploitation of an elder person if that person:

(1) Knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, an elder person's funds, assets or property with the intent to temporarily or permanently deprive the elder person of the use, benefit, or possession of the funds, assets or property, or to benefit someone other than the elder person by a person who:

- (i) Stands in a position of trust and confidence with the elder person; or
- (ii) Has a business relationship with the elder person; or

(2) Knowingly, by deception or intimidation, obtains or uses, endeavors to obtain or use, or conspires with another to obtain or use an elder person's funds, assets, or property with the intent to temporarily or permanently deprive the elder person of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elder person, by a person who knows or reasonably should know that the elder person lacks the capacity to consent.

(b) Any person who shall exploit an elder person as defined in this chapter shall be guilty of a felony.

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;

(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 the Licensing 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:

1. Upon proof of any of the cases stated in R.I. Gen. Laws §§ 23-17.9-8(1) through 23-17.9-8(5)
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.

Section 22.4 of the Licensing Regulation provides as follows:

Levels of Nursing Assistants

A. Pursuant to R.I. Gen. Laws § 23-17.9-2(3), the Director of the Rhode Island Department of Health hereby establishes the following levels of nursing assistants:

1. Nursing Assistant. A nursing assistant is a paraprofessional trained to provide personal care and related health care and assistance to individuals who are sick, disabled, or infirm, and who are residents of or receiving services from health care facilities or agencies licensed by the State, and holds a license as a nursing assistant issued by the Department.
2. Medication Aide. A medication aide is a nursing assistant who has had additional training in the administration of medication, and holds a license as a medication aide issued by the Department.

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

a. The Respondent's Plea is a Conviction

The Respondent testified that based on what her lawyer told her, her plea was not necessarily a conviction. However, under the relevant statute a plea of *nolo contendere* followed by probation is considered a conviction while the person is still on probation. R.I. Gen. Laws § 12-18-3 provides 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.

On March 16, 2023, the Respondent was sentenced to five (5) years of probation so under R.I. Gen. Laws § 12-18-3, her plea is considered a conviction because she is still on probation.

b. Fair Chance Licensing Act

The Fair Chance Licensing Act, R.I. Gen. Laws § 28-5.1-14, applies to this matter. R.I. Gen. Laws § 28-5.1-14 provides in part as follows:

State licensing and regulatory agencies.

(d) No person shall be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which an occupational license, permit, certificate, or registration is required to be issued by the state or any of its agencies or any state licensing board or commission, solely or in part, because of a prior conviction of a crime or crimes unless the underlying crime or crimes substantially relate to the occupation to which the license applies. Any other state law to the contrary will be superseded by this provision.

(e) No occupational license, permit, certificate, or registration issued by the state or any of its agencies or any state licensing board or commission shall be suspended or revoked, solely or in part, because of a prior conviction of a crime or crimes unless the underlying crime or crimes substantially relate to the occupation to which the license applies. Any other state law to the contrary will be superseded by this provision.

(f) In determining if a conviction substantially relates to the occupation for which the license is sought, the licensing authority shall consider:

(1) The state's legitimate interest in equal access to employment for individuals who have had past contact with the criminal justice system;

(2) The state's legitimate interest in protecting the property and the safety and welfare of specific individuals or the general public; and

(3) The relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.

While this statute was not discussed at hearing, it is relevant in that a basis for revocation of the Respondent's registration as a nursing assistant and medication aide is the Respondent's felony convictions. By definition, a nursing assistant is to provide personal care and related health care and assistance to individuals who are sick, disabled, or infirm, and who are residents of or receiving services from health care facilities or agencies licensed by the State. Section 22.4 of the Licensing Regulation. The Respondent took advantage of vulnerable patients (those with memory loss) in her care. While she disputed what actually happened, she was convicted of 12 counts of exploiting an elder. A nursing assistant is to assist patients who need help. Taking patients' money is unethical and untrustworthy and incompetent. The State has a legitimate interest in protecting the property and welfare of nursing home patients. The Respondent's actions are not the type needed or wanted by those who have the responsibility for care of patients. The Respondent's convictions of stealing from her patients are substantially related to her occupation as a nursing assistant.

c. Conclusion

The Respondent violated R.I. Gen. Laws § 27-17.9-8(3) as she was convicted of felonies. Her 12 felony convictions are substantially related to her occupation as a nursing assistant and medication aide as she stole money from vulnerable patients in her care. *Supra*.

The Respondent testified that she had receipts for the patient withdrawals that she was unable to access. A review of the exhibits show that the nursing home records indicated that receipts were requested from the Respondent by the nursing home, and the only receipt that she produced was for one patient which was dated after she was asked for receipts. In addition, the nursing home protocol was that all withdrawals from patient accounts were to have supporting signatures, and the three (3) nursing assistants whose initials appeared on the withdrawals all

provided statements that their initials were forged, and they had not given permission for their initials to be used. The police report indicated that the Respondent stated she used her credit card to purchase items for patients so only took the money to reimburse herself. While the Respondent has been convicted of theft by virtue of her *nolo contendere* plea, the supporting evidence contradicts her testimony that there was no malicious intent in taking any money. Department's Exhibits Seven (7) (nursing home complaint); Eight (8) (police report); and Nine (9) (criminal information). Further, the Respondent testified that she had already paid almost half of the restitution but she omitted that was ordered in the court judgment. Division's Exhibit Eleven (11).

Even if the Respondent's actions of taking her patients' money did not result in criminal convictions, the fact that she took her patients' money without their consent is also a basis to revoke her registration. Such actions – taking money without consent from her patients for her own gain - make her unfit and incompetent by reason of her actions so that the Respondent violated R.I. Gen. Laws § 27-17.9-8(1).¹ Such actions are also detrimental to the welfare of her patients in her care in that she took her patients' property (money) without consent, so she violated R.I. Gen. Laws § 27-17.9-8(5). In addition, her actions were unprofessional, so she violated R.I. Gen. Laws § 27-17.9-8(6) by violating § 22.6(A)(2) of the Licensing Regulation (unprofessional behavior). As a consequence, the Respondent violated R.I. Gen. Laws § 27-17.9-8(1), (3), (5), and (6) and § 22.6(A)(2) of the Licensing Regulation twelve times for each statutory and regulatory violation every time she withdrew the money from the patients' personal accounts for her own gain.

The Respondent was convicted of stealing from 12 patients. At hearing, the Respondent indicated that she had letters of recommendation, and the record was left open for her to submit such letters, but she did not submit any such letters. Her actions were not just a mistake or

¹ A nursing assistant should not be involved in financial transactions with patients even with consent such as a patient gifting money or items to a nursing assistant. However, that type of transaction is not what happened in this matter.

oversight. Instead, she stole from many vulnerable patients and committed numerous statutory and regulatory violations. Her explanation was contradicted by the Department's evidence. Not only was she convicted of felonies, but her actions were unprofessional, detrimental to the welfare of 12 patients, and demonstrated that she is unfit and incompetent as a nursing assistant and medication aide.

Based on the foregoing, the Respondent's numerous statutory and regulatory violations merit the revocation of her registration as a nursing assistant and medication aide.

VI. FINDINGS OF FACT

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

2. The Respondent holds a medication aide license endorsement pursuant to R.I. Gen. Laws § 23-17.9-2(a)(3) and the Licensing Regulation.

3. The Notice was issued by the Department to Respondent on March 3, 2023.

4. A hearing was held on August 20, 2023. The Department was represented by counsel. The Respondent was *pro se*. The parties rested on the record.


5. The record was left open to September 6, 2023 for the Respondent to submit letters of recommendation. The Respondent did not submit any such recommendations.

6. 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); (3), (5); and (6) and Section 22.6(A)(2) of the Licensing Regulation twelve times each and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that Respondent's nursing assistant and medication aide registration be revoked.

Date: September 28, 2023


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: 9/27/2023

Utpala Bandy, MD, MPH
Utpala Bandy, MD, MPH
Interim 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 28th day September, 2023 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. Tracy Famulari, 914 Tourtellot Hill Road, Scituate, R.I. 02857 and by electronic delivery to the Respondent at tfamz0680@gmail.com and by electronic delivery to Anita Flax, Esquire, Linda Esposito, Board Manager, and Jennifer Sternick, Associate Director, Department of Health, Three Capitol Hill, Providence, RI 02908.

Pamela Lopes