COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000622-D
(2011-CA-000853)

COMMONWEALTH OF KENTUCKY,
KENTUCKY BOARD OF NURSING — **APPELLANT**

v. — **JEFFERSON CIRCUIT COURT**
2010-CI-002890

SULLIVAN UNIVERSITY SYSTEM, INC.,
D/B/A SPENCERIAN COLLEGE, ET AL. — **APPELLEE**

REPLY BRIEF FOR APPELLANT, KENTUCKY BOARD OF NURSING

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was sent by U.S. First Class Mail, postage prepaid, this 10th day of January, 2014 to: Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Grover C. Potts, Jr., Mitzi D. Wyrick, Emily C. Lamb, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Suite 2800, Louisville, Kentucky 40202-2898; Mark A. Robinson, Michael A. Valenti, John E. Hanley, Valenti Hanley & Robinson, PLLC, One Riverfront Plaza, Suite 1950, 401 W. Main Street, Louisville, Kentucky 40202; and Hon. Olu A. Stevens, Jefferson Circuit Court, Division Six, Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202.

David Domene

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

The Kentucky Board of Nursing (the "Board") submits this reply brief to address the arguments raised in Spencerian's brief. As an initial matter, Spencerian incorrectly frames the controlling issue before this Court. The dispositive issue is whether the Court of Appeals correctly found that the Board's interpretation of the pre 2009 regulation – as applying to graduates taking the exam for the first time – was "in direct conflict" with the pre 2009 regulation. [Court of Appeals' Opinion at 10].[1]

I. The Court of Appeals Erred in Determining the Board's Longstanding Interpretation was in Direct Conflict with the Regulation

For years, this Court has ruled that courts "must defer" or give "controlling weight" to an agency's longstanding interpretation of its own regulation. Camera Center, Inc. v. Revenue Cabinet, 34 S.W.3d 39, 41 (Ky. 2000); *See*, *also*, Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991) ("A construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight.") Here, the Court of Appeals should have (but did not) defer to the Board's interpretation of the pre 2009 regulation, which stood for the entire life of the regulation (over 25 years).

On its face, the pre 2009 regulation applied the pass rate standard to "graduates of a program of nursing." From its inception, the Board interpreted this regulation to apply to graduates taking the exam for the first time upon graduation since the first exam attempt is most indicative of the quality of the subject nursing program. [30-6-10 VR 122: 7/9/10, 1:29:25: Dr. Charlotte Beason's testimony]. Spencerian nevertheless argues that this interpretation is not entitled to any deference since "graduate," as defined in

[1] As the Board discussed in its original brief to this Court, neither party raised or briefed this issue to the Circuit Court or Court of Appeals.

Webster's Dictionary, does not have a "temporal limitation". However, in the context of the regulation, the term "graduate" clearly implies those individuals taking the exam for the first time upon graduation and after completion of their studies with the nursing program.

Moreover, even if the term "graduate," by its dictionary definition, does not contain a temporal limitation, the Board's interpretation cannot be said to be incompatible, unreasonable, or "in direct conflict" with the regulation. When construing a statute, a court's "primary purpose" is to "carry out the intent of the legislature." Monumental Life Ins. Co. v. Department of Revenue, 294 S.W.3d 10, 19 (Ky. App. 2008).[2] Here, the legislature authorized creation of the Board in order to regulate and control the practice of nursing. KRS 314.021 §1. Furthermore, 201 KAR 20:360 instructed the Board to establish evaluative standards "to assure that the programs of nursing provide the necessary instruction and services to prepare graduates for licensure eligibility as registered nurses or as practical nurses" (emphasis added). Clearly, the statutory and regulatory intent is to assess how programs of nursing prepare graduates for licensure eligibility, not how distant graduates might perform on the exam after multiple attempts and resorting to alternative self-study or supplemental preparatory courses. Indeed, applying the standard to distant graduates, as Spencerian suggests, would have actually destroyed this clear regulatory purpose. At a minimum, the Board's longstanding interpretation was a reasonable interpretation of the Board's own regulation, especially when viewed in light of the Board's regulatory purpose. Accordingly, the Court of Appeals should have deferred to the Board's interpretation.

[2] The same rules that apply to statutory construction and interpretation are applicable to the construction and interpretation of administrative regulations. SmithKline Beecham Corp. v. Rev. Cab., 40 S.W.3d 883, 885 (Ky. App. 2001).

Spencerian claims that the Board's interpretation did not (and does not) further the Board's regulatory purpose since there is supposedly no "empirical data to establish or support the Board's position that the 85% standard" is a "quality measurement which supports the evaluation of nursing programs." This argument is nonsensical. The 85% pass rate standard (like any pass rate standard for any licensure exam) is obviously a "quality measurement" in and of itself. To suggest that the Board should invoke separate "empirical data" for such a common sense proposition is ridiculous.

Spencerian also argues the court's ruling has no effect on the Board's regulatory authority moving forward since the Board can only consider pass rates "for the preceding calendar year."[3] This is incorrect. The regulations direct the Board to continually assess programs based on such program's compliance with the evaluative standards, "NCLEX examination pass **rates**," (plural) and "other pertinent data". 201 KAR 20:360 §2(1) and 3(1). Nowhere do the regulations limit the Board to only considering a program's pass rate for the "preceding calendar year". Rather, the Board is permitted to consider a wide spectrum of data when assessing a program, including a program's past probation and history of deficient pass rates. As it stands, the Court of Appeals ruling clearly undermines the Board's ability to fully assess Spencerian and the other 102 educational institutions falling under the regulations.[4] This Court should reverse the Court of Appeals' decision and reinstate the Circuit Court's grant of summary judgment in the

[3] Spencerian's interpretation is not surprising since such an interpretation would effectively "expunge" Spencerian's past probation and nine consecutive years of deficient pass rates.

[4] The Circuit Court previously acknowledged the negative effect such a ruling would have, stating "Spencerian cannot simply wipe the slate clean for its failure to achieve the 85% pass rate for seven consecutive years. The amendments to the regulations do not constitute a 'do-over' for programs with a record of non-compliance." [R. 520: Opinion and Order at 5].

Board's favor.

II. The Circuit Court Correctly Rejected Spencerian's Additional Arguments

This Court granted discretionary review to determine whether the Court of Appeals correctly ruled that the Board's interpretation of the pre 2009 regulation directly conflicted with the regulation. On the one hand Spencerian argues that the issue is now moot since it is currently off probation, but on the other hand it now requests that this Court review three additional issues, all of which relate to the Board's 2010 probation decision.[5] The Circuit Court correctly rejected each of these issues and this Court should as well.

A. The Circuit Court Correctly Held the Board Did Not Retroactively Apply the Amended Regulations

The Circuit Court correctly rejected Spencerian's claim that the Board retroactively applied the amended regulation because Spencerian has always been required to achieve an 85% pass rate. [R. 520: Opinion and Order at 5]. For years, Spencerian submitted reports to the Board detailing its proposals for raising the pass rate of its graduates taking the exam for the first time. In fact, in 2006, Spencerian actually unsuccessfully challenged the application of the standard to graduates taking the exam for the first time. Simply put, the amendment imposed no new duties on Spencerian but merely codified the standard Spencerian had already been required to achieve. Spencerian cannot now "simply wipe the slate clean for its failure to achieve the 85% pass rate for seven consecutive years." [R. 520: Opinion and Order at 5]. The Circuit Court correctly dismissed Spencerian's claim.

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[5] In this record, Spencerian states that it was placed "back on Full Approval" when in reality this is the first time that the program had ever achieved full approval from the Board. [Spencerian's Brief at 10-11 (emphasis added)]. In any event, the Board has thoroughly addressed Spencerian's mootness argument in its response to Spencerian's Motion to Dismiss filed with this Court.

B. The Circuit Court Correctly Held the Board Did Not Act Arbitrarily and Capriciously

Despite being the **only** program in Kentucky to fail to achieve the minimum 85% annual pass rate for seven consecutive years, Spencerian nonetheless claims the Board acted arbitrarily in its probation decision. The Circuit Court correctly dismissed this claim since Spencerian cannot prove that the Board: (1) acted beyond a statutory grant of authority; (2) rendered its probation decision on less than substantial evidence; or (3) failed to afford Spencerian procedural due process. *See, e.g.*, Am. Beauty Homes Corp. v. Louisville and Jefferson Plan. Comm'n., 379 S.W.2d 450 (Ky. 1964).

Contrary to Spencerian's continued misinterpretation throughout this case, the regulations do not require repeated deficiencies of identical standards before a program may be placed on probation. Rather, the regulations simply state that a program of nursing shall be placed on probation "if one or more standards have continued to be unmet." 201 KAR 20:360 § 1(5). Thus, the fact that Spencerian failed to meet "one or more standards" every year since its inception was more than sufficient to warrant the Board's probation decision. Moreover, even if Spencerian's interpretation is accepted, it is undisputed that Spencerian had never achieved the 85% minimum pass rate standard prior to the Board's probation decision. In other words, at least one standard remained unmet for seven consecutive years prior to the Board's probation decision. The Board's probation decision was clearly within its statutory authority.

Likewise, the Board rendered its decision based on "substantial evidence"[6] after

[6] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Ky. State Racing Comm'n. v. Fuller, 481 S.W.2d 298, 307 (Ky. App. 1972) (internal citations omitted).

affording Spencerian sufficient notice and opportunity to be heard. The Board permitted Spencerian representatives approximately five hours to make presentations and participate in question and answer sessions during the February 2010 and April 2010 Board meetings. During these meetings, Spencerian's Program Director, Dale Charles, admitted to the program's deficiencies and acknowledged that probation would be justified. [Admin.R. Disc 5 at 24:18, 29:30, 1:46-2:10; *See*, *also*, Board's Appellee Brief at 5-7]. Given Charles' admissions and Spencerian's unprecedented failure to meet the evaluative standards, the Board's probation decision was certainly not arbitrary and capricious.

Spencerian attempts to discredit the Board's decision by arguing that "similarly-situated institutions" were not placed on probation in 2010. This is unconvincing. As an initial matter, the other institutions were not "similarly-situated". As the Circuit Court held in dismissing Spencerian's claim, the Board articulated "numerous reasons for distinguishing Spencerian" from these other institutions.[7] [R. 519-520: Opinion and Order at 4-5; Admin.R. No. 25 and 26]. Importantly, each of the other programs "met or partially met every other requirement except for the first-time pass rate criterion." [Id.] Moreover, the simple fact that the Board did not reach identical outcomes for each institution does not mean the Board violated the principle of uniformity. *See*, *e.g.*, Commonwealth Nat. Res. & Envt'l. Prot. Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718, 726 (Ky. 2005) (a violation of Section 2 of the Kentucky Constitution requires "a

[7] The numerous distinctions are succinctly outlined in the Board's appellee brief to the Court of Appeals. [Board's Appellee Brief at 12-13].

conscious violation of the principle of uniformity.") (emphasis added). There is no evidence that the Board consciously violated this principle.[8]

Given Spencerian's prolonged and unmatched history of noncompliance, the Circuit Court correctly rejected Spencerian's claim, concluding that it "will not substitute its judgment for that of the Board in such matters." [R. 520: Opinion and Order at 5].

C. The Circuit Court Correctly Held the Board Did Not Deprive Spencerian of Procedural Due Process

Finally, the Circuit Court correctly dismissed Spencerian's procedural due process claim. The Board submits it is unnecessary for this Court's analysis to proceed beyond the threshold issue of whether Spencerian was deprived of a protected property interest.

i. Spencerian Has Not Been Deprived of a Constitutionally Protected Property Interest

As a threshold matter, procedural due process requirements only apply to property interests recognized by the Fourteenth Amendment. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). A property interest is only "protected" if there is a "legitimate claim of entitlement" to such interest that is "created and defined by an independent source, such as state or federal law." Id. at 577. Here, Spencerian did not have a constitutionally protected property interest in continued conditional approval status.

Any interest Spencerian has in operating its ADN program is created and defined in KRS Chapter 314, which requires a nursing program to obtain ongoing Board

[8] Likewise, Spencerian's claim that its status as a proprietary institution motivated the Board's probation decision is unsupportable. Although there were six Kentucky proprietary institutions offering a RN licensing program at the time Spencerian was placed on probation, the Board did not consider any of the other proprietary programs for probation and actually granted initial approval to two of these schools (Daymar College and ITT Technical Institute) in 2009.

approval. The Board, in turn, maintains full authority to promulgate regulations setting forth the parameters of such approval. KRS 314.131. Board approval is contingent on a program meeting the educational and evaluative standards outlined in 201 KAR 20:260 through 201 KAR 20:360. If a conditionally approved program fails to correct its deficiencies, the program shall be placed on probation. 201 KAR 20:360 §1(5).

Spencerian is claiming entitlement to an interest that was, by definition, "conditional" from the outset. There of course can be no right to something which is "conditional". In addition, the regulations state that a program with ongoing deficiencies shall be adjusted from conditional to probational approval. Thus, pursuant to the clear language of the regulations, Spencerian – who failed to meet one or more standards every year prior to being placed on probation – simply had no right to remain on conditional approval. Finally, nowhere do the regulations entitle a program to a hearing prior to being placed on conditional approval status.[9] The fact that Spencerian does not have a protected property interest in its approval status is sufficient in and of itself to reject Spencerian's claim. *See, e.g.*, Excelsior College v. Cal. Bd. of Registered Nursing, 136 Cal.App.4th 1218 (Cal. App. 2006) (holding that Excelsior College did not have a property interest in its approval status with the California Board of Registered Nursing).

ii. The Board Afforded Spencerian Due Process of Law

Even if Spencerian had a protected property interest to conditional as opposed to probational approval (which it did not), Spencerian's claim would still fail since the Board gave Spencerian advance notice of its deficiencies and afforded Spencerian several

[9] The only substantial procedural restriction imposed on the Board's exercise of authority is found in KRS 314.111(4), which requires the Board to conduct an administrative hearing before **discontinuing** a program. But this statute does not apply to actions taken by the Board short of discontinuing a program, such as adjusting Spencerian's status from conditional to probational.

lengthy opportunities to be heard. *See, e.g.*, Hilltop Basic Resources, Inc. v. County of Boone, 180 S.W.3d 464, 469 (Ky. 2005) ("The fundamental requirement of procedural due process is simply that all affected parties be given 'the opportunity to be heard at a meaningful time and in a meaningful manner.'")

In June 2009, the Board made a decision to continue approval of the ADN Program "[c]onditional pending 2009 [RN licensure exam] results and the program plan of correction". [Admin.R. No. 4 at 8]. At this time, the Board provided Spencerian with a timeline for corrective action, which included a follow-up site visit in January 2010 as well as an order that Spencerian re-appear before the Board on February 18, 2010 to review the outcomes of its corrective action and the program's status. [Admin.R. No. 4 at 9; Admin.R. No. 5]. Thus, Spencerian knew by June 12, 2009 that it would be going before the Board the following February to address its test score improvement and approval status.

Following the January 2010 follow-up site visit, the Board issued a comprehensive report (made available to Spencerian) recommending probation. [Admin.R. No. 11 at 35]. On February 18, 2010, the Board met to consider the outcome of Spencerian's corrective plan and to review the status of the program. [Admin.R. No. 14]. Several Spencerian representatives attended this meeting, including its counsel in this litigation. Spencerian's Program Director, Dale Charles, addressed the Board for approximately two hours, during which time he admitted to many of the program's deficiencies and acknowledged that probation would be justified. Following the Board's probation decision, the Board promptly notified Spencerian of its decision and the procedures for contesting the decision, as set forth in 201 KAR 20:360 §1(5)(c).

[Admin.R. No. 16]. Spencerian again addressed the Board, this time for approximately three hours. This was more than adequate process.

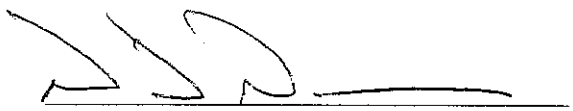
Spencerian' s claim that the Board was required to conduct a formal hearing in accordance with KRS Chapter 13B is without merit. The requirements of KRS Chapter 13B only apply to a "formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation..." KRS 13B.010(2). *See, also,* Abul-Ela, M.D. v. Ky. Board of Med. Licensure, 217 S.W.3d 246, 251 (Ky. App. 2006) (holding KRS Chapter 13B proceedings did not apply where statute "allows the Board to deny a license application without a hearing.") Here, as discussed above (n.5, *supra*), the statutes and regulations only require or permit a hearing when the Board **discontinues** a program.

Thus, although the Board did not conduct a full blown trial-type hearing, it nonetheless afforded Spencerian sufficient procedural due process. This Court should affirm the Circuit Court's decision dismissing Spencerian's procedural due process claim.

CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court reverse the decision of the Court of Appeals and affirm the Jefferson Circuit Court's grant of summary judgment in the Board's favor.

Respectfully submitted by:



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