

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON STATE BOARD OF NURSING**

In the Matter of the Proposed ) **FINAL ORDER**  
Revocation of the Nursing )  
Assistant Certificate Issued to: )  
)  
)  
) OAH Case No. 1303494  
**DANIEL AMBROSE** ) Agency Case No. 14-00048

**HISTORY OF THE CASE**

On November 26, 2013, the Oregon State Board of Nursing (Board) issued a Notice of Proposed Revocation of Certified Nursing Assistant Certificate (Notice) to Daniel Ambrose. The Board proposed to revoke Mr. Ambrose's certificate pursuant to ORS 678.442(2)(f) and OAR 851-063-0080(6) and 851-063-0090(1)(e) and (5). On or about December 4, 2013, Mr. Ambrose, through counsel, requested a contested case hearing.

On December 10, 2013, the Board referred the hearing request to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw of the OAH was assigned to preside over the matter.

On January 24, 2014, ALJ Rackstraw convened a telephone prehearing conference. At the conference, Senior Assistant Attorney General Lori Lindley represented the Board. Neither Mr. Ambrose nor his counsel at the time, Glenn Solomon, appeared. A hearing was scheduled for May 13 and 14, 2014.

The Board subsequently subpoenaed EMPLOYEE 1 to testify as a witness at the hearing. On April 29, 2014, EMPLOYEE 1, through attorney Sheri Osher, filed [EMPLOYEE 1]'s Motion for Protective Order and Alternative Motion to Quash Subpoena. EMPLOYEE 1 also submitted an affidavit in support of her motions. On May 1, 2014, ALJ Rackstraw scheduled a telephone conference for May 6, 2014, to discuss EMPLOYEE 1's motions.

On May 2, 2014, Mr. Solomon filed a Motion for Leave to Withdraw as Counsel for Mr. Ambrose. Mr. Solomon indicated that attorney John Kodachi would be assuming representation of Mr. Ambrose.

On May 5, 2014, Mr. Ambrose, through Mr. Kodachi, filed Daniel Ambrose's Motion to Continue Hearing and Daniel Ambrose's Response to [EMPLOYEE 1]'s Motion for Protective Order and Alternative Motion to Quash Subpoena. Mr. Kodachi conditioned his representation of Mr. Ambrose on the granting of the Motion to Continue Hearing.

On May 6, 2014, ALJ Rackstraw convened a second telephone conference. Ms. Lindley appeared for the Board. Mr. Kodachi appeared for Mr. Ambrose. Ms. Osher appeared for EMPLOYEE 1. During the conference, Ms. Osher provided argument in support of EMPLOYEE 1's motions and Mr. Kodachi provided argument in support of Mr. Ambrose's motion. Ms. Lindley clarified the Board's position with regard to the motions.

Upon consideration of the various motions filed, Mr. Ambrose's written response, and the arguments advanced at the conference, ALJ Rackstraw granted Mr. Ambrose's Motion to Continue the Hearing, denied EMPLOYEE 1's Motion for Protective Order (except for allowing telephone testimony), and denied EMPLOYEE 1's Alternative Motion to Quash Subpoena. In addition, ALJ Rackstraw granted Mr. Solomon's Motion for Leave to Withdraw as Counsel for Mr. Ambrose, and confirmed Mr. Kodachi's representation of Mr. Ambrose.

On June 3 and 4, 2014, ALJ Rackstraw convened a contested case hearing at the Board's offices in Portland, Oregon. Ms. Lindley represented the Board. Mr. Kodachi represented Mr. Ambrose. Attorney Shalini Vivek represented EMPLOYEE 1. Ms. Vivek was present via telephone when EMPLOYEE 1 testified. The following persons testified for the Board: Terri Lindberg; Anthony (Tony) Bracco; Jane Duck; Leslie Sacks; EMPLOYEE 1; and Liz Murvihill. Mr. Ambrose testified on his own behalf. In addition, the following persons testified for Mr. Ambrose: Gladys Tinong; Chinwe Erinne; and MacQueen Sam. The record closed at the conclusion of the hearing on June 4, 2014.

On September 19, 2014, ALJ Rackstraw issued a Proposed Order. In the Proposed Order ALJ Rackstraw found that the Board had proven that Mr. Ambrose engaged in multiple instances of "conduct unbecoming a nursing assistant in the performance of duties" as defined in OAR 851-063-0090. Under ORS 678.442(2)(f) and OAR 851-063-0080(6). ALJ Rackstraw recommended the Board revoke Mr. Ambrose's nursing assistant certificate. ALJ Rackstraw also allowed Mr. Ambrose 10 days from the date of the Proposed Order to submit exceptions. Mr. Ambrose did not submit exceptions to the Proposed Order.

At the Board meeting of November 19, 2014, the Board deliberated regarding the Proposed Order. The Board voted to accept the Proposed Order as written and to accept the recommendation of ALJ Rackstraw to Affirm the Board's Notice of Proposed Revocation of Certified Nurse Assistant and the ALJ's proposed sanction to Revoke Mr. Ambrose's Certified Nurse Assistant Certificate. The Board voted to issue this Final Order. The Board now issues the Final Order in this matter. In accordance with ORS 183.650(2) and (3) and OAR 137-003-0665(3) and (4), an agency must identify and explain those modifications to proposed findings of historical fact that change the outcome or basis for this Final Order from those in the Proposed Order. The Board has not made any changes that substantially modify the ALJ's proposed findings of historical fact or change the ALJ's recommended outcome. The Board has made changes to correct spelling, grammar, and/or textual placement.

## ISSUES

1. Whether Mr. Ambrose engaged in conduct unbecoming a nursing assistant in the performance of duties, under ORS 678.442(2)(f) and OAR 851-063-0080(6) and OAR 851-063-0090(1)(e) and (5).
2. If so, whether revocation of Mr. Ambrose's nursing assistant certificate is the appropriate sanction.

## EVIDENTIARY RULINGS

The Board's Exhibits A1 through A17 and Mr. Ambrose's Exhibits R1 through R3 were admitted into the record without objection. Mr. Ambrose's Exhibit R4 was admitted into the record over the Board's objection to the exhibit not being provided until the day of hearing.

The Board's Pleadings P1 through P13 were also made a part of the record.

## CREDIBILITY DETERMINATION

The parties agree that this case turns on witness credibility. The ALJ's chief responsibility was therefore to reconcile conflicting statements of the witnesses and determine which evidence is more likely than not correct. Such a determination requires that the ALJ assess the credibility of various witnesses offering testimony.

While a witness is presumed to speak the truth, the presumption may be overcome "by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence." ORS 44.370. A determination of witness credibility may also be based on the inherent probability of the evidence, whether the evidence is corroborated, whether the evidence is contradicted by other testimony or evidence, whether there are internal inconsistencies, and "whether human experience demonstrates that the evidence is logically incredible." *Tew v. DMV*, 179 Or App 443, 449 (2002), citing *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part).

The central issues in this case are 1) whether Mr. Ambrose made unwelcome physical advances towards Terri Lindberg in 2013; and 2) whether Mr. Ambrose sexually assaulted EMPLOYEE 1 on June 15, 2013, and thereafter made intimidating, and/or threatening statements to her.

### *1. Ms. Lindberg's allegations*

CNA Terri Lindberg contends that prior to June 15, 2013, Mr. Ambrose twice gave her unsolicited hugs in the workplace,<sup>1</sup> told her on at least one occasion that they could become

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<sup>1</sup> Robison Jewish Health Center.

“more than friends,” and tried to kiss her on the lips while they were working. Testimony of Lindberg; Exhibit A8. Ms. Lindberg contends that she pushed Mr. Ambrose away after he tried to kiss her and informed him that she was happily married. Ms. Lindberg also claims she reminded him that he had a wife and child, and told him that his behavior was not appropriate work behavior. Mr. Ambrose denies that he ever hugged or tried to kiss Ms. Lindberg, or that she ever told him that he had acted inappropriately towards her.

Ms. Lindberg’s hearing testimony was internally consistent, and it was also consistent with statements she made to Board Investigator Liz Murvihill during a July 24, 2013 interview. The only evidence that contradicts Ms. Lindberg’s assertions regarding Mr. Ambrose’s conduct towards her is Mr. Ambrose’s denial that he ever hugged, kissed, or inappropriately touched anyone at work (aside from his admission that he had hugged coworker Gladys Tinong). However, to find Mr. Ambrose’s denial credible requires a finding that Ms. Lindberg lied to facility management, Board staff, and the ALJ regarding Mr. Ambrose’s behavior towards her; that EMPLOYEE 1 lied to facility management, Board staff, and the ALJ regarding his behavior towards her; and that CNA Margarita Roman lied to facility management and Board staff regarding his behavior towards her. For the reasons explained below, the ALJ found EMPLOYEE 1 to be a credible witness. Moreover, although Ms. Roman did not provide hearing testimony, her consistent statements to management and Board staff, coupled with her reported reluctance to say anything disparaging about Mr. Ambrose,<sup>2</sup> lends credibility to her claims. In addition, there is no evidence that Ms. Roman had motive to lie about Mr. Ambrose.

Counsel for Mr. Ambrose asserts that Ms. Lindberg has “sour grapes” against Mr. Ambrose and is therefore not a credible witness. Closing Statement of Ambrose’s Counsel. This animosity allegedly stems from Mr. Ambrose refusing to talk to the charge nurse on Ms. Lindberg’s behalf after the facility transferred Ms. Lindberg to a different hall. Testimony of Ambrose, Sam. The record does not support counsel’s assertion.

Ms. Lindberg credibly testified that she did not report Mr. Ambrose’s attempts to hug and kiss her to management because after she physically pushed him away and told him his behavior was inappropriate, he made no further physical advances towards her. Indeed, Ms. Lindberg did not tell anyone about Mr. Ambrose’s conduct until after learning that Mr. Ambrose had engaged in serious adverse conduct towards EMPLOYEE 1. At that point, Ms. Lindberg disclosed the conduct to EMPLOYEE 1. And, Ms. Lindberg only reported the conduct to management when questioned during its investigation into EMPLOYEE 1’s claims. If Ms. Lindberg had wanted to retaliate against Mr. Ambrose for allegedly refusing to advocate for her transfer back to her original hall, she could have gone to management any time with claims of Mr. Ambrose’s inappropriate behavior. However, the evidence indicates that she did not intend to report the behavior, until she learned that Mr. Ambrose had allegedly done something very serious to EMPLOYEE 1. In conclusion, there is insufficient evidence to establish that Ms. Lindberg disliked Mr. Ambrose or had any animosity towards him. Ms. Lindberg admitted at hearing that Mr. Ambrose was a good employee, and that she had no issues with Mr. Ambrose or his work, aside from the unwelcome advances he made towards her.

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<sup>2</sup> See Exhibits A3 at 1 and A10 at 2. See also testimony of Duck and Sacks.

The ALJ concluded that Ms. Lindberg is a reliable, credible witness. Her testimony is therefore accorded significant weight. Where Mr. Ambrose's testimony conflicts with Ms. Lindberg's, the ALJ accorded greater weight to that of Ms. Lindberg.

## 2. EMPLOYEE 1's allegations

Facility nurse EMPLOYEE 1 contends that between 2:00 and 3:00 a.m. during the June 15, 2013 night shift, Mr. Ambrose forced her into a public bathroom located on Reuben Hall in the facility. She contends that despite her protests and struggling, he began kissing her and pulling her pants down. She contends that she stopped struggling after he made what she believed was a threat to physically harm her. She contends that he thereafter proceeded to pull her pants down, turn her towards the sink, and rape her. She contends that afterwards he told her he was "sorry" and left the bathroom. She contends that she was traumatized by the sexual assault, and that she went to the facility's lock-down unit, Miriam Suite, where she met up with CNA Anthony (Tony) Bracco. She contends that she curled up in a chair and cried, and then she took a shower in a nearby shower room. She contends that in the following days and weeks, Mr. Ambrose made several threatening and intimidating remarks to her, such as "I am watching you."

Mr. Ambrose denies all allegations from EMPLOYEE 1—including that he sexually assaulted EMPLOYEE 1, that he was ever in the public bathroom on Reuben Hall, and that he ever made threatening or intimidating remarks to EMPLOYEE 1.

Mr. Ambrose claims that EMPLOYEE 1 and Mr. Bracco concocted the rape story so that they could enjoy time alone in Miriam Suite, without worrying about Mr. Ambrose walking into the locked unit and disturbing them.<sup>3</sup> However, any instances of Mr. Ambrose entering Miriam

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<sup>3</sup> There is conflicting evidence as to whether the relationship between EMPLOYEE 1 and Mr. Bracco went beyond that of a friendship, prior to or after the alleged sexual assault. At hearing, EMPLOYEE 1 testified that they were not "at this time" more than friends. (Test. of EMPLOYEE 1.) There was no evidence that contradicted that testimony. Mr. Bracco testified at hearing that he and EMPLOYEE 1 "are good friends," and he denied ever kissing her. (Test. of Bracco.) Facility nurse Chinwe Erinne testified that she observed Mr. Bracco and EMPLOYEE 1 kissing at work on an unspecified date. In addition, facility CNA MacQueen Sam testified that she observed Mr. Bracco and EMPLOYEE 1 kissing at work in May 2013 and August 2013. Complicating the credibility determination is the fact that Ms. Erinne and Ms. Sam both share a cultural connection to Mr. Ambrose, and Ms. Sam is Mr. Ambrose's wife. It would be difficult, in particular, to find Ms. Sam free of bias by virtue of her relationship with Mr. Ambrose. Moreover, Ms. Sam may have animosity towards Mr. Bracco, as she lodged several complaints against him with facility management in August 2013, including an unsubstantiated allegation that he was intoxicated at work. Also, Ms. Erinne's credibility may be suspect because Ms. Sam alleged in an email to management that Ms. Erinne readily lies to cover for (ironically) Mr. Bracco. (See Ex. A16.)

Ultimately, however, it is unnecessary to resolve this issue because whether EMPLOYEE 1 and Mr. Bracco at some point became involved romantically or whether they were simply supportive colleagues and friends has no bearing on the relevant findings and conclusions in this matter.

Suite without a legitimate reason for doing so allegedly occurred *after* June 15, 2013, while Mr. Ambrose was supposedly engaging in a pattern of watching and intimidating EMPLOYEE 1. The record contains no evidence whatsoever of Mr. Ambrose entering Miriam Suite prior to the alleged rape, or of EMPLOYEE 1 and Mr. Bracco being upset about any alleged intrusions by Mr. Ambrose prior to June 15, 2013. In sum, there is insufficient evidence to establish that EMPLOYEE 1 and Mr. Bracco were motivated to lie about Mr. Ambrose sexually assaulting EMPLOYEE 1 so that Mr. Ambrose would be fired and no longer intrude upon them in Miriam Suite.<sup>4</sup>

Mr. Ambrose contends that EMPLOYEE 1's letter to Mr. Bracco supports that the rape allegations are a fabrication. Mr. Ambrose notes that the letter repeatedly uses a sentence structure that begins "Imagine ...[.]" See Exhibit A13. He asserts that the repeated use of the word "imagine" is evidence that EMPLOYEE 1's rape allegation is a product of her imagination. The ALJ disagreed. At hearing, EMPLOYEE 1 explained that she wrote the letter to Mr. Bracco in an attempt to help him understand what she was feeling in the aftermath of the sexual assault and why she had made some of the decisions she made. EMPLOYEE 1's explanation is plausible and persuasive. Utilizing a sentence structure beginning with "Imagine ..." when trying to help another person understand an experience you have endured is a reasonable and effective writing technique.

EMPLOYEE 1's verbal and written accounts of the alleged sexual assault and Mr. Ambrose's actions towards her afterwards have remained consistent throughout the facility's investigation, the Board's investigation, and the hearing process. Moreover, EMPLOYEE 1 has shown many classic signs and symptoms of having been a victim of sexual assault. See Exhibit A14. She has experienced fear, a loss of self-esteem, a loss of a sense of security at work. She has blamed herself, berated herself for what she "should have" done during the assault, and placed a significant amount of guilt on herself. This self-blame was reinforced when she told her mother what had occurred and her mother responded with, "well what did you do to deserve that?" See Exhibit A12 at 6. During a Board interview, EMPLOYEE 1 continued to demonstrate self-loathing and a great deal of emotional distress, as she made statements such as, "I'm so fuckin' pathetic," "I'm not brave," "I just want to feel clean," and "I don't want to cry anymore." *Id.* at 6, 13-4. In her letter to Mr. Bracco, EMPLOYEE 1 describes her feelings of denial, self-doubt, and self-blame after the assault. Exhibit A13 at 1 ("Then you block it from your mind – go into [denial] and doubt – maybe it wasn't rape – maybe I deserved it[.] Maybe I am shit. Then you feel so filthy.").

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Given that the credibility of Ms. Sam, Ms. Erinne, and Mr. Bracco is unresolved as to this issue, the ALJ did not rely on their testimony or prior statements to facility management or Board staff unless the testimony/statements are corroborated and consistent with other, credible evidence in the record.

<sup>4</sup> Even beyond that, there is no known motive for Mr. Bracco to have lied about the events surrounding the alleged sexual assault. Even if Mr. Bracco developed ill will towards Mr. Ambrose's wife, Ms. Sam, for complaining about him to management, Ms. Sam did not lodge her complaints about him until mid-August 2013—well after Mr. Bracco had provided statements to facility management regarding his knowledge of and observations regarding Mr. Ambrose's alleged sexual assault of EMPLOYEE 1. (See Ex. A16.)

Board Investigator Murvihill credibly testified that the Board interview with EMPLOYEE 1 was long and difficult, and that EMPLOYEE 1 almost terminated the interview due to the difficulty of discussing Mr. Ambrose and the sexual assault. Facility personnel Leslie Sacks and Jane Duck each provided credible testimony as to EMPLOYEE 1's demeanor (*i.e.* sitting in a fetal position, shaking, *etc.*) and the significant emotional distress she seemed to experience when relaying details of the assault to them during a facility interview. Ms. Sacks testified that EMPLOYEE 1 looked "traumatized" and "victimized." Testimony of Sacks.

Mr. Ambrose questions why EMPLOYEE 1 did not scream or attempt to use her pager to thwart the alleged rape. EMPLOYEE 1 provided credible testimony and prior statements to facility management and Board staff that she initially struggled against Mr. Ambrose and attempted to dissuade him from his actions. However, she testified that once he made a comment about not wanting to hurt her, she became so afraid of sustaining physical harm that she stopped struggling. The fact that EMPLOYEE 1 did or did not avail herself of every conceivable means of escape or rape prevention when confronted with such an unexpected and traumatic situation does not diminish her credibility.

Mr. Ambrose questions how EMPLOYEE 1 could be uncertain as to whether he wore a condom during the alleged rape. Given the traumatic nature of a sexual assault, it seems reasonable that an assault victim might not remember such a detail. This does not diminish EMPLOYEE 1's credibility.

Mr. Ambrose further questions how a rape could occur in a bathroom situated near a potentially busy reception area. The record does not establish whether and to what extent the facility's reception area was actually busy between 2:00 and 3:00 a.m. during the evening shift of June 15, 2013. This issue therefore has no bearing on the credibility determination.

Mr. Ambrose argues that there is no evidence that a rape occurred. He questions why EMPLOYEE 1 did not get an exam to preserve physical evidence and instead continued to work the rest of her shift after the alleged rape. EMPLOYEE 1 has provided credible hearing testimony and statements to facility management and Board staff that establish her frame of mind after the sexual assault and provide a basis for her actions thereafter. The record supports that EMPLOYEE 1 went to Miriam Suite shortly after the assault, sat in a fetal position in a chair and cried, felt compelled to take a shower ("I want[ed] to be clean"), and then because she did not know what else to do, she continued working. She explained it as follows to Board Investigator Murvihill, "I calmed down... I locked everything inside 'cause that [is] all I know how to do... I was so embarrassed and ashamed and I, I didn't know what to do and I, I couldn't think... I went back to work." Exhibit A12 at 5. EMPLOYEE 1's actions after the sexual assault are not inconsistent with a sexual assault victim experiencing feelings of denial, guilt, shame, self-blame, and trauma. One would not necessarily expect an individual in that situation to be an effective self-advocate, making reasoned, logical decisions such as going to get a physical exam.

Mr. Ambrose questions why Board Investigator Murvihill did not ask EMPLOYEE 1 for more specific details about the alleged rape, thereby suggesting that without more explicit details, there is insufficient evidence that a rape actually occurred. The ALJ disagreed, and concluded that this issue had no bearing on the credibility determination.

Additionally, Mr. Ambrose questions why EMPLOYEE 1 will not cooperate with the police. The record establishes that EMPLOYEE 1 has several times articulated her reasons for not cooperating with law enforcement. *See, e.g.*, Exhibit A12 at 13. Although reasonable persons may disagree with her decision, her reasons are her own and her choice not to cooperate with the police does not diminish her credibility.

There is no persuasive evidence of anyone wanting Mr. Ambrose to lose his job, and no evidence of any conspiracy against him. In fact, Mr. Ambrose and EMPLOYEE 1 were both relatively new employees when the incident allegedly occurred on June 15, 2014. It is even more unlikely that there was an employee conspiracy against Mr. Ambrose, given the short time period he had been working, and the fact that EMPLOYEE 1 barely knew him.

Mr. Ambrose has provided no plausible explanation for why EMPLOYEE 1 would go to these lengths (*i.e.* accusing him of rape, behaving in an emotionally traumatized manner, seeing a therapist for treatment), if the sexual assault did not actually occur. Prior to June 15, 2013, she did not even know Mr. Ambrose personally. There is no evidence that EMPLOYEE 1 has any mental or psychological disorder that might provide a basis for such an extensive fabrication. There is no evidence that EMPLOYEE 1 sought to benefit in any way from alleging that Mr. Ambrose raped her. Moreover, there is no evidence that she has actually received any benefit. Quite the contrary, the evidence supports that she has Post-Traumatic Stress Disorder as a result of the sexual assault, and that she has been seeing a therapist to assist in treating her condition and symptoms. The evidence supports that she continues to have periodic emotional breakdowns at work regarding the assault—breakdowns that presumably interfere with her work.

In sum, the ALJ found EMPLOYEE 1 to be a reliable, credible witness. Given this finding, Mr. Ambrose's denials regarding the sexual assault and the intimidating and threatening comments made thereafter are not reliable.

The Findings of Fact that follow are made in accordance with these credibility determinations.

## FINDINGS OF FACT

1. Mr. Ambrose has been a certified nursing assistant (CNA) in Oregon since 2013. (Test. of Ambrose.) He has no prior disciplinary history with the Board. (Ex. A9 at 1.) In April 2013, he began working as a CNA at the Robison Jewish Health Center (the facility). (Exs. A7 at 1, A10 at 4-5; test. of Ambrose.) He was considered a good facility employee. (Test. of Lindberg; Ex. A8 at 13.)

2. The facility includes a 30-bed residential care unit and an 88-bed skilled nursing unit. (Test. of Sacks.) The halls in the skilled nursing unit are named Dan Hall, Reuben Hall, Joseph Hall, and Asher Hall. (See Ex. A1.) The facility assigns each CNA on the night shift to work two halls. (Test. of Lindberg.) In addition, the facility assigns one CNA to work exclusively in Miriam Suite, a memory care lock-down unit, during each night shift. (Test. of Bracco, Lindberg; see Ex. A2 at 1.)

3. EMPLOYEE 1 has been a licensed practical nurse (LPN) since 2002. In March 2013, she began working at the facility. She customarily worked the evening shift, which lasted from 3:00 p.m. to 11:00 p.m. She also occasionally worked the night shift, which lasted from 11:00 p.m. to 7:00 a.m. In June 2013, she was working both evening and night shifts. (Test. of EMPLOYEE 1; Ex. A12 at 1.) Prior to June 15, 2013, EMPLOYEE 1 worked with Mr. Ambrose once or twice, without incident. She did not know Mr. Ambrose personally. (Test. of EMPLOYEE 1.)

4. Terri Lindberg has been a CNA for approximately 25 years. (Ex. A8 at 1.) She began working at the facility in June 2012. She worked the night shift with Mr. Ambrose approximately two or three times per week. (Test. of Lindberg; Ex. A8 at 1-2.) Ms. Lindberg knows of no one at the facility who disliked Mr. Ambrose or wanted him discharged from employment. (Test. of Lindberg.)

5. Anthony (Tony) Bracco has worked as a CNA at the facility since February 2012. For approximately the past year, he has worked the night shift in Miriam Suite. Mr. Bracco worked with Mr. Ambrose less than five times at the facility. Mr. Bracco is unaware of anyone at the facility who disliked Mr. Ambrose or who wanted Mr. Ambrose fired. (Test. of Bracco.)

6. Gladys Tinong has worked as a CNA at the facility since 2011. She generally works the evening shift. She initially floated among the various halls, but for the past year, she has had a permanent 3:00 to 11:00 p.m. shift in Miriam Suite. (Test. of Tinong.)

7. Chinwe Erinne, LPN, has worked as a night shift charge nurse at the facility since 2001. She typically oversees Joseph and Asher Halls and Miriam Suite. (Test. of Erinne.)

8. McQueen Sam worked as a CNA at the facility from December 2007 to January 2014. (Test. of Sam, Lindberg, Duck.) She primarily worked the evening shift. She is married to Mr. Ambrose, and they have a young daughter. Prior to July 2013, Ms. Sam was not aware of anyone at the facility who had issues with Mr. Ambrose. (Test. of Sam.)

9. Mr. Ambrose, Ms. Sam, Ms. Tinong, and Ms. Erinne are all from Nigeria. (Test. of Erinne, Ambrose, Sam; Ex. A9 at 28-29.) In Nigerian culture, it is not unusual for individuals to hug one another (without invitation) in social or professional settings. (Test. of Chinwe, Ambrose.)

10. On approximately five occasions while employed at the facility, Mr. Ambrose told Ms. Lindberg that she “looked nice.” (Test. of Lindberg.) On two occasions prior to June 15, 2013, Mr. Ambrose hugged Ms. Lindberg, without invitation, in the workplace. Mr. Ambrose told Ms. Lindberg on at least one occasion that they could become “more than friends.” (*Id.*; Ex. A8 at 2-3, 9.) Sometime after the two hugging incidents, Mr. Ambrose tried to kiss Ms. Lindberg on the lips. To avoid the unsolicited kiss on the lips, Ms. Lindberg turned her head so that Mr. Ambrose kissed her cheek instead of her lips. She then pushed Mr. Ambrose away from her and informed him that she was happily married, that he had a wife and child, and that it was not appropriate to act this way at work. Ms. Lindberg never told facility management about these interactions with Mr. Ambrose. Ms. Lindberg had no issues with Mr. Ambrose or his work, aside from the unwelcome advances he made towards her. (Test. of Lindberg; A8 at 3, 9-10.)

11. On at least one occasion after June 15, 2013, Ms. Lindberg saw Mr. Ambrose slap/pat a female CNA, Bindu Sheebu, on her buttocks. (Test. of Lindberg; Ex. A8 at 4, 11-12.) In response to the slap/pat, Ms. Sheebu told Mr. Ambrose to “stop.” (Ex. A8 at 4, 11.)

12. On June 15, 2013, staff assignments were as follows for the night shift:

Daniel	Joseph/Asher Hall CNA
Abdoulie	Reuben/Dan Hall CNA
Bindu	Joseph/Asher Hall CNA
Margarita	Reuben/Dan Hall CNA
Tony	Miriam Suite
Elgiresh	RCF CNA
EMPLOYEE 1	Joseph/Asher/Miriam Nurse
Mitty	Reuben/Dan/RCF Nurse

(Ex. A2 at 1; test. of Duck, EMPLOYEE 1.) Nurses on the night shift were responsible for relieving CNAs for their break times. (Test. of EMPLOYEE 1, Bracco, Ambrose.)

13. On the night shift, EMPLOYEE 1 had a specific routine she followed when relieving Mr. Bracco for his breaks at 1:00 and 3:00 a.m. She would walk down the hall in Miriam Suite and look into each resident’s room to check on the resident. During the night shift on June 15, 2013, EMPLOYEE 1 followed that routine when relieving Mr. Bracco for his 1:00 a.m. break. (Test. of Bracco.)

14. Between approximately 2:00 and 3:00 a.m. during the June 15, 2013 night shift,<sup>5</sup> EMPLOYEE 1 was heading down Reuben Hall when she encountered Mr. Ambrose. He was in the doorway of a public bathroom on the hall and he spoke to EMPLOYEE 1. In response, EMPLOYEE 1 leaned in towards him because she had been unable to understand what he said to her.<sup>6</sup> Mr. Ambrose then pulled her into the bathroom. He pushed her up against the bathroom sink and began kissing her. She pushed him away, told him to stop, and reminded him that he had a wife. He did not stop his actions and began pulling her pants down. She continued to struggle against his efforts, until he made a comment about not wanting to hurt her. The comment made her afraid that he would physically harm her, so she stopped struggling. (Test. of EMPLOYEE 1; Ex. A12 at 2-3, 12.) He then turned her around and, while standing behind her, had sexual intercourse with her. (Exs. A13 at 1, A12 at 3; test. of EMPLOYEE 1.) He then told her “sorry” and exited the bathroom. (Ex. A12 at 3.) She left the bathroom sometime after him. (*Id.*)

15. EMPLOYEE 1’s memory of what occurred during the remainder of her June 15, 2013 shift is somewhat muddled. She remembers, however, that sometime after she left the bathroom on Reuben Hall, she went to Miriam Suite because she was supposed to relieve Mr. Bracco for his 3:00 a.m. break. (Test. of EMPLOYEE 1; Ex. A12 at 3.) Mr. Bracco saw EMPLOYEE 1 walking down the hall towards him, and he noticed that she did not follow her usual protocol of checking each resident’s room. (Test. of Bracco; A7 at 3.) Once she reached Mr. Bracco, she requested a hug and asked him in a loud, hysterical-sounding voice, “Do I have the word ‘slut’ written all over me?” (Test. of Bracco; Ex. A7 at 3.) She subsequently took off her shoes, sat down in a chair, curled up in a ball, and cried. (Test. of EMPLOYEE 1, Bracco; Ex. A7 at 4.) She did not tell Mr. Bracco what happened with Mr. Ambrose. (Test. of EMPLOYEE 1, Bracco.) Mr. Bracco told her that he would stay with her instead of taking his break. (Test. of Bracco.) After a few minutes had passed, EMPLOYEE 1 informed Mr. Bracco that she was going to take a shower and she went into a nearby shower room and showered. (Exs. A7 at 4, A12 at 3; test. of Bracco.) She “wanted to feel clean.” (Test. of EMPLOYEE 1.) She had never before showered at the facility, and it was not customary for staff to do so. (Exs. A7 at 12, A12 at 3-4.) After showering, and further questioning from Mr. Bracco, EMPLOYEE 1 told him that something had happened with Mr. Ambrose. She would not explain further. After Mr. Bracco’s break time ended, he gave EMPLOYEE 1 a hug and she left Miriam Suite. (Test. of Bracco; A7 at 3-4.) She worked the remainder of her shift.<sup>7</sup> (Test. of EMPLOYEE 1.)

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<sup>5</sup> Although this would technically be the early morning hours of June 16, 2013, because the work shift started on June 15, 2013, anything that occurred during the shift is referred to as having occurred on June 15, 2013, or the night of June 15, 2013, in this Proposed Order.

<sup>6</sup> During a July 22, 2013 Board interview, EMPLOYEE 1 stated that “half the time,” she could not understand what Mr. Ambrose was saying, presumably because of his accent. (Ex. A12 at 2.)

<sup>7</sup> During the Board interview, EMPLOYEE 1 explained that after showering in the Miriam Suite shower, “I calmed down...I locked everything inside ‘cause that [is] all I know how to do...I was so embarrassed and ashamed and I, I didn’t know what to do and I, I couldn’t think...I went back to work.” (Ex. A12 at 5.)

16. For some time after June 15, 2013, EMPLOYEE 1 was unable to deal with the reality of the sexual assault, and she tried to pretend that it had not happened. (Test. of EMPLOYEE 1.)

17. During several night shifts following June 15, 2013, EMPLOYEE 1 requested that Mr. Bracco stay with her when she came to relieve him for his breaks. Mr. Bracco noticed that on at least a couple of occasions during those shifts Mr. Ambrose would come into Miriam Suite while EMPLOYEE 1 was there. Mr. Ambrose had no known legitimate reason to be in Miriam Suite on those occasions. On one occasion, Mr. Ambrose came into Miriam Suite to use the kitchen, even though he was working on a different hall that had its own kitchen. Mr. Bracco observed that EMPLOYEE 1 appeared afraid when she saw Mr. Ambrose. (Test. of Bracco.)

18. A few days after June 15, 2013, EMPLOYEE 1 approached facility nurse Stephanie Brant with the intention of telling her about the sexual assault. After EMPLOYEE 1 told Ms. Brant that someone on the night shift was bothering her, Ms. Brant made a comment that included the qualifier, “if this is a legitimate thing...” (Ex. A12 at 8.) EMPLOYEE 1 felt discouraged, and determined that because she had taken a shower after the sexual assault (thereby removing the physical evidence of the assault), it would come down to EMPLOYEE 1’s word against that of Mr. Ambrose, and he would “win.” (*Id.*) EMPLOYEE 1 elected not to tell Ms. Brant about the sexual assault. (*Id.*)

19. Sometime between June 15, 2013 and July 11, 2013, EMPLOYEE 1 told Ms. Lindberg that she needed to talk to someone, and she asked Ms. Lindberg not to leave her alone with Mr. Ambrose on the hall. Ms. Lindberg disclosed to EMPLOYEE 1 that Mr. Ambrose had made “passes” at her previously. (Test. of Lindberg; Ex. A8 at 4-6.) EMPLOYEE 1 told Ms. Lindberg that Mr. Ambrose had done something “pretty serious” to her. (Ex. A8 at 4; test. of Lindberg.) Ms. Lindberg observed that EMPLOYEE 1 was very “shaken up” during their conversation. (Test. of Lindberg; Ex. A8 at 6). Ms. Lindberg told EMPLOYEE 1 that she did not want to know the details of what happened, but she encouraged EMPLOYEE 1 to tell management about it.<sup>8</sup> EMPLOYEE 1 told Ms. Lindberg that she had talked with Mr. Bracco about the incident. Ms. Lindberg later followed up with Mr. Bracco, who confirmed to her that something “bad” had occurred between EMPLOYEE 1 and Mr. Ambrose. (Ex. A8 at 5-6.)

20. On one occasion between June 15, 2013 and July 11, 2013, Mr. Ambrose approached EMPLOYEE 1 while she was in Reuben Hall doing glucometer checks. He stood over her, stared at her, and stated, “I’m watching you.” (Ex. A12 at 6-7, 9; test. of EMPLOYEE 1.) In response, EMPLOYEE 1 left the room and went into a nearby room occupied by two other coworkers. She felt scared and shaken by Mr. Ambrose’s behavior. (Ex. A12 at 7-8.)

21. On one occasion between June 15, 2013 and July 11, 2013, Mr. Ambrose asked EMPLOYEE 1 if she was going to “cause trouble” for him. (Test. of EMPLOYEE 1.) In response, EMPLOYEE 1 answered, “No. I’m not going to do anything.” (*Id.*)

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<sup>8</sup> During a July 24, 2013 interview with Board staff, Ms. Lindberg stated, “[T]he way [EMPLOYEE 1] was shaking and stuff, I didn’t want to know the details.” (Ex. A8 at 7.)

22. On one occasion between June 15, 2013 and July 11, 2013, Mr. Ambrose followed EMPLOYEE 1 to the smoking area and told her he loved her. EMPLOYEE 1 told Mr. Ambrose, “You have a wife and a child.” (Test. of EMPLOYEE 1.) Mr. Ambrose became angry and replied, “Why do you have to bring that up?” (*Id.*)

23. On one occasion between June 15, 2013 and July 11, 2013, Mr. Ambrose mentioned to EMPLOYEE 1 that he knew her phone number, but that he would not call her because he did not want there to be a record of the call. EMPLOYEE 1 later determined that he could have obtained her phone number from a Rolodex kept at the facility’s front desk. (Ex. A12 at 7, 9; test. of Bracco.)

24. On one occasion between June 15, 2013 and July 11, 2013, Mr. Ambrose indicated to EMPLOYEE 1 that he knew which car she drove. (Ex. A12 at 8-9; test. of EMPLOYEE 1.) Thereafter, EMPLOYEE 1 would wait until Mr. Ambrose was “down at the hall” before walking to her car, or she would have a coworker accompany her to her car. (Ex. A12 at 8.)

25. Approximately one to two weeks after June 15, 2013, EMPLOYEE 1 and Mr. Bracco had coffee together outside of work. During their conversation, EMPLOYEE 1 blurted out, “He raped me.” (Test. of Bracco; Ex. A7 at 4.) EMPLOYEE 1 then began crying and told Mr. Bracco about the sexual assault. When Mr. Bracco urged her to report the assault, EMPLOYEE 1 responded that she felt ashamed, humiliated, and embarrassed, and that she knew it would be her word against Mr. Ambrose’s. Mr. Bracco told EMPLOYEE 1 that not reporting the assault placed other people at risk of Mr. Ambrose. (Test. of Bracco.) EMPLOYEE 1 believed that if she reported it, it would come down to her word versus Mr. Ambrose’s word, and that he would prevail, and she feared losing her job. (Test. of EMPLOYEE 1.)

26. Sometime after learning of Mr. Ambrose’s sexual assault against EMPLOYEE 1, Mr. Bracco told EMPLOYEE 1 that he would quit working at the facility if EMPLOYEE 1 did not report the incident to the facility’s management. Mr. Bracco was experiencing considerable difficulty seeing Mr. Ambrose at work and knowing what he had done to EMPLOYEE 1. Mr. Bracco’s threat to quit work played a role in EMPLOYEE 1’s decision to report the assault to management. (Test. of Bracco.) Another factor that influenced her decision to report the assault was her growing fear that Mr. Ambrose posed a risk to other employees, and possibly to the facility’s residents. (Test. of EMPLOYEE 1.)

27. On July 8, 2013, Mr. Bracco accompanied EMPLOYEE 1 to the office of Jane Duck, the facility’s director of nursing services (DNS), so that EMPLOYEE 1 could report the sexual assault. (Test. of EMPLOYEE 1, Duck, Bracco, Sacks; *see* Ex. A3 at 1.) EMPLOYEE 1 told Ms. Duck that Mr. Ambrose had raped her, and stated that she did not report it earlier because she was afraid of retaliation, she felt ashamed, and she wanted to keep her job. At some point during the conversation, Ms. Duck asked EMPLOYEE 1 if it was okay to bring the facility’s then-administrator, Leslie Sacks, into the office. EMPLOYEE 1 agreed, and Ms. Sacks joined the meeting. During the meeting, EMPLOYEE 1 appeared traumatized and upset; she was crying and shaking; and at one point had a “pretty serious meltdown.” (Test. of Duck, Sacks.) EMPLOYEE 1 had her feet up in the chair, while hugging her knees and sitting in a fetal position. EMPLOYEE 1 reported that Mr. Ambrose had pulled her into a facility bathroom,

locked the door, pushed her up against the sink/counter, and told her he wanted to have sex with her. EMPLOYEE 1 reported that she was frightened and too afraid to scream. EMPLOYEE 1 reported that after Mr. Ambrose raped her, she pulled up her scrubs, went to Miriam Suite, and eventually took a shower there. EMPLOYEE 1 reported that she was afraid of Mr. Ambrose, that he had her phone number, and that he appeared to be watching her. EMPLOYEE 1 stated that she did not want to report the rape to the police because certain life experiences (her own and those of family members) had made her distrustful of the police. Ms. Duck informed EMPLOYEE 1 that the facility had a responsibility to report the incident to the Board. EMPLOYEE 1 was unhappy to hear that information. Ms. Duck also encouraged EMPLOYEE 1 to seek counseling, and she provided EMPLOYEE 1 information regarding the facility's employee assistance program. (Test. of Duck, Sacks; Ex. A10 at 2-3.) Ms. Sacks was "very concerned" about EMPLOYEE 1's mental health at that time. (Test. of Sacks.)

28. On July 8, 2013, the facility suspended Mr. Ambrose pending an investigation into the alleged sexual assault. The facility did not provide Mr. Ambrose with a reason for the suspension. (Test. of Duck, Sacks, Ambrose; *see* Exs. A3 at 1, A10 at 1.)

29. As part of the facility's investigation, Ms. Sacks asked each night shift employee whether he or she had ever experienced or witnessed inappropriate interactions involving an employee. (Test. of Sacks; Exs. A4 at 1, A10 at 1-2.) CNA Margarita Roman reported—quite hesitantly—that Mr. Ambrose was flirtatious, made her feel uncomfortable, and was very "touchy feely." (Test. of Sacks, Duck; Ex. A10 at 2.) Ms. Lindberg reported her experiences with Mr. Ambrose, including his attempt to kiss her. (Test. of Duck.) The facility did not question Mr. Ambrose about any of the allegations against him. (Test. of Sacks.)

30. Based on the information obtained from EMPLOYEE 1, Ms. Lindberg, and Ms. Roman, on July 11, 2013, the facility terminated Mr. Ambrose's employment. (Ex. A5 at 1; test. of Duck.) When Ms. Sacks informed Mr. Ambrose of the termination, Mr. Ambrose asked for the reason. Ms. Sacks told Mr. Ambrose that it simply was not in the employer's "best interest" to continue his employment. (Test. of Ambrose, Sacks; Exs. A5 at 1, A10 at 4.) Mr. Ambrose did not ask for further clarification. (Test. of Sacks.)

31. On July 17, 2013, the facility reported the incidents involving Mr. Ambrose to the Board. (Ex. R2 at 1.) On July 18, 2013, Board Investigator Liz Murvihill interviewed Ms. Sacks. (Exs. A10, R2 at 1; test. of Murvihill.)

32. On July 19, 2013, Mr. Ambrose signed an Interim Consent Order, thereby agreeing to refrain from practicing as a CNA or functioning as a caregiver in any capacity until further Board action. (Ex. A6 at 1-2; test. of Murvihill.)

33. In mid to late July 2013, two police officers arrived at the facility to speak with EMPLOYEE 1. She was "very upset" by their presence and she informed the officers that she was not interested in speaking with them. Ms. Duck and Ms. Sacks spoke with the officers. (Test. of Duck, Sacks.)

34. On July 22, 2013, Board Investigator Murvihill interviewed EMPLOYEE 1. Ms. Sacks was also present. (Ex. A12; see Ex. R2 at 2; test. of Murvihill.) During the interview, EMPLOYEE 1 cried and sat with her knees drawn up to her chest and her arms around her legs. In Ms. Murvihill's opinion, the interview was a long and "difficult" one. (Test. of Murvihill.) During the interview, EMPLOYEE 1 made statements such as, "I'm so fuckin' pathetic," "I'm so pathetic," "I'm not brave," "I just want to feel clean," and "I don't want to cry anymore." (Ex. A12 at 6, 13-14.) At one point, EMPLOYEE 1 got up and almost terminated the interview. However, Ms. Murvihill was able to convince her to stay. (Test. of Murvihill.) During the interview, EMPLOYEE 1 described the sexual assault, in part, as follows:

I was just heading down Reuben Hall \* \* \* and he was (long pause)... he was opening the bathroom door and he said something[.]. I got close to him 'cause I can never understand half the time what he's saying and he grabbed me and he pulled [me] into the bathroom.

\* \* \* \* \*

He pushed me up against the sink... and he started kissing me... and I pushed him away and I told him to stop, and it was like (inaudible)... telling him to stop and reminding him he had a wife and, and I was his nurse and he wouldn't listen... he was taking my pants down... and all I could think about... and he was too strong...<sup>9</sup> and all I could think about was trying to keep my damn pants up. And he wouldn't listen and I'm struggling against him and he still had me pinned and holding me down...and he finally said, "I don't want to force you, you didn't [*sic*] want to get hurt." So I stopped struggling[.] \* \* \* \* \*. And then he raped me.

(Ex. A12 at 2-3.) In response to Ms. Murvihill's question, "What happened after that," EMPLOYEE 1 stated:

Just said he was sorry. (long pause) He left the bathroom and I, I finally left, I don't even know... where I went... or what I did. I just know that somewhere it was time to go back to the [dementia] unit [in Miriam Suite]. And so, I, I went back to the unit, you know, I didn't know what to do, I was... I just fell apart back there.

(*Id.* at 3.) EMPLOYEE 1 told Ms. Murvihill that once she got to Miriam Suite, she saw Tony, sat down in a chair, cried, and eventually took a shower in a nearby shower room. (*Id.* at 3-4.)

35. During the interview, EMPLOYEE 1 told Ms. Murvihill about various interactions she had with Mr. Ambrose after June 15, 2013, which included the following:

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<sup>9</sup> YM is approximately four feet and 11 inches tall, and weighs approximately 110 pounds. Mr. Ambrose is approximately six feet tall. (Test. of YM.)

[O]ne time, I was... in Reuben [Hall], and I was doing glucometer checks \* \* \* and he had no reason, 'cause he was on... Joseph Asher Hall, to come in there, and he came in there and just stood over me. And... just staring and, and... and he said, "I'm watching you." And I said... I don't even know what I said other th[a]n I got up and ran for it. I went into the next office and Stephanie was still there with Brian \* \* \* and I just stood there shaking[.]

\* \* \* \* \*

[H]e knows what car I drive, he knows my phone number... he, he would just mention stuff.

\* \* \* \* \*

It just seemed like he was always trying to follow me... and even when I, I went to evening shift [as opposed to night shift] and I thought it would be better and I still saw him[.]

(Ex. A12 at 6-8.)

36. During the interview, EMPLOYEE 1 told Ms. Murvihill that she did not have any family support to help her deal with the aftermath of the sexual assault, and she stated:

I eventually told my mom last week. And the first thing she says is, "well what did you do to deserve that?" Or something like that and then it was like, "were you wearing some of your sister[']s smelly, bloody shampoo? And then she turned around and told my aunt and my grandma and... My sister knows but we don't talk about that. I mean, there's been so much trauma in our lives already. Some things similar to this before.

(Ex. A12 at 6.) In response to Ms. Murvihill asking EMPLOYEE 1 why she did not report the sexual assault to the police and why she continued to oppose cooperating with the police, EMPLOYEE 1 stated:

My sister was gang raped. My other sister was there when they interviewed her, and the questions they asked her... they got away with it. My other sister was raped... and she was treated like trash because... she had a record... I was in a bad marriage... and was hurt. And he was a son of a cop. I'll never go through that again. No. I think that would break me.

(*Id.* at 13.)

37. On July 22, 2013, Ms. Murvihill interviewed Mr. Bracco. (Exs. A7, R2 at 2; test. of Murvihill.)

38. On July 24, 2013, Ms. Murvihill interviewed Ms. Lindberg. (Ex. A8; *see* Ex. R2 at 3; test. of Murvihill.) During the interview, Ms. Lindberg stated, in part:

[A]t first, I thought [Mr. Ambrose] was like, joking around but then he made a few passes at me and I told him, “Daniel, you can’t do this, it’s work, I’m married, you’re married, I’ve no interest in that,” I said, “you have a wife and a baby,” and I said, “it’s inappropriate to \* \* \* try stuff like what you’re doing,” and then I made it good and clear a couple times and I—so then after that, he never seemed to make any advancements any more at me[.]

(Ex. A8 at 2.) Ms. Lindberg described the initial hugging incidents as follows:

They were just hugs but he would say, “come here, come here, I got to tell you something,” so you would go and think you were (inaudible) follow us around. Like (inaudible) the ice room and the other one was in, um, the dining room[.] I didn’t trust him after that, though. When he’d say, “come here,” I’d say, “no, I got to take care of the residents[.]”

(*Id.* at 3.) Ms. Lindberg described the following incident to Ms. Murvihill:

[Mr. Ambrose and I were] getting water in this little room that you get the ice and whatnot, and he’d come up and he’d like, “give me a hug.” And he’d like, grab me and then he would—the last time, he tried to, to kiss me and I turned my head but then it only went on the cheek and then I pushed him away and I said, “that’s enough.”

\* \* \* \* \*

“Look,” I said, “this is work,” I said, “you have a family, I have a family, I’m happily married and I have a husband that I care about a lot, I would never do something like this.” So I first thought it was like the nationality ‘cause he’s a different nationality. I thought that’s like how he would—you know how sometimes people hug for good morning or whatever? So that really didn’t bother me but then that pass, the last one, I said, that’s it. \* \* \* \* \*. So then he didn’t do nothing towards me anymore.

(*Id.* at 2-3.) Ms. Lindberg told Ms. Murvihill that she did not initially tell anyone about Mr. Ambrose’s conduct because she did not want to “stir up” anything in the workplace, especially given that Mr. Ambrose’s wife also worked there. (*Id.* at 4.)

39. On or about August 23, 2013, Ms. Sam called the facility and reported to Ms. Erinne that Mr. Bracco had come to work that evening smelling of alcohol. (Ex. A16 at 1.) After learning of the complaint, Ms. Duck instructed Ms. Erinne and two other nurses to individually approach Mr. Bracco and assess whether they believed he smelled or alcohol, or otherwise

appeared intoxicated. The three nurses subsequently reported to Ms. Duck that they saw no signs of Mr. Bracco being intoxicated or smelling of alcohol. (Test. of Duck.) In an email to Ms. Duck dated August 29, 2013, Ms. Sam wrote, in part:

That Friday night when Tony came to work smelling [of] Alcohol I called Chinwe and reported the issue to her, she told me that, It does not matter how many people smelled Him, but what she will do is that she will write a note to Ronnie the Miriam Suite RCM and tell her that Tony was not smelling [of] Alcohol and with that note no matter what anybody will say her own words will be on top of it. \* \* \* \* \*. She said she will talk to Claudia to back her up by saying Tony did not smell [of] Alcohol. \* \* \*. This is not the first time Chinwe is trying to cover up for Tony[.]

(Ex. A16 at 1.) Ms. Sam went on to write that Chinwe failed to report an incident where Mr. Bracco was “behaving funny” and yelling obscenities at another CNA; that Chinwe failed to address complaints about Mr. Bracco from morning shift CNAs; and that Chinwe did not properly handle an incident where Mr. Bracco returned late from a break. (*Id.*) Ms. Sam also stated:

I personally do not have any problem with Tony nor Chinwe herself, but my concern is always how people can work together, telling the truth, love people and creating a loving environment for everyone and most of all [a] safe environment for the resident.

(*Id.*)

40. On September 3, 2013, Ms. Murvihill interviewed Mr. Ambrose. (Ex. A9; test. of Murvihill.) When Ms. Murvihill asked Mr. Ambrose what he thought about allegations that he had inappropriately touched, hugged, and kissed coworkers, he replied, in part:

[I] have never in my life touched either my residents or my coworkers inappropriately. I have not done that[.]

\* \* \* \* \*

[N]one of them... I have never touched none of them.

\* \* \* \* \*

[I] have never hugged a coworker like... like... if that coworker is... you know, like, let’s say I don’t know you, I just come and hug you. For what reason will I hug you for?

\* \* \* \* \*

[H]ow can you hug someone when that person doesn't want to hug you? And you're hugging that person? \* \* \*. No, I have never done that.

\* \* \* \* \*

I have never hugged a coworker at work inappropriately. The only people that greet me... let's say maybe when we are changing shifts[.]

\* \* \* \* \*

When we are changing shifts, those people that work with my wife, \* \* \* those people that are friends to my wife, which I have known them before[.] \* \* \* \* \*. Those are the only people that I am always very free with. If you ask the people that I work with, since I don't really know them, I only say, Hi, to them. I don't touch them. I don't hug them. I only say, Hi.

(Ex. A9 at 27-28.) When Ms. Murvihill asked Mr. Ambrose whether he had ever hugged anyone at work, Mr. Ambrose replied as follows:

Yes, I have hugged someone, someone hugged me. Not that I hug openly.

\* \* \* \* \*

[T]here's this, my wife's friend \* \* \* [who] works in the same Joseph Hall on the evening shift[.] \* \* \* \* \*. [S]he knows my wife very well and she knows me. That is the only person that's always like, Hey, brother. You know, that kind of stuff.

\* \* \* \* \*

That's Gladys [Tinong]. She's always like, Hey, brother. Because she's from Africa too.

\* \* \* \* \*

That's the only person that I have hugged, but it's not inappropriately.

(*Id.* at 28.) Later in the interview, Mr. Ambrose elaborated on the nature of his relationship with Ms. Tinong and stated, in part:

[G]ladys is married. I know the husband, we've been going to their house. \* \* \* \* \*. We go to the apartment. The husband called me, I called them. So Gladys is a close family. She is the most closest person to my family. If... let's say if I need a car right now to go to something, I can call her. \* \* \* \* \*. So they are very close family, I know the husband, they know

my wife, they know me, they know my daughter. They come to my house, we go to their house. They are very close family to me.

\* \* \* \* \*

And to say it... I have never kissed Gladys. I have never touched Gladys inappropriately. She will tell you that. I have never done inappropriate stuff to her. Apart from greeting her like a brother from the same place, that is Africa, I have never done anything inappropriate[.]

(*Id.* at 34-35.)

41. During the interview, when Ms. Murvihill asked Mr. Ambrose what he thought of allegations that he had inappropriately touched and kissed coworkers, Mr. Ambrose replied, in part:

To tell you the truth, that's a big lie. I have never kissed someone... why should I even kiss? I have a wife. My wife works there for 8 years. That would be for me to disrespect my wife. I cannot do that. I cannot hug someone inappropriately[.]

\* \* \* \* \*

I have never hugged anybody inappropriately at work. I have never kissed anybody[.]

\* \* \* \* \*

[I] cannot disrespect my family like that. I have a wife that has a reputation in that place for 8 years[.]

(Ex. A9 at 29-31.) In response to Ms. Murvihill asking about an allegation that Mr. Ambrose sexually assaulted a nurse on or about June 15, 2013, Mr. Ambrose replied, in part:

I have never done that. I sexually assaulted a nurse? No way, I have never done that in my life. I have never assaulted my nurse[.]

\* \* \* \* \*

[I] don't know why they are saying that, but I know, to tell you the whole truth, I have never done stuff like that. But I don't know why they are saying it. I don't know... if they are saying it out of spite or out of jealousy. \* \* \* \* \*. I have never done anything inappropriate to anybody in that place.

(*Id.* at 29-30.)

42. As part of the Board's investigation, Board staff interviewed Ms. Sheebu. (Ms. Sheebu denied that Mr. Ambrose ever touched her inappropriately or slapped her on the bottom. (Ex. R2 at 4; test. of Murvihill.) Board staff also interviewed Ms. Roman. Ms. Roman reported that Mr. Ambrose had touched her a couple of times at work on her shoulders and back. She reported that it made her feel uncomfortable and she backed away from him. (Ex. R2 at 4; test. of Murvihill.)

43. Ms. Murvihill also interviewed Ms. Duck. (Ex. A11; test. of Murvihill.) Ms. Duck informed Ms. Murvihill that when Ms. Duck first hired Mr. Ambrose, he gave her a "giant hug." (Ex. A11 at 3.) Ms. Duck went on to report that she found it "strange and odd" that he would hug her, but that she thought it might be a "cultural thing." (*Id.*) Ms. Duck told Ms. Murvihill, "I remember feeling really uncomfortable with [the hug]." (*Id.*) Ms. Duck informed Ms. Murvihill that Ms. Duck and Ms. Sacks both believe that Mr. Ambrose sexually assaulted EMPLOYEE 1. Ms. Duck then stated, "[N]one of us will know 100%, but... the information and the detail and the evidence was so consistent... it was obvious that something... something traumatic had happened." (*Id.* at 4.)

44. After learning that she might be subpoenaed to testify at Mr. Ambrose's contested case hearing, EMPLOYEE 1 wrote a letter to Mr. Bracco to try to help him understand what she had experienced and was continuing to experience, as a result of the sexual assault. (Ex. A13 at 1; test. of Bracco, EMPLOYEE 1.) The letter states:

I wish you could understand, to feel. Imagine having so much happen to you already but finally, finally, a chance at happiness. A fresh start with a new job. Imagine being so happy, so eager to please. Imagine feeling safe and hopeful. Imagine what it is like to be shy and insecure though, even about your body and not even wanting to be naked in front of a doctor. But it's ok, it's your body. It's ok. Imagine having someone grab you and take you into a room against your will, at first disbelief – what is going on? This can't be happening? I'm at work! Then panic as you try to stop him from touching you. And fear, mind numbing fear that you can't stop what is about to happen! And you[re] so afraid, you can't think. Then he tells you that he doesn't want to hurt you. And you[re] so afraid – you don't want to be hurt, to feel the pain. So you stop struggling. You stop trying to keep him from pulling your pants down. You stop trying to keep him from kissing you, or touching your breasts. He pulls your pants and undies down. Now you[re] naked and exposed – so exposed feeling. Ashamed. Afraid[.] Imagine that feeling of exposure, against your will. Then he turns you around and forces you down over the counter and has hold of your arm. You can feel him pushing into you and it hurts because you didn't want it and you[re] not wet, and it hurts. You can feel his belt buckle hitting the back of your legs and it feels big and [clunky]. You can smell him and you can't stop it. That is what it feels like to be raped. The betrayal and of hope crushed because the very last place you expect this to happen is at work. Now you are not safe

anywhere. Then you block it from your mind – go into [denial] and doubt – maybe it wasn't rape – maybe I deserved it[.] Maybe I am shit. Then you feel so filthy.

(Ex. A13 at 1; test. of EMPLOYEE 1; underline in original.) At Ms. Murvihill's request, Mr. Bracco provided the Board with a copy of the letter. (Test. of Murvihill.)

45. Materials distributed by Mid-Valley Women's Crisis Service discuss sexual assault, and provide information and resources for survivors and their supporters. (Ex. A14 at 1-20.) The materials state, in part:

Unfortunately, most victims [of sexual assault] will blame themselves. Survivors can find many things they "should" have done differently. In addition to the guilt she will place on herself, she must be careful about reporting the crime. Too often, her feelings of self-blame will be reinforced by those around her. We often judge the victim's behavior. \* \* \*. We frequently measure her response with some standard of how a victim "ought" to act.

\* \* \* \* \*

[Sexual assault survivors] may experience at least some of the following feelings and reactions:

- Fear of the sexual offender's return
- Frustration with the legal process

\* \* \* \* \*

- Fear
- Loss of self-esteem
- Guilt that she in some way caused the assault
- Loss of a sense of control
- Loss of a sense of security in her surroundings[.]

(*Id.* at 2, 9.) According to those same materials, it is estimated that fewer than 10 percent of women report sexual assault to law enforcement. (*Id.* at 9.)

46. In a letter dated April 17, 2014, Licensed Clinical Social Worker (L.C.S.W.) Susan Bamford states that she had been providing psychological treatment to EMPLOYEE 1 for Post-Traumatic Stress Disorder (PTSD) since March 6, 2014. Ms. Bamford further states that EMPLOYEE 1's current and ongoing diagnosis of PTSD was established from the DSM-IV-TR criteria noted therein. (Ex. A15 at 1.)

47. An April 30, 2014 letter from Ms. Bamford states, in part:

[EMPLOYEE 1] has been seen in this office from 3/6/14 to present for psychological treatment of [PTSD]. This treatment relates to sexual assault by a coworker occurring approximately 1 year ago.

(Ex. A17 at 1.) At the time of the hearing, EMPLOYEE 1 was seeing Ms. Bamford once per week. (Test. of EMPLOYEE 1.)

48. At the time of the hearing, EMPLOYEE 1 was still working at the facility. (Test. of EMPLOYEE 1, Lindberg.) She was continuing to have periodic “breakdowns” at work regarding the sexual assault. (Test. of Lindberg.) She continued to feel afraid of Mr. Ambrose. (Test. of EMPLOYEE 1.)

SIGNATURES & DATED COPY ON FILE IN BOARD OFFICE

## CONCLUSIONS OF LAW

1. Mr. Ambrose engaged in conduct unbecoming a nursing assistant in the performance of duties, under ORS 678.442(2)(f) and OAR 851-063-0080(6) and OAR 851-063-0090(1)(e) and (5).
2. Revocation of Mr. Ambrose's nursing assistant certificate is the appropriate sanction.

## OPINION

The Board seeks to revoke Mr. Ambrose's nursing assistant certificate on the ground that he demonstrated conduct unbecoming a nursing assistance in the performance of duties. The Board must prove its allegations by a preponderance of the evidence, and must establish that the proposed sanction is appropriate. *See* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalfe v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

### 1. Conduct unbecoming a nursing assistant in performance of duties

ORS 678.442(2)(f) allows the Board to revoke or suspend a nursing assistant certificate for "conduct unbecoming a nursing assistant in the performance of duties."

The Board has adopted OAR 851-063-0080, which provides, in part:

[T]he Board may deny, reprimand, suspend, place on probation or revoke the certificate to perform duties as a CNA for the following causes:

\* \* \* \* \*

(6) Conduct unbecoming a nursing assistant in the performance of duties[.]

The Board has defined "conduct unbecoming a nursing assistant in the performance of duties" in OAR 851-063-0090, and relevant portions of the rule are set forth as follows:

A CNA, regardless of job location, responsibilities, or use of the title "CNA," who, in the performance of nursing related duties, may adversely affect the health, safety or welfare of the public, may be found guilty of conduct unbecoming a nursing assistant. Conduct unbecoming a nursing assistant includes but is not limited to:

(1) Conduct related to the client's safety and integrity:

\* \* \* \* \*

(e) Engaging in sexual misconduct related to the client or to the workplace.

\* \* \* \* \*

(5) Conduct related to co-workers: violent, abusive, threatening, harassing or intimidating behavior towards a co-worker which either occurs in the presence of clients or otherwise relates to the delivery of safe care to clients.

*Ms. Lindberg*

The record establishes, by a preponderance of evidence, that on at least two occasions, Mr. Ambrose engaged in unsolicited physical contact with Ms. Lindberg at the facility. Specifically, Mr. Ambrose hugged and attempted to kiss Ms. Lindberg while they were working.

Ms. Lindberg admitted at hearing that she was not bothered when Mr. Ambrose initially gave her one or two unsolicited hugs because she viewed the hugs as merely “friendly.” Testimony of Lindberg. However, after some time, Mr. Ambrose began telling Ms. Lindberg that they could become more than friends, and he tried to kiss her on the lips while they were working in the facility’s ice room. To try to avoid the unwelcome kiss, Ms. Lindberg turned her face to the side, resulting in Mr. Ambrose kissing her cheek. She then pushed Mr. Ambrose away and told him that they were both married to other people and that his behavior was not appropriate for the workplace.

The ALJ concluded that Mr. Ambrose’s unsolicited and unwelcome physical attempt to become “more than friends” with Ms. Lindberg constitutes harassing behavior in the workplace, and is therefore conduct unbecoming a nursing assistant under OAR 851-063-0090(5).

*EMPLOYEE 1*

The record establishes, by a preponderance of the evidence, that sometime between 2:00 and 3:00 a.m. during the June 15, 2013 night shift, Mr. Ambrose sexually assaulted EMPLOYEE 1 in a public bathroom at the facility. In so doing, Mr. Ambrose engaged in sexual misconduct in the workplace. This constitutes conduct unbecoming a nursing assistant under OAR 851-063-0090(1)(e).

The record also persuasively establishes that in the days and weeks following the sexual assault, Mr. Ambrose made intimidating comments to EMPLOYEE 1 at the facility. Those comments included telling EMPLOYEE 1 that he was watching her (while literally standing over her), that he knew her phone number, and that he knew what type of car she drove. He also asked EMPLOYEE 1 whether she was going to cause trouble, to which she replied, “No. I’m not going to do anything.” Testimony of EMPLOYEE 1. Given that Mr. Ambrose had already

sexually assaulted EMPLOYEE 1 at work, his comments thereafter caused EMPLOYEE 1 to feel intimidated, threatened, and unsafe in the workplace. Mr. Ambrose's actions constitute conduct unbecoming a nursing assistant under OAR 851-063-0090(5).

## 2. Sanction

The Board has proven that Mr. Ambrose engaged in multiple instances of "conduct unbecoming a nursing assistant in the performance of duties" as defined in OAR 851-063-0090. Under ORS 678.442(2)(f) and OAR 851-063-0080(6), the Board may sanction Mr. Ambrose for the violations, and the possible sanctions include reprimand, suspension, probation, or revocation of his certificate to perform duties as a CNA.

Given the seriousness of the violations proven herein—particularly the sexual assault of EMPLOYEE 1 and Mr. Ambrose's intimidating and threatening comments made to her thereafter—The ALJ was persuaded that Mr. Ambrose poses a serious risk to the safety and welfare of patients, residents, and coworkers.

It is within the Board's discretion to revoke Mr. Ambrose's nursing assistant certification and, on this record, the Board has demonstrated ample justification to do so. Revocation of Mr. Ambrose's certificate is the appropriate penalty in this case.

### ORDER

*The Board of Nursing hereby issues the following order:*

Daniel Ambrose's nursing assistant certificate is REVOKED.

Kay Carnegie, RN  
Board President

### APPEAL

If you wish to appeal the Final Order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the Final Order is served upon you. *See* ORS 183.480 *et seq.*

**CERTIFICATE OF MAILING**

On November \_\_\_\_, 2014, I mailed the foregoing Final Order issued on this date in OAH Case No. 1303494.

By: First Class Mail

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