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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000853-MR

THE SULLIVAN UNIVERSITY SYSTEM, INC.
D/B/A SPENCERIAN COLLEGE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 10-CI-002890

COMMONWEALTH OF KENTUCKY,
KENTUCKY BOARD OF NURSING

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: The Sullivan University System, Inc. d/b/a Spencerian

College (hereinafter Spencerian) appeals from an order of the Jefferson Circuit

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Court granting summary judgment in favor of the Kentucky Board of Nursing (hereinafter the Board). Spencerian argues the trial court erred by granting summary judgment in favor of the Board. We find summary judgment was improperly granted in favor of the Board because it retroactively applied new regulations; therefore, we reverse and remand with directions for the trial court to enter judgment in favor of Spencerian.

Spencerian offers an Applied Science Degree in Nursing (ADN) Program on its Louisville campus. The Board, among other things, enforces the standards applicable to Spencerian and other pre-licensure nursing programs. A nursing program in Kentucky may not operate without initial and ongoing approval of the Board. Board approval is contingent on the program meeting the educational and evaluative standards outlined in 201 KAR 20:260 through 201 KAR 20:360. A program that fails to satisfy one or more of the standards may only operate with the conditional approval of the Board and is obligated to work toward full compliance. A conditionally approved program is placed on probational approval status if it continuously fails to meet the standards. A probational program may not admit new students. If the probational program fails to meet and correct its deficiencies within one year, the Board may withdraw approval for the program to operate. On July 31, 2009, the Board enacted changes to the relevant administrative regulations regarding nursing programs.

Spencerian's ADN Program was established in 2001. It has never been fully approved by the Board. It has always been on conditional approval

status because it has failed to meet one or more standards every year. According to the Board, the main standard that has never been met by Spencerian is an 85% pass rate for the National Council Licensure Examination for Nurses (NCLEX-RN). It only takes one standard to be unmet to be put on conditional or probational approval status.

As part of Spencerian's conditional approval status, the Board has conducted ongoing evaluations and site visits. After such an evaluation and visit in May of 2009, the Board requested Spencerian's presence at its June meeting to address its continued failure to meet the pass rate standard. After the meeting, the Board decided to continue its conditional approval of Spencerian's program. It also scheduled another site visit and report for January of 2010. The Board also requested Spencerian officials attend its February meeting to discuss the future of the ADN program.

After the February meeting, the Board voted to change Spencerian's approval status to probational. Spencerian requested it be allowed to address the Board to contest the decision and did so in April. After the meeting, the Board upheld its previous decision to change Spencerian's status to probational. Following the Board's decision, Spencerian appealed to the Jefferson Circuit Court alleging the Board deprived it of procedural due process, acted arbitrarily, and improperly applied regulations retroactively. Spencerian also moved for injunctive relief.

In July of 2010, the trial court granted Spencerian an injunction, stopping the Board from changing Spencerian's status to probational. Later, both parties filed motions for summary judgment. The trial court granted summary judgment in favor of the Board. This appeal followed.

In order to proceed, a citation to the relevant administrative code is necessary. The current version of 201 KAR 20:360 states in pertinent part:

Section 1. Approval Status and Withdrawal of Approval.
Approval status shall be based upon each program of nursing's performance and demonstrated compliance with 201 KAR 20:260 through 20:360.

- (1) Developmental approval shall be the designation granted to a proposed program of nursing to continue development of plans for program implementation.
- (2) Initial approval shall be the designation granted to a new program of nursing upon admission of the first class, if provided the date of enrollment is within eighteen (18) months of board approval of the proposal. During the period of initial approval, reports documenting implementation of the proposal shall be submitted on a quarterly basis.
- (3) Full approval shall be the designation granted to a program of nursing that has implemented the proposal and that continues to meet the standards of 201 KAR 20:260 through 20:360.
- (4) Conditional approval shall be the designation granted to a program of nursing if one (1) or more of the standards of 201 KAR 20:260 through 20:360 have not been met.
 - (a) Following the decision of the board to place a program of nursing on conditional status, the program administrator shall be notified of the areas of

deficiency and the time frame allowed for corrective action to be implemented.

(b) The program administrator shall, within thirty (30) days of the notice of deficiencies being sent, file a plan to correct each of the deficiencies.

(c) The program administrator may, within thirty (30) days of the notice of the deficiencies, request to appear before the board to contest the board's determination of deficiencies.

(d) If the board's determination of deficiencies has not been contested or if the deficiencies being sent are upheld after a request to contest them, the board may conduct periodic evaluations of the program of nursing during the time of correction to determine that deficiencies have been corrected.

(e) If the plan of compliance is not completed satisfactorily within the time frame set by the board and if the program of nursing has not been granted additional time for completion, the approval status of the program of nursing shall be adjusted to probational.

(5) Probational approval shall be the designation granted to a program of nursing if one or more standards have continued to be unmet.

(a) Following the decision of the board to place a program of nursing on probational status, the program administrator shall be notified of the continued areas of deficiency. A new student shall not be admitted until the time the program of nursing comes into compliance. This period of time shall not exceed one academic year.

(b) The program administrator shall, within thirty (30) days of the notice of the deficiencies being sent, file a plan to correct each of the identified deficiencies.

(c) The program administrator may, within thirty (30) days[] of the notice of the deficiencies, submit a request to appear before the board to contest the board's determination of deficiencies.

(d) If the board's determination of deficiencies has not been contested or if the deficiencies are upheld after a request to contest them, the board may conduct periodic evaluations of the program of nursing during the time of correction to determine that deficiencies have been corrected.

(6) If the program of nursing has not corrected the deficiencies within one (1) academic year of being placed on probational status, a hearing pursuant to KRS Chapter 13B shall be conducted to determine whether to withdraw approval of the program of nursing.

(7) If the board decides to withdraw approval of a program of nursing, upon the effective date of the decision the program of nursing shall be removed from the official approved status listing. A program of nursing whose approval has been withdrawn shall:

(a) Allow a student who is currently enrolled in a nursing class to complete the program of nursing; or

(b) Assist a currently enrolled student to transfer to an approved program of nursing.

(8) A program of nursing whose approval has been withdrawn but continues to operate pursuant to subsection (7)(a) of this section shall be continuously monitored by the board until the program closes.

Section 2. Reports and Examination Pass Rates. (1) A program of nursing that prepares graduates for licensure shall meet all standards of 201 KAR 20:260 through 20:360 in order to retain full approval. **Approval status shall be determined annually by the board on the basis of the program's annual report, NCLEX examination pass rates for first time test takers, and other pertinent data.**

(2) A program of nursing shall submit an annual report regarding its compliance with administrative regulations 201 KAR 20:260 through 20:360. A secondary or distance learning site shall be treated independently for purposes of compliance with the regulatory standards.

(3) To verify continued compliance with these administrative regulations, the program administrator shall submit progress reports or periodic supplemental reports, completed questionnaires, surveys, and other documents as requested by the board.

(4) A program of nursing shall maintain at least an eighty-five 85 percent annual pass rate for graduates taking the NCLEX-RN or NCLEX-PN for the first time. Pass rates shall be published on a calendar year basis for those graduates who have tested within twelve (12) months of graduation.

(5) A program of nursing and secondary or distance learning site shall be evaluated individually concerning licensure examination results.

(6) If a program of nursing's pass rate for first time test takers is less than eighty-five 85 percent for a calendar year, the program administrator shall submit a self study report that evaluates factors that contributed to the graduates' performance on the NCLEX examination and a description of the corrective measures to be implemented.

Section 3. Factors That May Jeopardize Program Approval Status.

Approval status may change for any of the following reasons:

(1) Deficiencies in compliance with 201 KAR 20:260 through 20:360;

(2) Noncompliance with the governing institution or program of nursing's stated philosophy, mission, program design, objectives/outcomes, or policies;

(3) Continual failure to submit records or reports to the board within the designated time frame;

(4) Failure to provide sufficient clinical learning opportunities for students to achieve stated objectives/outcomes;

(5) Failure to comply with requirements of the board or to respond to recommendations of the board within the specified time;

(6) Failure to maintain the pass rate on the licensure examination for first time test takers as set by Section 2(4) of this administrative regulation;

(7) Withdrawal of accreditation by a national nursing accrediting body recognized by the United States Department of Education. (Emphasis added).

As stated previously, this case mainly revolves around Spencerian not having an 85% pass rate for takers of the NCLEX-RN examination. It will therefore be the focus of our opinion.

This Court finds that the 85% pass rate issue is the main issue of this case. All parties, as well as the trial court, have focused on this issue. The Board enacted new regulations in July of 2009, and part of the change concerned the above emphasized language. Specifically, the prior version of the regulation did not have the 85% pass rate apply only to first time test takers; it only stated the program must have a pass rate of 85% on the NCLEX-RN. It was not until the 2009 revision that the “first time test takers” language was added. Also in the prior

version, the pass rate was measured over a period of three years. The new version measures the pass rate every year.

This Court reviews a circuit court's decision affirming an administrative decision using the clearly erroneous standard. *500 Associates, Inc. v. Natural Res. and Env'tl. Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006).

Spencerian makes multiple arguments in its brief, but we find one to be dispositive of the case. Spencerian argues that the Board retroactively enforced its new regulations. As previously discussed, the Board made amendments to its regulations that became effective on July 31, 2009. It was not until the 2009 revision that the "first time test takers" language was included. The Board, however, considered the pass rate of first time test takers in the years prior to the 2009 amendment when placing Spencerian on probational approval status. The retroactive application of administrative regulations is prohibited. *Kerr v. Ky. State Bd. Of Registration for Prof'l Eng'rs & Land Surveyors*, 797 S.W.2d 714, 717 (Ky. App. 1990). "An agency must be bound by the regulations it promulgates. Further, the regulations adopted by an agency have the force and effect of law. An agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation." *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991)(citations omitted). Also, KRS 13A.130 states:

(1) An administrative body shall not by internal policy, memorandum, or other form of action:

- (a) Modify a statute or administrative regulation;
 - (b) Expand upon or limit a statute or administrative regulation; and
 - (c) Except as authorized by the Constitution of the United States, the Constitution of Kentucky or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Constitution of Kentucky, a statute, or an administrative regulation.
- (2) Any administrative body memorandum, internal policy, or other form of action violative of this section or the spirit thereof is null, void, and unenforceable.
- (3) This section shall not be construed to prohibit an administrative body issuing an opinion or administrative decision which is authorized by statute.

Here, the Board argues that although the prior version of the regulation did not state that the pass rate concerned first time test takers, it was always interpreted that way. This interpretation is in direct conflict with the actual language of the old version of the Board's regulations. We can only enforce the law as written; therefore, the pass rate for first time test takers shall not be considered prior to the 2009 revision. The trial court's judgment is clearly erroneous because the Board acted unreasonably in applying the "first time test takers" language to the prior version of its regulations.

Based on the foregoing, we reverse and remand with instructions to the court to enter judgment in favor of Spencerian.

ALL CONCUR.

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