

**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.: C16-813

v.

**Peter N. Mburu,
Respondent.**

DECISION

I. INTRODUCTION

This matter arose pursuant to an Administrative Hearing Notice (“Notice”) issued to Peter Mburu (“Respondent”) by the Department of Health (“Department”) on July 12, 2017. The Respondent held a license as a certified nursing assistant (“CNA”) pursuant to R.I. Gen. Laws § 23-17.9-1 *et seq.*¹ A hearing was scheduled for August 10, 2017 at which time the Respondent did not appear at the hearing. Pursuant to Section 5.6 of the *Rules and Regulations of the Department of Health Regarding Practices and Procedures Before the Department of Health* (“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

¹ The testimony at hearing was that the Respondent’s License expired on June 30, 2016.

Pursuant to Section 5.4 of the *Rules and Regulations Pertaining to Rhode Island Certificates of Registration for Nursing Assistants, Medication Aides, and the Approval of Nursing Assistant and Medication Aides Training Programs* (“License Regulation”), a nursing assistant whose license has expired and not renewed may reinstate the license within two (2) years of the expiration. As the Respondent was licensed at the time of the incident, the Department has jurisdiction over this matter and a decision is being issued as related to this incident.

and certified mail.² Since the Respondent was adequately noticed of hearing, a hearing was held before the undersigned on August 10, 2017.³ Additionally, Section 12.9 of 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 § 23-7.9-8 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”) and if so, what is the appropriate sanction.

IV. TESTIMONY AND MATERIAL FACTS

Robert O’Donnell, Investigator, testified on behalf of the Department. He testified that the Department received a complaint in 2016 from a nursing agency for whom the Respondent worked stating that the agency received a complaint from a 96 year old patient’s son that the Respondent while caring for said patient took a beer from the patient’s refrigerator and drank it. He testified that the complaint stated that the nursing manager had spoken to the Respondent and he admitted to taking the beer and drinking it. See Department’s Exhibits One (1) (complaint from agency).

J. Michel Martineau, CNA Board Manager, testified on behalf of the Department. He testified that licensees are required to maintain their current address with the Department. He testified that the Notice was sent by certified mail and regular mail to the Respondent’s address on

² See testimony below.

³ Pursuant to a delegation of authority by the Director of the Department of Health.

the record with the Department and was not returned to the Department. He testified that prior to the Notice being sent the Department had heard from the Respondent in 2016 about how he had been hospitalized but since then the Respondent had not responded to the Department several attempts to contact him. See Department's Exhibits One (1) (Notice) and Three (3) (various correspondence sent to Respondent by Department and his one response). He testified that the Board recommended a suspension of Respondent's License for two (2) years.

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:

(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 License 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:

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;

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

The Department argued that the Respondent violated R.I. Gen. Laws § 23-7.9-8 by taking a beer from a patient's refrigerator and drinking it while caring for a patient. The Department sought a two (2) year suspension Respondent's License.

Based on the pleadings and the undisputed evidence, the Respondent took a beer from a patient's home and drank it while caring for the patient. The Respondent's actions violated R.I. Gen. Laws § 23-17.9-8(2) (inconsistent with the health and safety of a patient); R.I. Gen. Laws § 23-17.9-8(5) (detrimental to health and safety of patient); and (6) (violates Section 6.1(f) of Licensing Regulation). The Respondent's actions also violated Section 6.1(b) (inconsistent with the health and safety of a patient); Section 6.1(e) (detrimental to health and safety of patient); and Section 6.1(f) (fails to conform to the standards of acceptable and prevailing practice) of the Licensing Regulation.

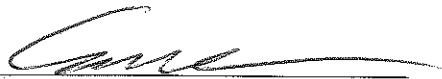
VI. FINDINGS OF FACT

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 July 12, 2017 to the Respondent's most recent address on record with the Department.
3. A hearing was scheduled for August 10, 2017 at which time the Respondent did not appear. As the Respondent had adequate notice of hearing, the undersigned held the hearing.
4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the forgoing, the Respondent violated R.I. Gen. Laws § 23-7.9-8(2), (5) and (6) and violated Sections 6.1(b), (e), and (f) of the Licensing Regulation and pursuant to R.I. Gen. Laws § 23-17.9-8, the undersigned recommends that Respondent's two (2) year right of reinstatement is suspended so that if the Respondent will have to go through the licensing process if he tries to be re-licensed.

Entered this day 28th August, 2017.

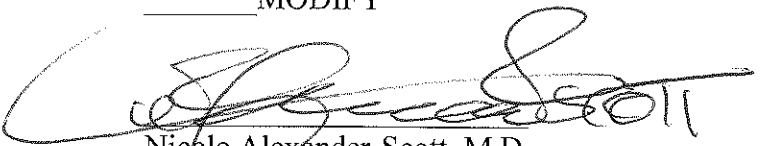

Catherine R. Warren, Esquire
Hearing Officer

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: 8/28/17

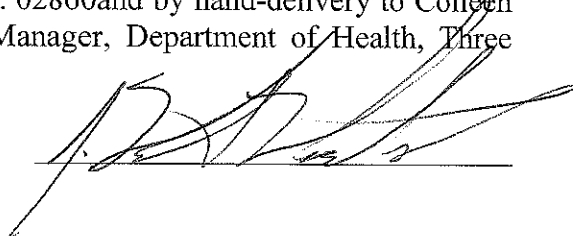

Nicole Alexander-Scott, M.D.
Director

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 COURTSITTING IN 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 that on this 30 day of August, 2017 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt request to Mr. Peter N. Mburu, 816 Weeden Street, Pawtucket, R.I. 02860 and by hand-delivery to Colleen McCarthy, Esquire, and J. Michel Martineau, Board Manager, Department of Health, Three Capitol Hill, Providence, RI, 02908.

A handwritten signature in black ink, appearing to be "J. Michel Martineau", written over a horizontal line.