STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERGENCY EDUCATION INSTITUTE,

Petitioner,

vs. Case No. 19-0442RU

BOARD OF NURSING,

Respondent.
_____/

FINAL ORDER

On September 28 and November 7, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

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For Respondent: Marlene K. Stern, Esquire
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STATEMENT OF THE ISSUES

The issues are whether, in violation of sections 120.54(1)(a) and 120.56(4), Florida Statutes, Respondent has made an agency statement that is an unadopted rule in implementing a 2017 statutory amendment broadening the category of first-time test-takers to be counted when calculating the passing rate of the graduates of Petitioner's prelicensure professional nursing education program (Program) and whether, pursuant to section 57.111, Petitioner may recover attorneys' fees and costs from Respondent. At Petitioner's request, the parties presented evidence concerning constitutional challenges that Petitioner intends to present to a district court of appeal.

PRELIMINARY STATEMENT

By Notice of Intent to Place Program on Probation filed May 3, 2017, Respondent placed Petitioner's Program on probationary status for 2017 due to inadequate passing rates of its graduates taking the NCLEX for the first time in 2015 and 2016 (Probationary Order). By Notice of Intent to Extend Probation filed February 23, 2018, Respondent extended the Program's probationary status for 2018 due to an inadequate passing rate of its graduates taking the NCLEX for the first time in 2017 (Order Extending Probation).

In response to the Order Extending Probation, on March 21, 2018, Petitioner filed with DOAH a Petition for Formal

Administrative Proceedings (Petition). This filing commenced DOAH Case 18-1872. Paragraph 10 of the Petition states that, on March 12, Petitioner filed with Respondent the same petition, but paragraph 11 of the Petition alleges that, on March 19, Respondent advised that, rather than transmit the proceeding to DOAH, it "wanted to dismiss the petition on the ground that it was filed in an incorrect forum."

When Respondent reportedly resisted transmitting the request to DOAH, Petitioner filed the Petition with DOAH. On its face, the Petition commenced a proceeding, under section 120.56(4)(c), to obtain a final order from the administrative law judge invalidating an unadopted rule and impliedly commenced a proceeding, under sections 120.569(1) and 120.57(1), to obtain a final order from Respondent returning Petitioner's program to approved status from probationary status. Indirectly confirming its intent to commence a proceeding under sections 120.569(1) and 120.57(1), the Petition invoked section 120.57(1)(e) to bar Respondent and the administrative law judge from basing agency action on an unadopted rule. Obviating the question of whether Petitioner could file the Petition with DOAH to commence a proceeding under sections 120.569(1) and 120.57(1), on April 10, 2018, Respondent filed a Referral for Hearing, which transmitted to DOAH both proceedings.

Through the final hearing, the proceedings under sections 120.569(1) and 120.57(1) and section 120.56 remained consolidated, as filed, pursuant to section 120.57(1)(e)1.d. The need for separate orders dictated the severance of the section 120.56 proceeding, which became DOAH Case 19-0442RU.

On June 8, 2018, Petitioner filed a Motion for Leave to Amend Petition. On June 15, 2018, Respondent filed a response stating that it took no position on the motion, which seeks attorneys' fees and costs under section 57.111. On June 19, 2018, the administrative law judge granted the motion.

Issued on the same date as the final order in this case, the recommended order in DOAH Case 18-1872 determines that DOAH lacks jurisdiction under section 120.57(1) due to the absence of a genuine issue of a material fact, as required by section 120.57(1)(*l*), but proffers a different application of the statutory amendment from those argued by the parties.

As pertinent to the section 120.56(4) proceeding, the Petition challenges Respondent's application of a statutory amendment, which took effect on June 23, 2017, to all of 2017 and notes that the legislature has explicitly declined to provide Respondent with any residual rulemaking authority.

At the hearing, Petitioner called three witnesses and offered into evidence 13 exhibits: Petitioner Exhibits C.1, D.3, E, E.1 (as identified by Respondent), E.11 (as identified by

Respondent), E.12 (as identified by Respondent), F, G.1, G.2, H.1, H.2, J, and K. Respondent called two witnesses and offered into evidence nine exhibits: Respondent Exhibits Dd.2, E.2 through E.6, E.8 through E.9, and E.16. All exhibits were admitted.

The court reporter filed the transcript on October 23, 2018. On December 21, 2018, Petitioner filed a proposed final order and Respondent filed a proposed recommended order. The administrative law judge has considered each proposed order in preparing this final order.

FINDINGS OF FACT

1. The Program is a prelicensure professional nursing education program that terminates with an associate degree. Respondent approved the Program in 2013, thus authorizing Petitioner to admit degree-seeking students into the Program, as provided in section 464.019.

2. As provided by section 464.019(5)(a)1., the passing rate of the Program's graduates taking the NCLEX for the first time must meet or exceed the minimum passing rate, which is ten points less than the average passage rate of graduates taking the NCLEX nationally for the first time. Until June 23, 2017, the passing rate of a Florida program was based only on first-time test-takers who had taken the exam within six months of graduating (New Graduates). Chapter 2017-134, sections 4 and 8,

Laws of Florida, which took effect when signed into law on June 23, 2017 (Statutory Amendment), removes the six-month restriction, so that the passing rate of a Florida program is now based on all first-time test-takers, regardless of when they graduated (Graduates). The statutory language does not otherwise address the implementation of the Statutory Amendment.

3. For 2015 and 2016, respectively, the minimum passing rates in Florida were 72% and 71.68%, and the Program's New Graduates passed the NCLEX at the rates of 44% and 15.79%. As required by section 464.019(5), Respondent issued the Probationary Order.

4. The Probationary Order recites the provisions of section 464.019(5)(a) specifying the applicable passing rate, directing Respondent to place a program on probation if its graduates fail to pass at the minimum specified passing rates for two consecutive years, and mandating that the program remain on probation until its passing rate achieves the minimum specified rate. The Probationary Order details the 2015 and 2016 passing rates of Petitioner's relevant graduates and the minimum passing rates for these years. The Probationary Order makes no attempt to describe the condition of probation, which might have included a reference to New Graduates, other than to refer to section 464.019(5)(a)2., which, unchanged by the Statutory Amendment, specifies only that a program must remain on probation until and

unless its graduates achieve a passing rate at least equal to the minimum passing rate for the year in question.

5. For 2017, the minimum passing rate for a Florida program was 74.24%. If, as Respondent contends, the new law applies to all of 2017, six of the fifteen of the Program's Graduates failed the NCLEX, so the Program's passing rate was inadequate at 60%. If, as Petitioner contends, the old law applies to all of 2017, twelve of the Program's test-takers were New Graduates, and only three of them failed, so the Program's passing rate was adequate at 75%.

6. Respondent clearly applied the Statutory Amendment retroactively to January 1, 2017, in the Order Extending Probation because the order states that that the passing rate of the Program's Graduates for 2017 was only 60% and therefore extends Petitioner's probationary status for 2018. The Order Extending Probation provides Petitioner with a clear point of entry to request an administrative hearing.

7. Each party applies the Statutory Amendment without regard to the effective date of June 23, 2017, but Respondent reaches the correct conclusion: the passing rate of the Program's graduates for 2017 was inadequate. The NCLEX is administered throughout the year, and the dates of graduation are available for Petitioner's Graduates taking the NCLEX in 2017, so it is possible to calculate a combined passing rate, using only

New Graduates under the old law for testing dates through June 22 and all Graduates under the new law for testing dates after June 22. From January 1 through June 22, 2017, five of the Program's test-takers were New Graduates and they all passed. From June 23 through December 31, 2017, four of the eight Graduates taking the NCLEX passed the test. Combining these results for all of 2017, the Program's passing rate was nine divided by thirteen, or 69%, which was inadequate for 2017.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction. Jurisdiction to challenge an unadopted rule requires a demonstration that the challenger is substantially affected by the rule. § 120.56(4)(a).

9. Jurisdiction under section 120.569(1) is a "forward-looking concept" that does not "disappear" if the final result is adverse to the permit challenger, but requires only that the challenger demonstrates that it "reasonably expects" for its substantial interests to be determined by the agency. See, e.g., Palm Beach Cnty. Envtl. Coal. v. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009).

10. The forward-looking principle also applies to a rule challenge proceeding. Jurisdiction would not disappear if, for example, Petitioner had failed to prove that Respondent's

application of the Statutory Amendment constituted an unadopted rule or, as here, Petitioner proved that Respondent's application of the Statutory Amendment was unlawful as an unadopted rule, but the correct application of the Statutory Amendment supports the Order Extending Probation. Petitioner is substantially affected because it could reasonably have expected to have been affected by Respondent's retroactive application of the Statutory Amendment to January 1, 2017, and, as a person subject to regulation by Respondent, Petitioner is readily recognized by courts to be a substantially affected person. See, e.g., Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999); Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404 (Fla. 1st DCA 1997); Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995) (per curiam).

11. The burden of proof is on Petitioner. § 120.56(4)(c). The standard of proof is a preponderance of the evidence. § 120.56(1)(e).

12. Subject to exceptions that are irrelevant to the present case, an agency acts by rule or order. McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 577 (Fla. 1st DCA 1977). The progressive development of policy that ultimately finds expression as a rule, as endorsed in McDonald, has been legislatively circumscribed by the mandate that "[r]ulemaking is not a matter of agency discretion[,]" so that any agency

statement meeting the definition of a rule must be adopted "as soon as feasible and practicable." § 120.54(1)(a). Feasibility and practicability are "presumed," subject to an agency's proving the applicability of a statutory exception. § 120.54(a)1. and 2. Neither exception applies to this case, nor has Respondent attempted to invoke either of them.

13. A "rule" is "each agency statement of general applicability that implements, interprets, or prescribes law or policy," including "the amendment or repeal of a rule." § 120.52(16). A "final order" is a "written final decision" that results from a proceeding under section 120.56, 120.569, and 120.57, among other statutes, and that is not a rule. § 120.52(7). Thus, all or part of a nominal final order in a proceeding under sections 120.569(1) and 120.57(1), such as a final order granting an application, may be a rule, if all or part of the final order meets the definition of a rule. See, e.g., Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118 (Fla. 1st DCA 2014) (per curiam). A rule may be unwritten. Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81 (Fla. 1st DCA 1997). In this case, the unadopted rule is the implementation of the Statutory Amendment retroactive to January 1, 2017.

14. An agency's implementation of a statute is not a rule, if the implementation merely restates the law or declares what is

"readily apparent" from the law--in other words, if the implementation is "clearly correct." Grabba Leaf, LLC v. Dep't of Bus. & Prof'l Reg., __ So. 3d __, 2018 Fla. App. LEXIS 15780 (Fla. 1st DCA 2018) (citing Amerisure Mut. Ins. Co. v. Dep't of Fin. Servs., 156 So. 3d 520 (Fla. 1st DCA 2015)); St. Francis Hosp., Inc. v. Dep't of Health & Rehab. Servs., 553 So. 2d 1351 (Fla. 1st DCA 1989). Otherwise, an agency's implementation of a statute may be a rule.

15. Respondent's implementation of the Statutory Amendment is clearly incorrect. The legislature could have chosen January 1, 2017, as the effective date of the Statutory Amendment, but did not. By choosing this effective date for the legislature, Respondent has not merely restated the Statutory Amendment or declared what is readily apparent from the Statutory Amendment; Respondent itself has legislated. In its proposed recommended order, Respondent justifies its retroactive application of the Statutory Amendment to January 1, 2017, partly on the basis that relevant provisions of section 464.019 speak in terms of a calendar year, but these provisions, such as in section 464.019(5)(a), establish the timeframe within which a passing rate is to be calculated. The Statutory Amendment establishes how the passing rate is to be calculated after June 22, 2017, and the old law established how the passing rate was to be calculated before June 23, 2017; changing the

calculation methodology mid-year does not impair the integrity of the calendar year, as used elsewhere in section 464.019.

16. As one hopes that the parties might grudgingly admit, restating the Statutory Amendment and its effective date necessitates some use of June 23, 2018. There are several events that could fall on either side of this date--the date of enrollment of a student, the date on which a graduate takes the NCLEX, and the date on which the NCLEX score is reported for the graduate. By repealing the six-month provision in the old law, the Statutory Amendment indirectly addresses two of these events--the date of graduation and the date on which the NCLEX is taken. The focus of the relevant provisions of section 464.019 is on a graduate's performance on the NCLEX, so the test date is the obvious choice in applying the Statutory Amendment. For test dates prior to June 23, only New Graduates are considered; for test dates after June 22, all Graduates are considered.

17. It would seem that every program would be affected by Respondent's implementation of the Statutory Amendment because passing rates must be calculated each year. But the implementation would qualify as a rule, even if Petitioner's program were the lone program affected. A statement directed to one person may qualify as a rule. McCarthy v. Dep't of Ins. & Treasurer, 479 So. 2d 135, 137 (Fla. 2d DCA 1985).

18. In argument likely applicable to the section 120.57(1)(e) issue in DOAH Case 18-1872, Petitioner has argued that Respondent's unadopted rule is an invalid exercise of delegated legislative authority under sections 120.56(1)(a) and 120.52(8)(a). Petitioner's argument is correct. Obviously, Respondent has not adopted its implementation of the Statutory Amendment through the process set forth in section 120.54, and this omission renders the unadopted rule an invalid exercise of delegated legislative authority under section 120.52(8)(a). Also, for the reasons set forth immediately above, the unadopted rule enlarges, modifies, or contravenes the Statutory Amendment by adopting a different effective date from the effective date set forth in the Statutory Amendment.

19. But the labors required of Petitioner in this case naturally do not include a showing that the unadopted rule, if adopted, would be an invalid exercise of delegated legislative authority. This requirement of section 120.56(1)(a) applies only to challenges of rules and proposed rules. Under section 120.56(4), Petitioner is required only to show that the unadopted rule violates section 120.54(1)(a), which, as noted above, informs agencies that rulemaking is not left to their discretion, but must be undertaken as soon as feasible and practicable--a responsibility that Petitioner has already proved that Respondent has failed to discharge.

20. Petitioner's claim for attorneys' fees under section 57.111 requires proof that Petitioner was a prevailing small business party in a proceeding initiated by Respondent, unless Respondent's actions were "were substantially justified or special circumstances exist which would make the award unjust." § 57.111(4)(a).

21. Petitioner has prevailed in this proceeding under section 120.56. For the purpose of this discussion, this final order assumes that Petitioner is a small business party, as defined in section 57.111(3)(d).

22. However, this proceeding under section 120.56 was not initiated by Respondent, as defined in section 57.111(3)(b). Clearly, Petitioner initiated the rule challenge. Under section 57.111(3)(b)3., an agency is treated as having initiated a proceeding if it was required to provide a clear point of entry. The Order Extending Probation contains a clear point of entry, but the point of entry applies to the initiation of the proceeding under sections 120.569(1) and 120.57(1).

23. These cases present a Catch-22 situation for Petitioner, who: 1) prevailed in this proceeding, which Respondent did not initiate and 2) failed to prevail in the sections 120.569(1) and 120.57(1) proceeding, which Respondent did initiate. Underscoring this paradox is the fact that these

cases proceeded as a single case until the issuance of the final and recommended orders.

24. Alternatively, though, Petitioner's request for attorneys' fees is denied on the ground that Respondent's actions "were substantially justified or special circumstances exist which would make the award unjust." Respondent's actions were substantially justified because its incorrect implementation of the Statutory Amendment produced the same result as the correct implementation of the Statutory Amendment produces.

ORDER

It is

ORDERED that:

1. The Board of Nursing's retroactive implementation of the Statutory Amendment to January 1, 2017, is an unadopted rule in violation of sections 120.54(1)(a) and 120.56(4), and the Board of Nursing shall immediately discontinue reliance on this unadopted rule, pursuant to section 120.56(4)(e); and

2. Petitioner's claims under section 57.111 are denied.

DONE AND ORDERED this 29th day of January, 2019, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2019.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.