STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEVERLY UMILTA NEBLETT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-3198
	)	
DEPARTMENT OF HEALTH, BOARD OF NURSING,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on November 2, 2000, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alicia M. Phidd, Esquire
Post Office Box 260004
Pembroke Pines, Florida 33026

For Respondent: Lee Ann Gustafson, Esquire
Office of the Attorney General
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to licensure by endorsement pursuant to Section 464.009, Florida Statutes, as implemented by Rule 64B9-3.008.

PRELIMINARY STATEMENT

By letter dated July 26, 2000, to the Department of Health, Board of Nursing (Board), Petitioner requested a "formal administrative hearing" on the Board's proposed denial of her application for licensure by endorsement. Her letter read as follows:

> Please consider this letter an official appeal of the Agency denial of my LPN license which was filed January 31, 2000. I am requesting a formal administrative hearing to challenge the agency denial of my application. The disputed issues of material fact include, but are not limited to, the fact that I meet all licensure requirements for licensure by endorsement and that the agency failed to render a decision on my application within the time required under Chapter 120 of the Florida Statutes. The agency also failed to comply with Florida Administrative Code 64B9-3.008 and 64B9-3.008 section 4.
>
> Please forward this Petition to the Division of Administrative Hearings.
>
> Kindly forward all correspondence to the above address. Thank you in advance for your speedy response to this appeal.

Pursuant to Petitioner's request, the Board, on August 4, 2000, referred the matter to the Division of Administrative Hearings (Division) for the "assign[ment of] an administrative law judge for the purpose of hearing the disputed issues of fact arising from the Notice of Intent to Deny Petitioner's application for licensure."

As noted above, the hearing requested by Petitioner was held on November 2, 2000. At the hearing, Petitioner testified on her

own behalf, and Mary Kay Jacobsen, the Board's Nursing Education Director, testified on behalf of Respondent. No other testimony was presented. In addition to the testimony of Petitioner and Ms. Jacobsen, a total of three exhibits (Petitioner's Exhibits 1 through 3) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, advised the parties of their right to file proposed recommended orders and established a deadline (November 28, 2000) for the filing of such post-hearing submittals.

On November 28, 2000, Petitioner filed an unopposed motion requesting an extension of this deadline. By Order issued November 30, 2000, the undersigned granted the request and established a new deadline (December 8, 2000).

The Board and Petitioner filed their Proposed Recommended Orders on December 5, 2000, and December 8, 2000, respectively. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at hearing 1/ and the record as a whole, the following findings of fact are made:

1. Petitioner is now, and has been continuously since June 27, 1980, registered as a practical nurse in Ontario, Canada. She holds registration number HJ-11850.

2. She received her initial registration after taking and receiving a score of 563 on the June 1980 Canadian Nurses Association Practical Nurse/Nursing Assistant Registration/Licensure Examination (CNAPN Test).

3. The CNAPN Test that Petitioner took was, at that time, one of the two Canadian national licensure examinations developed and administered by the Canadian Nursing Association Testing Service (CNATS). The other was an examination for professional/registered nurses (CNATS/RN Test).

4. In 1980, the examination that applicants seeking to be licensed as a practical nurse in Florida had to take and pass was the State Board Test Pool Examination (SBTPE) for practical nurses. This examination (which is now known as the National Council Licensure Examination, or NCLEX, for practical nurses) was a national examination developed and administered by the National Council of State Boards of Nursing (National Council).

5. In or about early 2000, Petitioner applied for licensure by endorsement as a practical nurse in Florida.

6. Her application fees were received by the Board on February 1, 2000.

7. Petitioner's application was not properly notarized, did not contain a completed statement of physical and mental health, and was not accompanied by the necessary written verification of her Ontario registration and examination scores.

8. Petitioner was notified of the foregoing deficiencies, and she corrected them on or about February 28, 2000.

9. Petitioner subsequently received a letter from the Board advising that the Board does not "endorse L.P.N's from Canada."

10. Petitioner thereafter requested, and was granted, the opportunity to go before the Board to explain why she believed that she was entitled to licensure by endorsement.

11. Petitioner appeared before the Board at its April 2, 2000 meeting.

12. At the meeting, Petitioner argued that she (and other "L.P.N's from Canada" like her) qualified for licensure under that subsection of the Board's licensure by endorsement rule (Subsection (4) of Rule 64B9-3.008, Florida Administrative Code) which provided, in pertinent part, as follows: "An applicant having successfully completed the Canadian Nurses Association Testing Service (CNATS) examination from 1980 up to August 9, 1995, with a minimum score of 400 on the examination . . . can be licensed by endorsement."

13. After Petitioner's presentation, the Board asked her whether she would be willing to waive her right to have a final decision on her application within the 90-day period prescribed by Section 120.60, Florida Statutes, so that the "history" of the rule provision cited by Petitioner could be researched. Petitioner indicated that she would be willing to do so, and the

Board deferred its decision on Petitioner's application until its June 2000 meeting.

14. Research conducted by Board staff on the "history" of Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, revealed that: during the 1980's, the Board was advised that the National Council had performed a psychometric analysis of the CNATS/RN Test and determined that a score of 400 or above on the CNATS/RN Test was the substantial equivalent of a passing score on the SBTPE/NCLEX for registered nurses; there is no indication that the National Council has ever performed a similar analysis of the CNAPN Test; such an analysis, however, was performed in 1984 by a Board staff member, who determined that the CNAPN Test was neither substantially equivalent to, nor more stringent than, the SBTPE/NCLEX for practical nurses, and she so advised the Board; and the Board, since 1984, has consistently declined to grant licensure by endorsement based upon scores received on the CNAPN Test.

15. Petitioner appeared before the Board again at its June 7, 2000 meeting and made an additional presentation to the Board in support of her application for licensure. After hearing from Petitioner, the Board advised her that it was denying her application because she had not demonstrated that she had passed a licensure examination that was equivalent to, or more stringent than, the SBTPE/NCLEX for practical nurses.

16. On June 14, 2000, the Board reduced its decision to writing in a Notice of Intent to Deny, which read as follows:

> Beverly Umilta Neblett has applied for licensure as a practical nurse by endorsement. The application came before the Board of Nursing at a duly noticed public meeting on June 7, 2000, in Jupiter, Florida.
>
> Upon review of the application file, the Board has determined that the applicant i[s] not eligible for licensure on the following grounds:
>
> Applicant has not passed a licensing examination that is at least equivalent to or more stringent than that required in Florida in 1980 under Section 464.009, Florida Statutes, and Rule 64B9-3.008, Florida Administrative Code.
>
> It is therefore ORDERED that the application for licensure of Beverly Umilta Neblett is [h]ereby DENIED.

17. It is this proposed agency action that Petitioner is challenging in the instant case.

CONCLUSIONS OF LAW

18. Persons engaged in practical nursing in Florida must, pursuant to Chapter 464, Part I, Florida Statutes, have a license to do so. "The sole legislative purpose in [imposing such a requirement was] to ensure that every nurse practicing in this state meets minimum requirements for safe practice." Section 464.002, Florida Statutes.

19. A license to engage in practical nursing in Florida may be obtained by taking and passing the state licensure examination and providing proof of graduation from an approved nursing

program, as more fully described in Section 464.008, Florida Statutes.

20. Alternatively, a person may seek to obtain a license by endorsement pursuant to Section 464.009, Florida Statutes, and Rule 64B-3.008, Florida Administrative Code, which provide, respectively, as follows:

> 464.009 Licensure by endorsement.--
>
> (1) The department shall issue the appropriate license by endorsement to practice professional or practical nursing to an applicant who, upon applying to the department and remitting a fee set by the board not to exceed $100, demonstrates to the board that he or she:
>
> (a) Holds a valid license to practice professional or practical nursing in another state of the United States, provided that, when the applicant secured his or her original license, the requirements for licensure were substantially equivalent to or more stringent than those existing in Florida at that time; or
>
> (b) Meets the qualifications for licensure in s. 464.008 and has successfully completed a state, regional, or national examination which is substantially equivalent to or more stringent than the examination given by the department.
>
> (2) Such examinations and requirements from other states shall be presumed to be substantially equivalent to or more stringent than those in this state. Such presumption shall not arise until January 1, 1980. However, the board may, by rule, specify states the examinations and requirements of which shall not be presumed to be substantially equivalent to those of this state.
>
> (3) The department shall not issue a license by endorsement to any applicant who is under

investigation in another state for an act which would constitute a violation of this part until such time as the investigation is complete, at which time the provisions of s. 464.018 shall apply.

64B9-3.008 Licensure by Endorsement.

(1) A nurse who desires to be licensed to practice professional or practical nursing in Florida by endorsement must apply to the Department on prescribed forms and pay the required fee. Additionally, if the applicant has been convicted of any offense, other than a minor traffic violation, the applicant shall furnish court records stating the nature of the offense and the disposition of the case so that a determination may be made by the Board whether the conviction related to the practice of nursing or the ability to practice nursing. If the applicant has ever had disciplinary action taken against a license (including relinquishment or denial of licensure) in another state, territory, or country, he shall submit to the Board documentation pertaining to such action and its final disposition. This information is required even though the action may have been ultimately dismissed or the penalty already served.

(2) To apply for endorsement pursuant to Section 464.009(1)(a), F.S., an applicant shall be required to show licensure in another state of the United States or province of Canada and to show what requirements were met at the time the license was issued. The Board will then determine in the following manner whether such requirements were equal to or more stringent than those imposed by Florida at that time:

(a) If Florida law would have required an applicant to take the licensure examination had he applied in Florida at the time he was licensed in the state of original licensure, the following criteria will be applied to determine whether the examination in the original state was equivalent to or more stringent than that given in Florida:

(b) The State Board Test Pool Examination for Professional Nurses given between 1951 and 1981 is deemed the equivalent of the Florida examination for registered nurses, if the applicant passed the examination with a score of 350 in each subject, or with a total score of 1800.

(c) The State Board Test Pool Examination for Practical Nurses given between 1952 and 1981 is deemed the equivalent of the Florida examination for practical nurses, if the applicant passed the examination with a score of 350.

(d) Licensing examinations given in other states prior to 1951 for registered nurses and 1952 for practical nurses are deemed the equivalent of the examinations given in Florida.

(e) Any other examination taken as a condition for state licensure since 1951, for registered nurses, or 1952, for practical nurses, is deemed to be equivalent to or more stringent than the examination given by Florida at the time if it meets these standards.

1. The examination is developed using accepted psychometric procedures.

2. The content and passing score of the examination are substantially equivalent to that of the examination given in Florida at the time.

3. The security of the examination is maintained.

4. At least one of the reliability estimations for the examination is 0.7 or higher.

5. The examination is revised after each administration to insure currency of content.

(3) To apply for endorsement pursuant to Section 464.009(1)(b), F.S., an applicant shall meet all requirements for eligibility

to take the licensure examination as provided in 64B9-3.002, and have successfully completed the National Council Licensure Examination for registered nurses with a minimum score of 1600, or the National Council Licensure Examination for practical nurses with a minimum score of 350, or a state, regional, or national examination which meets the following minimum requirements of equivalence with the National Council Licensure Examination. However, as of the February 1989 registered nurse examination and the October 1988 practical nurse examination, applicants must have achieved passing status as reported by the National Council of State Boards of Nursing.

(a) The examination is developed using accepted psychometric procedures.

(b) The content and passing score of the examination are substantially equivalent to that of the National Council Licensure Examination.

(c) The security of the examination is maintained.

(d) At least one of the reliability estimations for the examination is 0.7 or higher.

(e) The examination is revised after each administration to insure currency of content.

(4) An applicant having successfully completed the Canadian Nurses Association Testing Service (CNATS) examination from 1980 up to August 9, 1995, with a minimum score of 400 on the examination or, prior to 1980, either a minimum score of 400 on each portion of the five-part examination or a total score of 2,050, or a minimum score of 400 on each portion of the four-part examination with a combined medical surgical nursing or a total score of 1,640, can be licensed by endorsement. An applicant licensed in Canada based on the criterion referenced Canadian Nurses Association Testing Service (CNATS) examination administered effective August 9,

> 1995 and with a PASS/FAIL score standard is not eligible for licensure by endorsement in Florida as this examination is not deemed substantially equivalent or more stringent than the examination given in Florida.
>
> (5) A person licensed in the Republic of Cuba prior to December 31, 1961, shall be presumed to have successfully completed an examination equivalent to the one given in Florida, and shall be eligible for licensure by endorsement when he or she has provided proof of licensure in Cuba and has successfully completed a program which is given in an institution of higher learning, is intended to assure current competency of the applicant, and is approved by the Board. An official document which verifies licensure in Cuba shall be acceptable proof. If the applicant has no official document verifying licensure in Cuba, the applicant may provide proof of actual licensure in the manner provided in Rule 64B9-3.002(4)(b)1. and 2.

21. Upon receiving an application for licensure, the Board must act in accordance with the requirements of Section 120.60, Florida Statutes, which provides, in pertinent part, as follows:

> (1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is

> provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. An application for a license must be approved or denied within the 90-day or shorter time period, within 15 days after the conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever is later. The agency must approve any application for a license or for an examination required for licensure if the agency has not approved or denied the application within the time periods prescribed by this subsection. . . .
>
> (3) Each applicant shall be given written notice either personally or by mail that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has requested notice of agency action. Each notice shall inform the recipient of the basis for the agency decision, shall inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57 or judicial review pursuant to s.120.68 which may be available, shall indicate the procedure which must be followed, and shall state the applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification shall be filed with the agency clerk. . . .

22. An applicant for licensure as a practical nurse whose application is preliminarily denied bears the ultimate burden (in a Section 120.57(1) hearing on such preliminary action) of demonstrating, by a preponderance of the evidence, entitlement to such licensure. See Espinoza v. Department of Business and

Professional Regulation, 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999); Pershing Industries, Inc., v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991); Cordes v. Department of Environmental Regulation, 582 So. 2d 652, 654 (Fla. 1st DCA 1991); Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); and Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414-15 (Fla. 4th DCA 1974). The applicant, however, need address only those entitlement issues raised in the Board's notice of intent to deny the applicant's application. See Woodholly Associates v. Department of Natural Resources, 451 So. 2d 1002 (Fla. 1st DCA 1984).

23. In the Notice of Intent to Deny it issued in the instant case, the Board indicated that it intended to deny Petitioner's application for licensure by endorsement because Petitioner "ha[d] not passed a licensing examination that is at least equivalent to or more stringent than that required in Florida in 1980 under Section 464.009, Florida Statutes, and Rule 64B9-3.008, Florida Administrative Code." By letter dated July 26, 2000, Petitioner has challenged this proposed agency action, arguing that that the Board "failed to render a decision on [her] application within the time required under Chapter 120 of the Florida Statutes" and "also failed to comply with Florida Administrative Code 64B9-3.008."

24. Pursuant to Section 120.60(1), Florida Statutes, an applicant for licensure has a right to have his or her application approved or denied within 90 days of the date that it is deemed "complete." An application is considered "complete," under the statute, "upon receipt [by the agency] of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification [30 days from the date the application was initially received by the agency] has expired." In the instant case, Petitioner was timely notified that her application was not properly notarized, did not contain a completed statement of physical and mental health, and was not accompanied by the necessary written verification of her Ontario registration and examination scores. She corrected these deficiencies on or about February 28, 2000. Petitioner's application became "complete," within the meaning of Section 120.60(1), Florida Statutes, when she made these corrections, and the Board had 90 days from this date within which to approve or deny the application. 2/ The Board met within this 90-day period (on April 2, 2000) to consider Petitioner's application. Petitioner appeared before the Board, and, during her presentation, she knowingly and voluntarily agreed to allow the Board to defer ruling on her application until its June 7, 2000, meeting. Having done so, she cannot now complain that, in denying her application at the June 7, 2000 meeting, the Board acted on her application in an

untimely manner in derogation of the requirements of Section 120.60(1), Florida Statutes. See Torres v. K-Site 500 Associates, 632 So. 2d 110, 112 (Fla. 3d DCA 1994)("A party may waive any rights to which he or she is legally entitled, by actions or conduct warranting an inference that a known right has been relinquished.").

25. Petitioner's argument that the Board "failed to comply with Florida Administrative Code 64B9-3.008" is also without merit. It is Petitioner's position that, inasmuch as she received a score of 563 on the June 1980 CNAPN Test, she is entitled to licensure by endorsement pursuant to that portion of Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, which reads as follows: "An applicant having successfully completed the Canadian Nurses Association Testing Service (CNATS) examination from 1980 up to August 9, 1995, with a minimum score of 400 on the examination . . . can be licensed by endorsement."

26. It is true that the CNAPN Test is a "CNATS examination"; but Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, refers to "the . . . CNATS examination," without specifying to which of the two CNATS examinations, the CNAPN Test or the CNATS/RN Test, the reference is. The Board has consistently construed "the . . . CNATS examination," referred to in Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, to mean, not the CNAPN Test, but the CNATS/RN Test. This reasonable interpretation by the Board of its own rule (the

language of which is not clear and unambiguous 3/) must be given deference, particularly in light of the "history" (described above) of the rule provision and the absence of any showing that Board has ever been presented with the results of any psychometric study, similar to the psychometric study performed by the National Council in the 1980's of the CNATS/RN Test, demonstrating that the CNAPN Test is substantially equivalent to, or more stringent than, the SBTPE/NCLEX for practical nurses. See Citizens of the State of Florida v. Wilson, 568 So. 2d 1267, 1271 (Fla. 1990)("An agency's interpretation of its own rules is entitled to great deference."); and Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995) ("An agency's interpretation of its own rules and regulations is entitled to great weight, and shall not be overturned unless the interpretation is clearly erroneous."). This is so even though, as Petitioner complains in her Proposed Recommended Order, the Board has not taken steps to amend Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, to specify that "the . . . CNATS examination" referred to therein is the CNATS/RN Test and not the CNAPN Test. Even assuming arguendo that the Board's "unadopted" interpretation of Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, itself constituted a "rule," as defined in Section 120.52(15), Florida Statutes, 4/ (which appears not to be the case 5/) the Board would nonetheless be

permitted to base its denial of Petitioner's application for licensure by endorsement upon this interpretation inasmuch as the evidentiary record in the instant case establishes that the Board's interpretation meets the requirements of Section 120.57(1)(e), Florida Statutes, which provides as follows:

> (e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.
>
> 2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:
>
> a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;
>
> b. Does not enlarge, modify, or contravene the specific provisions of law implemented; 6/
>
> c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
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> d. Is not arbitrary or capricious; 7/
>
> e. Is not being applied to the substantially affected party without due notice; 8/
>
> f. Is supported by competent and substantial evidence; and
>
> g. Does not impose excessive regulatory costs on the regulated person, county, or city.

27. Inasmuch as Petitioner has failed to demonstrate that it is inconsistent with the plain meaning of either Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, or the

statute it implements, Section 464.009, Florida Statutes, for the Board (as has been its established practice) to interpret the former as not authorizing licensure by endorsement of applicants based on their passing the CNAPN Test, and because Petitioner has not shown that there is any other good reason for the Board to reject such an interpretation, the Board, in the instant case, should follow its established practice and hold that Petitioner's having received a score of 563 on the June 1980 CNAPN Test does not entitle her to licensure by endorsement. Cf. Coastal Petroleum Company v. Florida Wildlife Federation, Inc., 766 So. 2d 226, 228 (Fla. 1st DCA 2000)(agency acted appropriately in "'chang[ing] its mind' about how to interpret [Section 377.241, Florida Statutes]" where its "previous practice was not consistent with the proper interpretation of the . . . statute and [it] adequately explained its determination.").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered denying Petitioner's application for licensure by endorsement as a practical nurse.

DONE AND ENTERED this 18th day of December, 2000, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of December, 2000.

ENDNOTES

1/ A Transcript of the hearing (consisting of one volume) was filed with the Division on December 6, 2000, and has been reviewed by the undersigned.

2/ An agency, pursuant to Section 120.60, Florida Statutes, must merely approve or deny an application for licensure within 90 days from the date the application is considered "complete," not reduce its decision to writing or provide the applicant written notification of its action. See Sumner v. Department of Professional Regulation, Board of Psychological Examiners, 555 So. 2d 919(Fla. 1st DCA 1990).

3/ An agency may not "place a construction on a rule which is clearly contradictory to the unambiguous language of the rule." See Kearse v. Department of Health and Rehabilitative Services, 474 So. 2d 819, 820 (Fla. 1st DCA 1985). Rather, it must give effect to this "unambiguous language" unless and until the language is changed through the rulemaking process. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . ."); Vantage Healthcare Corp. v. Agency for Health Care Administration, 687 So. 2d 306, 308 (Fla. 1st DCA 1997)("The agency is obligated to follow its own rules."); Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996)("Without question, an agency must follow its own rules, . . . but if the rule, as it plainly reads, should prove impractical in operation, the rule

can be amended pursuant to established rulemaking procedures. However, [a]bsent such amendment, expedience cannot be permitted to dictate its terms. . . . That is, while an administrative agency is not necessarily bound by its initial construction of a statute evidenced by the adoption of a rule, the agency may implement its changed interpretation only by validly adopting subsequent rule changes.")(internal quotation marks omitted); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Marrero v. Department of Professional Regulation, 622 So. 2d 1109, 1111 (Fla. 1st DCA 1993)("Since the Board is bound to comply with its own rules until they have been repealed or otherwise invalidated, it cannot take the position in this case that its rule does not embrace 'applicants' for licensure as well as license holders, contrary to the unambiguous language of the rule."); and Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."). The pertinent language of Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, however, is not "unambiguous," nor is it reasonably susceptible only to the interpretation urged by Petitioner.

4/ Section 120.52(15), Florida Statutes, provides as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
>
> (c) The preparation or modification of:
>
> 1. Agency budgets.

> 2. Statements, memoranda, or instructions to state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Comptroller.
>
> 3. Contractual provisions reached as a result of collective bargaining.
>
> 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

5/ "An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes." Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998).

6/ Subsection (4) of Rule 64B9-3.008, Florida Administrative Code, implements Section 464.009, Florida Statutes, which makes no specific mention of the CNAPN Test. In fact, a reasonable argument can be made that the term, "national examination," used in Section 464.009, Florida Statutes, does not include any examination taken outside the United States. Compare the language of Section 464.009, Florida Statutes, with that of Section 471.015(3), Florida Statutes, which authorizes the licensure by endorsement of engineers and provides, in pertinent part, as follows:

> The board shall certify as qualified for a license by endorsement an applicant who: . . .
>
> (a) [H]as passed a United States national, regional, state, or territorial or foreign national licensing examination that is substantially equivalent to the examination required by s. 471.013.

See Wanda Marine Corporation v. Department of Revenue, 305 So. 2d 65, 69 (Fla. 1st DCA 1975)("It is our view that the word 'state' as used in the exemption proviso of Section 212.06(8), means one of the states of the

United States and not a foreign entity. This construction is in keeping with the common usage of the word 'state.' The absence of a different connotation expressed or implied in the statute causes us to reach this conclusion and to hold that the appellant's use of the boat in foreign waters, for whatever period of time prior to bringing it into Florida, did not bring it within the ambit of the exemption provision relied upon by appellant. Had the legislature intended for the term 'state' to include foreign countries it could have done so by adding the phrase 'or foreign country' after the word 'state' in the exemption proviso, as it did do in Section 212.06(2)(b) in defining the term 'dealer.'").

7/ An "arbitrary" action is "one not supported by facts or logic, or [is] despotic." A "capricious" action is "one which is taken without thought or reason or [is] irrational[]." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978); see also Board of Clinical Laboratory Personnel, v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998)("An 'arbitrary' decision is one not supported by facts or logic. A 'capricious' action is one taken irrationally, without thought or reason.").

8/ Petitioner was made aware of the Board's interpretation (and its application to her situation) prior to the April 2, 2000 Board meeting, and had the opportunity at that meeting and at the Board's June 7, 2000, meeting, as well as at the final hearing held November 2, 2000, in the instant case, to challenge this interpretation.

COPIES FURNISHED:

Alicia M. Phidd, Esquire
Post Office Box 260004
Pembroke Pines, Florida 33026

Lee Ann Gustafson, Esquire
Office of the Attorney General
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Ruth R. Stiehl, Ph.D., R.N., Executive Director
Board of Nursing
Department of Health
4080 Woodcock Drive, Suite 202
Jacksonville, Florida 32207-2714

Theodore M. Henderson, Agency Clerk
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1701

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.