

**STATE OF CONNECTICUT  
BOARD OF EXAMINERS FOR NURSING**

David Zaborowski, LPN  
License No. 025972

Petition No. 2010-270

**MEMORANDUM OF DECISION**

*Procedural Background*

On April 29, 2010, the Department of Public Health ("the Department") filed a Statement of Charges with the Board of Examiners for Nursing ("the Board"). Bd. Exh. 1. The Charges allege violations of certain provisions of Chapter 378 of the General Statutes ("the Statutes") by David Zaborowski ("respondent") which would subject respondent's licensed practical nurse license to disciplinary action pursuant to §§19a-17 and 20-99(b) of the Statutes.

On May 19, 2010, the Statement of Charges and a Notice of Hearing were sent to respondent by certified and first class mail. Bd. Exh. 2.

On June 1, 2010, respondent filed a request to revise the Statement of Charges. (Bd. Exh. 3) to which the Department filed an objection on June 14, 2010. Bd. Exh. 4. On June 28, 2010, respondent filed a reply to the Department's objection (Bd. Exh. 5); and, on June 29, 2010, respondent filed a request for oral argument. Bd. Exh. 6. After hearing oral arguments from respondent and the Department on respondent's request to revise the Statement of Charges, the Board denied respondent's request. Tr. 7/21/10, pp. 15-19.

On August 17, 2010, respondent filed a written Answer with special defenses to the Statement of Charges. Bd. Exh. 13.

On February 25, 2011, the Department filed a Motion to Amend the Statement of Charges ("the Charges"); and, on March 9, 2011, the Motion was granted. Bd. Exh. 15., Tr. 3/19/11 p. 5

The hearing was held on December 15, 2010 and March 9, 2011. At the hearing, respondent was represented by Attorney Ellen Costello; the Department was represented by Attorney Diane Wilan. Following the close of the record on March 9, 2011, the Board conducted fact finding.

Each member of the Board involved in this decision attests that he/she was present at the hearing or has reviewed the record, and that this decision is based entirely on the record, the law, and the Board's specialized professional knowledge in evaluating the evidence.

*Allegations*

1. In paragraph one of the Charges, the Department alleges that respondent of East Hampton is, and has been at all times referenced in the Charges, the holder of Connecticut licensed practical nurse license number 025972.
2. In paragraph two of the Charges, the Department alleges that at all relevant times, respondent was employed as a licensed practical nurse at Gaylord Hospital in Wallingford, Connecticut.
3. In paragraph three of the Charges, the Department alleges that at all relevant times, patient V.S. was a 70 year old man with a diagnosis of moderate dementia, cognitive deficits, status post CABG, tracheostomy, PEG tube placement, and ventilator-dependent respiratory failure.
4. In paragraph four of the Charges, the Department alleges that on or about March 23, 2010, after reinforcing wrist restraints on patient V.S., respondent:
  - a. yelled verbally abusive comments at patient V.S.; and/or
  - b. struck V.S. with a closed fist on V.S.'s upper chest.
5. In paragraph five of the Charges, the Department alleges that the above described facts constitute grounds for disciplinary action pursuant to §20-99(b) of the Statutes, including, but not limited to §20-99(b)(2).

*Findings of Fact*

1. Respondent of East Hampton is, and has been at all times referenced in the Charges, the holder of Connecticut licensed practical nurse license number 025972. Bd. Exh. 13.
2. At all relevant times, respondent was employed as a licensed practical nurse at Gaylord Hospital in Wallingford, Connecticut. Bd. Exh. 13.
3. At all relevant times, patient V.S. was a 70 year old man with a diagnosis of moderate dementia, cognitive deficits, status post CABG, tracheostomy, PEG tube placement, and ventilator-dependent respiratory failure. Resp. Exh. 1, pp. R50-R52 (under seal).
4. On March 23, 2010, after reinforcing wrist restraints on patient V.S., respondent yelled verbally abusive comments to patient V.S. Dept. Exh. 1, pp. 1-2; Dept. Exh. 2, pp.1, 3; Dept. Exh. 5, p. 1; Tr. 12/15/10, pp. 14-18, 50-51, 90-92; Tr. 3/9/11, pp. 66-69.
5. There is insufficient evidence to establish that on March 23, 2010, respondent struck V.S. with a closed fist on V.S.'s upper chest. Dept. Exh. 1, p. 3; Dept. Exh. 2, pp. 1-2; Tr.

12/15/10, pp. 16, 18, 55-59, 62, 70, 75, 83-84, 89, 108-109, 114; Tr. 3/9/11, pp., 7-9, 12, 15, 17, 23.

### *Discussion and Conclusions of Law*

The Department bears the burden of proof by a preponderance of the evidence in this matter. *Goldstar Medical Services, Inc., et al. v. Department of Social Services*, 288 Conn. 790 (2008); *Swiller v. Comm'r of Public Health*, CV-950705601, Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995; *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, *reh'g den.*, 451 U.S. 933 (1981). The Department sustained its burden of proof with regard to all of the allegations contained in the Charges, except for the allegations contained in paragraph 4b.

Section 20-99 of the Statutes provides, in pertinent part, that:

(a) The Board . . . shall have jurisdiction to hear all charges of conduct which fails to conform to the accepted standards of the nursing profession brought against persons licensed to practice nursing. After holding a hearing . . . said board, if it finds such person to be guilty, may revoke or suspend his or her license or take any of the actions set forth in section 19a-17 . . . .

(b) conduct which fails to conform to the accepted standard . . . (2) illegal conduct, incompetence or negligence in carrying out usual nursing functions; . . .

Respondent admits the allegations in paragraphs one and two of the Charges, that he has been at all times referenced in the Charges, the holder of Connecticut licensed practical nurse license number 025972, and was employed as a licensed practical nurse at Gaylord Hospital in Wallingford, Connecticut.

With regard to paragraph 3 of the Charges, there is no dispute that at all relevant times, patient V.S. was a 70 year old man with a diagnosis of moderate dementia, cognitive deficits, status post CABG, tracheostomy, PEG tube placement, and ventilator-dependent respiratory failure. Therefore, the Department sustained its burden of proof with respect to this allegation. Resp. Ex. 1 pp. R50-R52 (Under seal). With regard to paragraph 4a of the Charges, the Department established by a preponderance of the evidence that respondent yelled verbally abusive comments to patient V.S.

In presenting its case, the Department offered four witnesses: Zenaida Acebedo, RN, Team Leader; Marjory Palladino, RN, Director of Nursing; Karen Solosky, RN, Nursing Supervisor; and, Pamela Pelletier, Nurse Consultant for the Department. Other than Ms. Acebedo, none of the other witnesses for the Department had any personal knowledge of the

incident and no one interviewed the patient about the incident. Tr. 12/15/10 pp. 16, 18, 55-59, 62, 70, 75, 83-84, 89, 108-109, 114, Tr. 3/9/11 pp. 7-9, 12, 15, 17, 23 41, Dept. Ex. 1 pp 1-2, Dept. Ex. 2 pp. 1, 3, Dept Ex 5. P. 1

The evidence establishes that on the night of the incident, Ms. Acebedo and respondent were working third shift, on the same floor, in the acute care unit with 17 patients, six to eight of whom were ventilator-dependent, including patient V.S. Ms. Acebedo testified that it was a busy night with a lot of call lights and ventilator alarms, causing patients to be agitated and some were trying to get out of bed—including her assigned patient, V.S., who was in restraints. While Ms. Acebedo was caring for another patient, respondent answered V.S.'s ventilator alarm and discovered that despite his restraints, V.S. was at the foot of the bed, with his ventilator tubing and tube feeding stretched and at risk of getting disconnected, and his tracheotomy tube partially out. Respondent called for Ms. Acebedo's assistance and the two of them were able to re-secure V.S.'s restraints and properly reposition V.S. in his bed for his safety. Tr. 12/15/10, pp. 14-16, 50-51; Tr. 3/9/11, pp. 66-69. The evidence further establishes that immediately afterwards, V.S. again attempted to get out of bed, and respondent became angry with V.S. and yelled, "Where are you friggin' going? I'm not here to friggin' babysit you. You need to stay in bed." Tr. 12/15/10, p. 15. Ms. Acebedo's credible eye witness testimony also establishes that when V.S. told respondent to "get out," respondent replied: "I'll get out when you decide to keep your ass in bed." Tr. 12/15/10, pp. 17-18. Ms. Acebedo's testimony is corroborated by the investigative report in which respondent admitted acting inappropriately and raising his voice, but did not specify the words he spoke and denied being "abusive."

Respondent claims he raised his voice because V.S. has a hearing impairment. Tr. 3/9/11 p. 71. Additionally, respondent testified that he raised his voice to get V.S.'s attention because V.S. was fighting with him and disoriented—thinking that it was time to get up and out of bed and not knowing that it was night time. Tr. 3/9/11, pp. 67-69, 88-89. Although respondent repeatedly denied behaving inappropriately with V.S., his testimony is inconsistent with the report of his March 23, 2010 interview with Ms. Palladino and Bruce Dalstrom, Vice President of Human Resources, in which he acknowledged his inappropriate behavior, but denied being abusive. Dept. Exh. 1, p. 2; Dept. Exh. 3, p. 2. Thus, the Department sustained its burden of proof by a preponderance of the evidence.

With regard to paragraph 4b of the Charges, the Department failed to establish by a preponderance of the evidence that respondent struck V.S. with a closed fist on V.S.'s upper chest. Ms. Acebedo's testimony was inconsistent with her prior statements and there were no other witnesses to this incident and no signs of physical abuse of the patient. Dept. Exh. 1, p. 3.

Respondent denies the allegation.

The Board concludes that respondent's conduct as alleged in paragraph 4a of the Charges is proven by a preponderance of the evidence presented. The Board further concludes that said conduct constitutes grounds for disciplinary action pursuant to §§20-99(b)(2) and 19a-17 of the Statutes. The Board finds that respondent can practice nursing with reasonable skill and safety under the terms of this Order.

#### *Order*

Based on the record in this case, the above findings of fact and conclusions of law, the Board hereby orders, with respect to license number 025972 held by David Zaborowski, L.P.N., as follows:

1. Respondent's license shall be placed on probation for a period of six months under the following terms and conditions. If any of the conditions of probation are not met, respondent's licensed practical nurse license may be subject to disciplinary action pursuant to §19a-17 of the General Statutes of Connecticut.
  - A. During the period of probation the Board shall pre-approve respondent's employment and/or change of employment within the nursing profession.
  - B. Respondent shall not be employed as a nurse for a personnel provider service, assisted living services agency, homemaker-home health aide agency, or home health care agency, and shall not be self-employed as a nurse for the period of probation.
  - C. Respondent shall provide a copy of this Memorandum of Decision to any and all employers if employed as a nurse during the probationary period. The Board shall be notified in writing by any employer(s), within thirty (30) days of the commencement of employment, as to receipt of a copy of this Memorandum of Decision.
  - D. If employed as a nurse, respondent shall cause employer reports to be submitted to the Board, by his immediate supervisor during the entire probationary period.

Employer reports shall be submitted commencing with the report due on the first business day of month following employment as a nurse.

- E. The employer reports cited in Paragraph D above shall include documentation of respondent's ability to safely and competently practice nursing. Employer reports shall be submitted directly to the Board at the address cited in Paragraph J below.
- F. Should respondent's employment as a nurse be involuntarily terminated or suspended, respondent and his employer shall notify the Board within seventy-two (72) hours of such termination or suspension.
- G. If respondent pursues further training in any subject area that is regulated by the Department, respondent shall provide a copy of this Memorandum of Decision to the educational institution or, if not an institution, to respondent's instructor. Such institution or instructor shall notify the Department in writing as to receipt of a copy of this Memorandum of Decision within fifteen (15) days of receipt. Said notification shall be submitted directly to the Department at the address cited in Paragraph J below.
- H. At his own expense, during the period of probation, respondent shall successfully complete a course, pre-approved by the Board, in anger management and care of patients with dementia and delirium. Within thirty days of completion of the course, respondent shall provide proof to the satisfaction of the Board and Department of his successful completion of the course.
- I. The Board must be informed in writing prior to any change of address.
- J. All communications, payments if required, correspondence, and reports are to be addressed to:

Bonnie Pinkerton, RN, Nurse Consultant  
Department of Public Health  
Division of Health Systems Regulation  
Board of Examiners For Nursing  
410 Capitol Avenue, MS #12HSR  
P. O. Box 340308  
Hartford CT 06134-0308

- 2. Any deviation from the terms of probation, without prior written approval by the Board, shall constitute a violation of probation, which will be cause for an immediate hearing

on charges of violating this Order. Any finding that respondent has violated this Order will subject respondent to sanctions under §19a-17(a) and (c) of the General Statutes of Connecticut, including but not limited to, the revocation of his license. Any extension of time or grace period for reporting granted by the Board shall not be a waiver or preclude the Board's right to take subsequent action. The Board shall not be required to grant future extensions of time or grace periods. Notice of revocation or other disciplinary action shall be sent to respondent's address of record (most current address reported to the Office of Practitioner Licensing and Certification of the Department of Public Health or the Board).

3. This Memorandum of Decision becomes effective, and the six month probation of licensed practical nurse license no.025972 shall commence on August 1, 2011.

The Board of Examiners for Nursing hereby informs respondent, David Zaborowksi, and the Department of Public Health of the State of Connecticut of this decision.

Dated at Hartford, Connecticut this 20<sup>th</sup> day of July, 2011.

BOARD OF EXAMINERS FOR NURSING

By Patricia C. Bouffard  
Patricia C. Bouffard, RN, Chairperson

**CERTIFICATION**

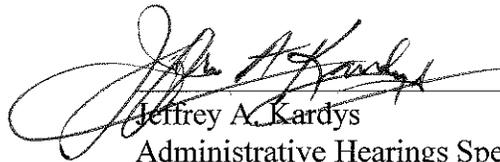
I hereby certify that, pursuant to Connecticut General Statutes § 4-180(c), a copy of the foregoing Memorandum of Decision was sent this 21st day of July 2011, by certified mail, return receipt requested to:

Ellen Costello, Esq.  
Del Sole & Del Sole  
46 Whittlesey Avenue  
Wallingford, CT 06492

Certified Mail RRR #91-7108-2133-3932-0556-3191

and via email to:

Matthew Antonetti, Principal Attorney  
Legal Office  
Department of Public Health  
410 Capitol Avenue, MS #12LEG  
Hartford, CT 06134-0308



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Jeffrey A. Kardys  
Administrative Hearings Specialist/Board Liaison  
Department of Public Health  
Public Health Hearing Office



# STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH

February 2, 2012

David Zaborowski, LPN  
28 Wangonk Trail  
East Hampton, CT 06424

Re: Memorandum of Decision  
Petition No. 2010-270  
License No. 025972

Dear Mr. Zaborowski:

Please accept this letter as notice that you have satisfied the terms of your license probation, effective February 1, 2012.

Notice will be sent to the Department's Licensure and Registration section to remove all restrictions from your license related to the above-referenced Memorandum of Decision.

Please be certain to retain a copy of this letter as documented proof that you have completed your license probation.

Thank you for your cooperation during this process, and good luck to you in the future.

Very truly yours,

Bonnie Pinkerton, RN, Nurse Consultant  
Practitioner Licensing and Investigations Section

cc: J. Filippone  
J. Wojick



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