

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

THE INSTITUTE OF ALLIED )  
HEALTH, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-1504  
 )  
DEPARTMENT OF HEALTH, BOARD )  
OF NURSING, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on August 25, 2005.

APPEARANCES

For Petitioner: Mark J. Berkowitz  
Mark J. Berkowitz, P. A.  
524 South Andrews Avenue, Suite 200N  
Fort Lauderdale, Florida 33301

For Respondent: Lee Ann Gustafson  
Assistant Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Respondent may rescind its approval of Petitioner's program to operate a practical-nurse education program.

PRELIMINARY STATEMENT

By Order dated February 16, 2005, and effective June 30, 2005, Respondent revoked Petitioner's approval to operate a practical nursing program. Petitioner's approval had expired on June 30, 2004. The Order states that Petitioner had not adequately explained its failure to notify Respondent of the relocation of the program to a new location, had failed to provide sufficient information in its Program Evaluation Report to document compliance with Respondent's rules, had failed to identify corrective actions to improve the pass rate of its students taking the national licensure examination, and had failed to demonstrate compliance with suggestions to improve student performance and program quality.

Petitioner timely requested a formal hearing.

At the hearing, Petitioner called two witnesses and offered into evidence eight exhibits: Petitioner Exhibits 1, 2, 2A, 3, 3A, 4, 5, and 6. Respondent called one witness and offered into evidence 16 exhibits: Respondent Exhibits 1-16. All exhibits were admitted.

The court reporter filed the transcript on September 26, 2005. The parties filed their Proposed Recommended Orders on October 10, 2005.

## FINDINGS OF FACT

1. For the past 13 years, Petitioner has operated an unaccredited education program for persons seeking licensure as practical nurses. During this period, Beverly Pryce has been the Program Director. Ms. Pryce is a registered nurse in Florida and has 27 years of clinical experience comprising 10 years as a licensed practical nurse and 17 years as a registered nurse.

2. For the 2002-03 and 2003-04 school years, Petitioner has admitted 24 students annually from a pool of 35-40 applicants. Nineteen students graduated from the 2002-03 class, and 22 students graduated from the following year's class. In both years, Petitioner retained four faculty members--two full time and two part time. In both years, Petitioner had one faculty position vacant.

3. In February 2003, Petitioner relocated its operations from a building in Hallandale to a building in Hollywood. Petitioner made this move without prior notification to, or consent from, Respondent.

4. Ms. Pryce testified that, subsequent to the move, Petitioner communicated to Respondent, using Petitioner's new address, about several items, such as the names of upcoming graduates. These contacts do not represent a formal notification of a change of address, and Ms. Pryce conceded that

she had not known of any requirement of notice prior to making such a move.

5. Petitioner's formal notification of the change of address took place over one year after it had relocated its operations. The omission of prior notice denied Respondent the opportunity to inspect the proposed new facility, including classrooms, laboratories, computers, and library resources, to ensure that it met all applicable requirements for a school educating persons seeking licensure as licensed practice nurses. By letter dated May 10, 2004, Respondent advised Petitioner that the failure to notify Respondent of the change of address violated "64B-9."

6. The notification issue arose when Respondent mailed a letter to Petitioner warning that its license would expire on June 30, 2004, and requesting a Program Evaluation Report by September 2, 2004. The postal service returned the letter as undeliverable because it was addressed to Petitioner's former address. After obtaining the new address, Respondent re-mailed the letter, on June 16, 2004, again requesting a Program Evaluation Report by September 2.

7. Petitioner failed to provide Respondent with a Program Evaluation Report by the deadline set forth in the June 16 letter from Respondent. Thus, on September 21, 2004, Respondent sent another letter, advising Petitioner that Respondent would

review Petitioner's approval status at its meeting on October 14, 2004. This letter notes that Respondent had not received any response to the request for a Program Evaluation Report, and Respondent would not accept additional documents for consideration at its October 14 meeting. Ms. Pryce claims that hurricane season and her unfamiliarity with computers delayed the timely delivery of the Program Evaluation Report, but these claims do not justify the length of time, past the deadline, before Ms. Pryce filed the report.

8. Based on its consideration of the matter at the October meeting, Respondent issued, on November 2, 2004, an Order determining that Petitioner was not in compliance with Board rules due to the above-described relocation and failure to file a Program Evaluation Report. The Order notes that Petitioner's approval has expired and is not renewed until Petitioner timely files a Program Evaluation Report, undergoes a site visit by the Executive Director of the Board, and appears at the Board's December 2, 2004, meeting. Until then, the Order prohibits Respondent from admitting additional students, although it may continue to educate existing students, who will be eligible to take the licensure examination, upon graduation.

9. The November 2 Order memorializes the decision of the Board--and agreed to by Ms. Pryce--to extend the deadline for filing the Program Evaluation Report to November 1, 2004. The

Order requires the Program Evaluation Report to demonstrate compliance with Florida Administrative Code Rules 64B9-2.002(2) and (6) and Petitioner to demonstrate compliance with Florida Administrative Code Rule 64B9-2.015, during the site visit.

10. On November 12, 2004--11 days after the extended deadline to which she had agreed--Ms. Pryce filed the Program Evaluation Report. Two days later, Respondent's Executive Director conducted a site visit. On his site visit, the Executive Director found that the passing rate of Petitioner's students, on the practice nursing licensure exam, for the 2002-03 school year was 63.2 percent, while the national and Florida averages were 86.5 percent, and the passing rate of Petitioner's students for the 2003-04 school year was 59.1 percent, while the national average was 88.7 percent and the Florida average was 83.6 percent. Since at least 1997, the passing rate of Petitioner's students has been at least 10 percent below the national average passing rate. The Executive Director also issued a report, dated November 17, 2004, setting forth various recommendations to the Board for consideration to improve the quality of Petitioner's program.

11. At Ms. Pryce's request, the Board continued consideration of Petitioner's case from the December meeting to the February meeting. The December 7, 2004, letter continuing the matter also warns Petitioner to provide to Respondent any

additional materials that Petitioner wants the Board to consider prior to January 3, 2005.

12. At the February, 10, 2005, meeting, the Board asked Ms. Pryce if she had yet obtained a consultant's report with specific recommendations to improve the quality of Petitioner's nurse-education program. Ms. Pryce responded that she had a consultant in mind, but had not retained anyone yet.

13. On February 16, 2005, Respondent issued a second Order. The Order outlines the above-stated facts and revokes Petitioner's approval, effective June 30, 2005, but allows currently enrolled students to complete the program by June 30, 2005.

14. On March 6, 2005, a consultant issued a detailed report, recommending that Petitioner raise its admission standards and provide tutoring for students, form an advisory committee for curriculum, and increase faculty involvement and raise faculty standards.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

16. Section 464.019, Florida Statutes, authorizes Respondent to adopt rules to approve and administer programs for the education of nurses. Section 464.019(4) provides:

If the board, through an investigation by the department, finds that an approved program no longer meets the required standards, it may place the program on probationary status until such time as the standards are restored. If a program fails to correct these conditions within a specified period of time, the board may rescind the approval. Any program having its approval rescinded shall have the right to reapply.

17. Section 464.019(6) and (7), Florida Statutes, provides:

(6) Any nursing program that maintains accreditation through a nursing accrediting body recognized by the United States Department of Education shall be exempt from the rules of the board except as provided in paragraph (2)(b), provided such exemption shall apply only to the extent the program maintains a student pass rate on the National Clinical Licensure Examination of not less than 10 percentage points below the national average pass rate as reported annually by the National Council of State Boards of Nursing.

(7) If an institution's passing rate on the National Clinical Licensure Examination drops below the standard established in subsection (6) for 2 consecutive years, the program must be reviewed by the board. The board may take action to assist the program to return to compliance. Any program having its approval rescinded shall have the right to reapply.

18. The above-cited statutes give Respondent the authority to regulate a nurse-education program, subject Petitioner to Respondent's rules due to Petitioner's status as an unaccredited program, and require Respondent to impose probation on a regulated program prior to rescinding the program's approval.



19. As assumed by Respondent in its Proposed Recommended Order, even though Petitioner's approval has expired, this case must proceed as though Respondent were rescinding Petitioner's approval to operate a nurse-education program. See, e.g., Durbin v. Department of Business Regulation, 262 So. 2d 273 (Fla. 1st DCA 1972); Vocelle v. Riddell, 119 So. 2d 809 (Fla. 2d DCA 1960); and Vicbar, Inc., v. City of Miami, 330 So. 2d 46 (Fla. 3d DCA 1976), cert. denied, 344 So. 2d 324 (Fla. 1977). Petitioner must thus prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. The requirements that Respondent has imposed upon Petitioner are all derived from the rules.

21. The requirement of notice prior to relocating facilities is based on two rules. Florida Administrative Code Rule 64B9-2.013(2) provides that the program operator must notify Respondent, in writing, of "any change in information provided to meet standards of nursing education." Florida Administrative Code Rule 64B9-2.015(2) provides, as to such standards:

Resources. The parent institution shall provide financial and administrative support and resources to the nursing program that includes:

(a) Classroom space, laboratories, and office space for the nursing program.

(b) Nursing resource library holdings to include textbooks, journals and instructional media that are pertinent, recent, and have appropriate content and reading level.

1. A regular schedule for evaluation and deletion of outdated books and instructional media.

2. Teaching materials to include a variety of current technological aids for both group and self-instruction.

(c) Secretarial, clerical, and other support personnel services.

(d) Counseling services and remedial assistance for students.

22. The requirement of a minimum pass rate, which is mentioned in the statute cited above, is also based on a rule. Florida Administrative Code Rule 64B9-2.015(12)(a) requires that each nurse-education program maintain a pass rate that is not less than ten percent lower than the pass rate of the nation or Florida, whichever is lower.

23. The requirement of a Program Evaluation Report is found in Florida Administrative Code Rule 64B9-2.015(12)(b), which provides:

The nursing program shall have a written plan for the systematic evaluation of the total program and its outcomes for the purpose of determining competency, adequacy and effectiveness. The plan shall include the methodology, frequency of evaluation, assignment of responsibility, and evaluative criteria. The following areas shall be evaluated:

1. Organization and administration of the program;

2. Philosophy, conceptual framework, and objectives/outcomes;
3. Curriculum;
4. Educational facilities, resources, and services;
5. Clinical resources;
6. Students theoretical and clinical performance;
7. Graduates' performance on the licensing examination;
8. Graduates' nursing competence;
9. Performance of the faculty;
10. Protection of patient safety;
11. The methods and instruments used for evaluation purposes.

24. Respondent has proved that Petitioner has failed to comply with the requirements of notice prior to relocation, pass rates, and Program Evaluation Reports. The only remaining issue in this case is whether Respondent has satisfied the condition precedent of probation prior to rescinding Petitioner's approval to conduct a nurse-education program.

25. Florida Administrative Code Rule 64B9-2.011(3) provides:

Probationary Status: If a program which has received provisional or full approval fails to maintain compliance with the standards of nursing education, the program will be permitted to continue operations only under conditions set by the Board.

26. Florida Administrative Code Rule 64B9-2.001(6) defines "probationary status" as: "a status indicating a nursing education program has not met the standards established by the Board."

27. Florida Administrative Code Rule 64B9-2.002(3)-(6)

states:

(3) Probationary status - An institution may be placed on probationary status when in the opinion of the Board the institution does not meet required standards. Probationary status, if granted, shall be for a specified period of time as determined by the Board on an individual basis.

(4) The Board may decline to approve any program on provisional status, or decline to renew or rescind approval of any program on probationary status which fails to meet required standards or fails to make satisfactory progress for corrections of deficiencies within the time period outlined by the Board.

(5) The administrator of the nursing program shall be notified in writing of any problems with programs on provisional or probationary status prior to Board action.

(6) Programs reapplying for approval shall meet required standards as outlined in paragraph 64B9-2.002(1)(a), F.A.C., prior to renewal of the program approval by the Board. As a condition of renewal, a program may be placed on probation if it does not meet the required standards.

28. Although Respondent did not use the word, "probation" in the November 1 Order, the effect of this Order was to place Petitioner on probation until it filed a Program Evaluation Report and demonstrated evidence of its compliance with the Standards of Nursing Education, as disclosed by a site visit. Another condition of probation was the prohibition against the admission of new students, until the other probationary

conditions had been satisfied. Respondent has thus satisfied the requirement that it place a program on probation prior to rescinding program approval.

29. While on probation, Petitioner has failed, without justification, to satisfy the conditions of probation. Petitioner's various violations--most importantly, of the minimum pass rate--justify rescission of the approval to operate a nurse-education program.

RECOMMENDATION

It is

RECOMMENDED that the Board of Nursing enter a final order rescinding Petitioner's approval to operate a nurse-education program.

DONE AND ENTERED this 21st day of November, 2005, in Tallahassee, Leon County, Florida.



---

ROBERT E. MEALE  
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 21st day of November, 2005.

COPIES FURNISHED:

Dan Coble, Executive Director  
Board of Nursing  
Department of Health  
4052 Bald Cypress Way, Bin C02  
Tallahassee, Florida 32399-3252

R. S. Power, Agency Clerk  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

Timothy M. Cerio, General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

Mark J. Berkowitz  
Mark J. Berkowitz, P. A.  
524 South Andrews Avenue, Suite 200N  
Fort Lauderdale, Florida 33301

Lee Ann Gustafson  
Assistant Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

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 must be filed with the agency that will issue the final order in this case.