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

BRIEF FOR APPELLANT, KENTUCKY BOARD OF NURSING

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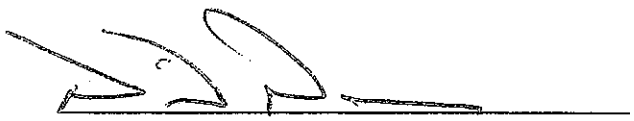
CERTIFICATE OF SERVICE

I certify that a copy of this brief was sent by U.S. First Class Mail, postage prepaid, this 21st day of October, 2013 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

INTRODUCTION

This is a case where the Kentucky Board of Nursing (the "Board") appeals from the Court of Appeals' ruling that the Board unreasonably interpreted its own regulation and erred when placing Spencerian's nursing program on probation based on such interpretation.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant, the Kentucky Board of Nursing (the "Board"), requests oral argument as this case involves important issues concerning the regulatory authority of the Board. In addition, oral argument will provide a convenient forum to address any questions that may arise concerning the procedural history, background facts and legal issues in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. The Kentucky Board of Nursing.

The Kentucky Board of Nursing (the "Board") is a state agency charged with the duty of regulating and controlling the practice of nursing in Kentucky in order to protect and safeguard the health and safety of its citizens. KRS 314.021. To that end, KRS 314.131 authorizes the Board to promulgate regulations to ensure pre-licensure nursing educational programs adequately prepare graduates for licensure eligibility as registered or practical nurses. More specifically, 201 KAR 20:360 directed 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." A nursing program in Kentucky may not operate without initial and ongoing approval of the Board. KRS 314.111. Furthermore, an individual is not eligible for licensure as a nurse unless he or she has graduated from an approved program. KRS 314.041.

Board approval is contingent on the program meeting the educational and evaluative standards outlined in 201 KAR 20:260 through 201 KAR 20:360 (the "standards"). Once the Board has granted a program initial approval status, the program's future status depends upon the degree to which it complies with the standards. 201 KAR 20:260 through 201 KAR 20:360. In order to gain full approval status, a program must meet all of the standards. 201 KAR 20:360 § 1(3). If a program fails to satisfy one or more of the standards, it may only operate with conditional approval status and is obligated to work toward full compliance. 201 KAR 20:360 §1(4); 201 KAR 20:360 §2. If deficiencies are not corrected, the program may be placed on probational

approval status. 201 KAR 20:360 §1(4)(e) and (5). A program placed on probation may not admit new students for a period not to exceed one academic year while it works to correct its deficiencies. 201 KAR 20:360 §1(5)(a). If the deficiencies remain uncorrected for one year, the Board may then conduct a hearing to determine whether to completely withdraw approval of the program. 201 KAR 20:360 §1(6). In addition, even a program achieving full approval is subject to ongoing monitoring by the Board and a potential downgrade in its approval status. 201 KAR 20:360 §2 and §3.

One standard the Board has always used to evaluate nursing programs is the pass rate for graduates taking the RN licensure examination (NCLEX-RN) for the first time. As explained by the Board's former Executive Director, Dr. Charlotte Beason, the pass rate standard, considered alongside other evaluative standards, enables the Board to assess the quality of education provided by a nursing program. [30-6-10 VR 121: 4:11:30, 4:13:30]. Prior to being amended in 2009, 201 KAR 20:360, which was promulgated in 1985, required that the "graduates of a program of nursing" achieve a pass rate of at least "eighty five (85) percent on the licensure examination". From its inception, the Board interpreted the regulation as applying to graduates taking the exam for the first time upon graduation since such is indicative of the quality of the subject nursing program. [30-6-10 VR 122: 7/9/10, 1:29:25]. By contrast, subsequent exam results are affected by numerous external variables such as alternative study courses and private tutors which are unrelated to the quality of the program. [Id.] In other words, the Board's interpretation was consistent with the purpose of assuring that "programs of nursing provide the necessary instruction and services to prepare graduates for licensure eligibility". 201 KAR 20:360 (emphasis added).

B. Spencerian's Associate Degree of Nursing Program.

Spencerian is one of six proprietary institutions in Kentucky offering a Registered Nurse ("RN") licensing program. Its Associate Degree of Nursing ("ADN") program, when established in 2001, allowed Licensed Practical Nurses ("PNs") to "bridge" their prior training to become Registered Nurses ("RNs") in a shorter amount of time than would otherwise be required. [R.3: Compl. ¶ 9]. Kentucky residents starting the program before June 2010 were able to complete the program in just one year, rather than the 18 months or two years typical of other RN programs.[1] [R.3: Compl. ¶9].

From 2001 to 2011, Spencerian's program continually failed to meet one or more standards and, therefore, never acquired full approval to operate during this period. As a result, Spencerian's program was only permitted to operate with conditional approval for ten consecutive years. Notably, the program failed every year from 2001 to 2011 to achieve the minimum 85% annual pass rate for graduates taking the licensure examination for the first time, as required by 201 KAR 20:360 § 2(4). Spencerian's pass rates during that time frame were as follows:

	2003	2004	2005	2006	2007	2008	2009	2010	2011
# tested	64	122	100	100	48	57	123	117	57
# passed	51	94	76	82	38	41	100	90	44
% pass	80%	77%	76%	82%	79%	72%	81%	79%	77%

[1] In February 2010, Spencerian's Program Director, Dale Charles, stated that 90% of the students he surveyed said they chose the program because it only took one year to complete. [See Record No. 13, filed July 1, 2010, Disc 4 at 43:03].

[R. 317; Admin.R. No. 23 at 1].[2] (See, also, Kentucky Board of Nursing Annual Reports for years 2009-2010 and 2010-2011 at 15-17, publicly available online at https://www.kbn.ky.gov/board/annualrpt.htm). No other Kentucky nursing program has ever failed to achieve the minimum pass rate for such a prolonged and continuous period.

During this span, Spencerian submitted reports to the Board with proposals for raising the pass rate for its graduates taking the exam for the first time. In addition, and of particular importance to this Court, in 2006, Spencerian also challenged the Board's interpretation of 201 KAR 20:360 as applying to individuals taking the exam for the first time after graduation. However, Jefferson Circuit Court Judge Geoffrey Morris rejected Spencerian's position, finding that the Board's "long standing interpretation" was "fairly compatible and consistent with the statutory framework" and therefore the Court was "not permitted to substitute its judgment for that of the Board." [R. 26-28: Pl.'s Compl., Ex. A at 12-14]. Notably, Spencerian never again challenged the Board's interpretation of the pre-amendment regulation. Later in 2009, the Board promulgated several amendments to the regulations, one of which memorialized the Board's longstanding interpretation that the minimum pass rate requirement applied to graduates taking the exam for the first time. 201 KAR 20:360 § 2(4).

C. The Board's Decision to Adjust the ADN Program's Approval Status to Probational.

In light of the ADN Program's prolonged conditional status, the Board conducted ongoing evaluation and site visits. In May 2009, the Board's Educational Consultant, Dr.

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[2] The Administrative Record is identified in the Record on Appeal as R. 317-334: Notice of Filing of Supplement to Record; "One (1) manilla envelope labeled 'KBN Board Meeting 6 CDs';" and two black binders tabbed 1-29 identified as "One (1) Black Binder 'Notice of Filing of Record' fld. Jul. 1, 2010; One (1) Black Binder 'Notice of Filing of Second Supplementation to Record' fld. Jul. 21, 2010." For purposes of this Brief, these items will be cited as "Admin.R. No. [tab] at [pg] or [disc] at [time]."

Patricia Spurr, conducted such a visit. [R. 5: Compl. ¶14]. In her subsequent report, Dr. Spurr noted that "Spencerian College has not met the benchmark of 85% since the graduation of their first class in 2003." [R. 5: Compl. ¶ 14; Admin.R. No. 1 at 2]. Her report also noted the program's failure to adequately report faculty appointments and to develop and implement course syllabi, both of which were violations of the standards set forth in 201 KAR 20:360 and 201 KAR 20:320. [Admin.R. No. 1 at 16].

Following Dr. Spurr's report, the Board issued a "Letter to Show Cause" to Spencerian pursuant to 201 KAR 20:360, and requested Spencerian's presence at the June 2009 Board meeting to address the program's continued failure to achieve the minimum pass rate standard.[3] [Admin.R. No. 2]. After the meeting, the Board decided to continue Spencerian on conditional approval "pending 2009 [RN licensure exam] results and the program plan of correction." [Admin.R. No. 4 at 8]. In addition, the Board established an eight month timeline for corrective action. [Admin.R. No. 4 at 9; Admin.R. No. 5].

As outlined by the timeline, Dr. Spurr, accompanied by another Board staff member, Dr. Suzette Scheuermann, conducted a follow-up site visit in January 2010. Following consultation with Dr. Scheuermann, Dr. Spurr then prepared a new comprehensive report noting that Spencerian "has not shown a concerted and sustained effort to meet all Board requests for the analysis and commitment to the improvement of graduate scores for first time [RN licensure exam] testers." [Admin.R. No. 11 at 35]. Therefore, the report recommended adjusting the program's status from conditional to probational. [Admin.R. No. 11 at 35].

[3] Spencerian attendees included: Jane Younger, Director of Nursing; Dale Charles, Associate Director of Nursing; Dr. Marilyn Musacchio, Dean of Nursing Education; and Linda Blair, Dean of Spencerian College.

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 the meeting, including its counsel in this litigation. After Dr. Spurr presented her findings and recommendations to the Board, Spencerian's Program Director, Dale Charles[4], made a presentation and responded to questions from the Board. At several times, Mr. Charles candidly admitted to the deficiencies noted in Dr. Spurr's report, and acknowledged that probation would be justified. His statements included the following:

> What Spencerian has done in the past has not been data driven and it has not been student driven, it has not been student supportive or faculty supportive the way it should have been.

[Admin.R. Disc 5 at 22:46].

> The easy thing to do is for you [the Board] to decide '[w]e've got a pass rate of less than 85%. We're going to probate the program, stop enrollment.'

[Admin.R. Disc 4 at 56:35].

> If you want to judge us by the last seven years, there's nothing I can say to that.

[Admin.R. Disc 5 at 24:18].

> I'm asking you to swallow a horse pill and I know it.

[Admin.R. Disc 5 at 22:30].

> If I were in your shoes, I don't know that I would swallow the pill I'm asking you to take. I understand where you're coming from when you've had people sit at this table and promise you things for seven years that never happened. I understand that.

[Admin.R. Disc 5 at 1:46–2:10].

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[4] At the time, Dale Charles served as the Program Director for both the ADN and PN programs at Spencerian. However, Spencerian subsequently replaced Charles with separate directors for its ADN and PN programs.

> It sounds great to get our RN in a year, but the end result is poor pass rates, frustrated students, broken dreams and people that never achieve their goals.

[Admin.R. Disc 5 at 29:30]. After Spencerian's presentation, the Board voted to adjust the program's status from conditional to probational and promptly notified Spencerian pursuant to 201 KAR 20:360 §1(5)(a). [Admin.R. No. 16].

Pursuant to 201 KAR 20:360 §1(5)(c), Spencerian then requested to appear before the Board to contest the decision. The Board granted Spencerian's request and allowed it to address the Board again on April 15, 2010. Again, Mr. Charles presented on behalf of Spencerian and once again candidly acknowledged the program's failures:

> It's great to say 'hey our population's going to get their license in a year.' It doesn't work at Spencerian.

[Admin.R. No. 21, Disc 2 at 12:19].

> If I was in your shoes, I would feel the same way. You get tired of the boy that cried wolf. But I've not cried wolf yet. Give me my chance.

[Admin.R. No. 21, Disc 2 at 44:15]. At the close of the session, the Board voted to uphold its probation decision.

D. Spencerian's Suit and the Jefferson Circuit Court's Decision Affirming Probation.

Following the Board's decision, Spencerian filed suit in Jefferson Circuit Court alleging that: (1) the Board acted arbitrarily and in violation of Section 2 of the Kentucky Constitution by placing the program on probation; (2) the Board's probation decision violated Spencerian's due process rights under the United States Constitution; and (3) the Board improperly and retroactively applied the new 2009 regulatory amendments when placing the program on probation. [R. 10: Compl.] Spencerian sought a judgment reversing the probation decision and also moved for injunctive relief to stay the decision.

[Id.]

At the injunction hearing, former Spencerian students testified that the program did not prepare them to sit for the licensure exam and that, as a result, they were afraid to care for patients. [30-6-10 VR 121: 7/8/10, 3:53:20, 3:53:35, 3:44:34]. One student described how instructors routinely carried on personal cell phone conversations during class and required students to buy books that were never used. [30-6-10 VR 121: 7/8/10, 3:40:51 and 3:41:35]. Another described how students "were crying out for help" from the administration but were ultimately told "if you don't like it, leave." [30-6-10 VR 121: 7/8/10, 3:55:30 and 3:56:05]. In addition, Mr. Charles testified to the program's high 50% annual faculty turnover and acknowledged once again, as he did in the previous board meetings, that probation was justified:

> Q: So the easy decision for the Board to make based on the track record of below 85% pass rate for every single year, the 'easy decision' in your own words, is to place the program on probation, correct?
>
> A: Correct.

[30-6-10 VR 122: 7/9/10, 4:28:40, 4:47:28 and 4:57:27].

Following the injunction hearing, the parties filed cross-motions for summary judgment and the Circuit Court subsequently issued its Opinion and Order rejecting Spencerian's arguments and upholding the probation decision. [R. 515-521: Opinion and Order, attached as Exhibit B]. The court rejected Spencerian's constitutional arguments and also held that "the Board's action in placing Spencerian on Probational Approval Status was not arbitrary because Spencerian failed to achieve the 85% pass rate for seven years." [Exhibit B: Opinion and Order at 4-5]. The court further noted that the Board had "numerous reasons" for distinguishing Spencerian from other institutions not placed

on probation, concluding it would "not substitute its judgment for that of the Board in such matters." [Id.] Finally, and of significance to the current appeal, the court also rejected Spencerian's argument that the Board retroactively applied the new 2009 regulatory amendments to test results that occurred prior to its effective date, holding:

> Spencerian cannot point to a single year in which it achieved the 85% pass rate. Even under the old regulations, Spencerian was out of compliance ... 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.

[Id.] Spencerian subsequently appealed the ruling to the Court of Appeals.

E. The Court of Appeals' Proceedings and Opinion.

On appeal, Spencerian reiterated its arguments that: (1) the Board acted arbitrarily and capriciously in placing Spencerian on probation; (2) the Board violated Spencerian's due process rights by placing it on probation; and (3) "the Board retroactively applied the new standards contained in the July 2009 amendment" by applying the new regulation to test results that occurred prior to its effective date. [Spencerian's Appellate Brief at 25 (emphasis added)]. In response, the Board addressed these arguments and explained that the new regulation did not create or impose any new duties because Spencerian had always been required to achieve an 85% pass rate for graduates taking the exam for the first time after graduation. [Board's Appellate Brief at 22-24].

During the pendency of the appeal, and as a result of certain corrective actions taken by Spencerian in response to probation, the Board removed the program from probation and placed it back on conditional approval status. However, Spencerian continued to prosecute the appeal and explained at oral argument that this case "is not moot by any stretch of the imagination." [Court of Appeals Oral Argument 5-21-12,

02:09:48]. As explained in its response to Spencerian's separate motion to dismiss, the Board agrees with this assertion.

In August, 2012, the Court of Appeals rendered a "To Be Published" Opinion overturning the Circuit Court's ruling under the stringent "clearly erroneous" standard, but based on an issue not briefed or raised by the parties. Specifically, the Court found that the Board's interpretation of the former, pre-2009 regulation as applying to graduates taking the licensure exam for the first time was unreasonable and "in direct conflict with the actual language" of the regulation.[5] [Court of Appeals Opinion at pg. 10, attached as Exhibit A]. Therefore, the Court reversed and remanded with instructions to "enter judgment in favor of Spencerian." [Id.] In support of its decision, the Court of Appeals relied on KRS 13A.130 and this Court's decision in Hagan v. Farris, 807 S.W.2d 488 (Ky. 1991), neither of which were cited in the parties' briefs nor discussed at oral argument. [Exhibit A: Court of Appeals Opinion at 9-10]. Subsequently, this Court granted discretionary review.

F. Recent Developments with Spencerian's ADN Program.

In response to probation, Spencerian has made certain program changes that have improved its compliance with the regulatory standards. For instance, Spencerian increased the length of its ADN program from 12 months to 18 months and implemented a new curriculum. It also replaced its former Program Director, Dale Charles, with separate directors for its ADN and PN programs. As mentioned above, the Board initially responded by first taking Spencerian off probation and once Spencerian exceeded the minimum licensure pass rate for first time in 2012, the Board granted the

[5] Ironically, this is the same argument Spencerian abandoned after Judge Morris found in 2006 that the Board's interpretation was in fact consistent with the statutory framework. [R. 26-28: Pl.'s Comp. Ex. A at 12-14].

program full approval status for the very first time. Notwithstanding the program's recent progress, its difficult history cannot be overlooked, and the Board is required to monitor the program's progress moving forward.

ARGUMENT

The Appellant Board properly preserved review of the Court of Appeals' Opinion to this Court by timely filing a motion for discretionary review pursuant to CR 76.20.

When reviewing the Opinion, this Court should determine whether the agency-Board's decision was clearly erroneous. Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 579 (Ky. 2002). A clearly erroneous decision is one that is "unsupported by substantial evidence." Id. (citing, Danville-Boyle County Planning and Zoning Comm'n v. Prall, 840 S.W.2d 205, 208 (Ky. 1992)). Thus, "if there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." Taylor v. Coblin, 461 S.W.2d 78, 80 (Ky. 1970).

I. The Court of Appeals Erred in Determining that the Board's Longstanding Interpretation of the Pre 2009 Regulation was in Direct Conflict with the Regulation.

The Court of Appeals incorrectly determined that the Board's longstanding interpretation of the pre 2009 regulation, as applying to graduates taking the exam for the first time, was "in direct conflict" with the regulation. [*See*, Exhibit A: Court of Appeals Opinion at 10]. In reaching this decision, the Court of Appeals actually interpreted the regulation in a manner inconsistent with its clear purpose. Furthermore, the Court's opinion overlooks the Supreme Court's substantial precedent requiring courts to defer to an agency's longstanding interpretation of its own regulations. Finally, the Court of

Appeals' ruling undermines: (1) the Board's mission to safeguard the public and ensure that nursing programs throughout the state (including Spencerian's program) adequately prepare students for licensure as nurses; and (2) the ability of all agencies and the public to rely on longstanding interpretations of regulations.

A. The Board's Longstanding Interpretation was Consistent with the Regulation and Effectuated its Clear Purpose.

Prior to being amended in 2009, 201 KAR 20:360, titled "Evaluation of prelicensure registered nurse and practical nurse programs," stated in pertinent part:

> Section 1. Evaluation for Full Approval: Registered Nurse and Practical Nurse Programs. (1) Retaining full approval. **A program of nursing that prepares graduates for licensure** shall meet standards in order to retain full approval.
>
> (4) If for one (1) fiscal year the **graduates of a program of nursing** achieve a pass-rate less than eighty-five (85) percent on the licensure examination:
>
> (a) A letter of concern shall be issued.
>
> (b) The nurse administrator shall be requested to submit an analysis of the cause(s) of the high failure rate on the licensure examination and plans to correct the deficiencies for the future.
>
> (5) If for two (2) consecutive fiscal years the **graduates of a program of nursing** achieve a pass-rate less than eighty-five (85) percent on the licensure examination:
>
> (a) A letter of warning shall be issued.
>
> (b) The nurse administrator shall appear before the board and give a report of the implementation of the plans submitted to the board the previous year and to present any further analysis and plans to correct the deficiencies as defined.
>
> (c) The program of nursing shall be surveyed by a representative of the board.
>
> (6) If for three (3) consecutive fiscal years the **graduates of a program of nursing** achieve a pass-rate less than eighty-five (85) percent on the licensure examination, the nurse administrator and the head of the governing institution or designee shall appear before the board to show cause that approval of the program be continued.
>
> (7) Evaluation. The faculty shall perform systematic and periodic evaluation of the total program including:
>
> (a) Organization and administration of the program of nursing.

(b) Curriculum.
(c) Resources, facilities, and services.
(d) Teaching and learning methods.
(e) Faculty.
(f) Students.
(g) Graduates.
(h) Licensure examination pass-rates.

(emphasis added).

On its face, the former regulation applied the pass rate to "graduates of a program of nursing." The term "graduates" clearly implies those individuals taking the examination upon graduation and after completion of their studies with the subject educational program. It does not reasonably encompass individuals far removed from the program who decide to repeat the exam after initially failing. Thus, contrary to the Court of Appeals' ruling, applying the regulation to graduates taking the exam for the first time upon graduation comports with the language of the regulation.

Moreover, the Board's interpretation was consistent with the policy and function of the statute authorizing the creation of the Board. KRS 314.021 §1 provides that "it is the declared policy … that the practice of nursing should be regulated and controlled as provided herein and by regulations of the board in order to protect and safeguard the health and safety of the citizens of the Commonwealth of Kentucky." In addition, 201 KAR 20:360 provided that "evaluative standards need to be established 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 pass rate standard was (and remains) part of a statutory and regulatory framework intended to assess how well the subject program prepares graduates for the licensure exam.

By contrast, the regulation was not intended to assess how distant graduates might perform on the exam after multiple attempts and resorting to alternative self-study or supplemental preparatory courses. Indeed, including those individuals in the calculation would have actually undermined the very purpose of the regulation. As explained by the Board's former Executive Director, Dr. Charlotte Beason, a graduate's first exam effort upon graduation is indicative of the quality of the subject program, while subsequent exam results are affected by numerous external variables such as alternative study courses and private tutors. [30-6-10 VR 122: 7/9/10, 1:29:25]. Thus, in light of the Board's purpose of assuring that "programs of nursing provide the necessary instruction and services to prepare graduates for licensure eligibility," applying the standard to individuals taking the exam for the first time upon graduating was the only logical interpretation. Put another way, it was the only interpretation that effectuated the obvious purpose of the regulation.

B. The Board's Longstanding Interpretation is Entitled to Controlling Weight.

The Court of Appeals' ruling also violated well established precedent from this Court that an agency's longstanding interpretation of its own regulation is entitled to controlling weight. Camera Center, Inc. v. Revenue Cabinet, 34 S.W.3d 39, 41 (Ky. 2000); Grantz v. Grauman, 302 S.W.2d 364, 367 (Ky. 1957).

Initially, it should be pointed out that the Court's reliance on KRS 13A.130 and isolated language from Hagan v. Farris, 807 S.W.2d 488 (Ky. 1991) was misplaced.

KRS 13A.130, states in pertinent part as follows:

> (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 [.]

The statute is inapplicable as it merely prohibits an agency from altering a regulation without following the proper procedures for doing so. *See*, e.g., Com. Educ. & Humanities Cabinet Dept. of Educ. v. Gobert, 979 S.W.2d 922 (Ky. App. 1998) (voiding internal personnel memo that attempted to modify regulatory reclassification procedure). Here, the Board never modified, expanded upon, limited, or otherwise altered the pre 2009 regulation by internal policy, memorandum, or other form of action. In fact, to the contrary, the Board consistently applied the pre 2009 regulation to graduates taking the exam for the first time since it was originally promulgated nearly 30 years ago. Consistent with this longstanding interpretation, for many years Spencerian and other programs submitted reports detailing ways in which they might improve their pass rates for graduates taking the exam for the first time after graduation.

Furthermore, no published decision has ever interpreted KRS 13A.130 in the same broad manner as the Court of Appeals so as to invalidate an agency's longstanding interpretation of its own regulation. In fact, such an expansive application of KRS 13A.130 would essentially vitiate this Court's well-established precedent that courts must defer to an agency's longstanding interpretation of its own regulations. Camera Center, Inc., 34 S.W.3d at 41; Grantz, 302 S.W.2d at 367.

In addition, this Court's decision in Hagan v. Farris, 807 S.W.2d 488 (Ky. 1991), upon which the Court of Appeals relied, actually supports the above precedent that an agency's longstanding interpretation of its own regulation is entitled to controlling weight. In Hagan, this Court examined whether the Alcoholic Beverage Control Board

acted in excess of its power by interpreting the "buy-out" provision in its regulations to allow a seller to place a license in extended dormant status while locating a purchaser. After acquiring real estate and rights to a retail package liquor license, the seller, Houghlin, closed the liquor store, had the building razed, and constructed a parking lot in its space for use in conjunction with his funeral home, which was located across the street. Thereafter, the ABC Board granted Houghlin's request to place the license in dormancy status for two years while he found someone to purchase the license.

The ABC Board's regulations clearly stated that a license lapsed and became void after remaining dormant for two years. Despite this provision, the ABC Board granted Houghlin's request to sell the liquor license to Bloomfield Liquors after the expiration of the two-year period. Thereafter, the owner of a third-party liquor store challenged the sale of the license, and the Board held a hearing in which it determined the "buy-out" provision in its regulations, which allowed the Board to extend a license thirty days beyond the date of expiration, validated the sale. On appeal, the trial court upheld the Board's decision but noted that the Board's interpretation of the buy-out provision was "tortured at best" and defeated the purpose of the regulation. In a subsequent appeal, this Court agreed that the facts did "not support the Board's interpretation that the entire dormancy period should be covered by the 'buy-out' exception," but nevertheless determined that it would be "unjust to overrule the ABC Board's decision" because "of Houghlin's reliance and the ABC Board's continued misinterpretation of its own regulation." In 2005, the Court of Appeals reiterated this holding, stating that "[t]he Hagan decision held that, even though improper, a 'decades old, consistent interpretation' of a liquor license would be applied prospectively." St. Luke Hospitals, Inc. v. Com.,

186 S.W.3d 746, 751 (Ky. App. 2005).

Hagan cannot be said to support the Court of Appeals' decision to disregard the Board's logical and reasonable interpretation of its own regulation. Indeed, to the contrary, Hagan actually supports deference to an agency's longstanding interpretation of its own regulations, even in instances where the interpretation is found to be tenuous. Here, the Board's longstanding interpretation that the 85% requirement applied to graduates taking the exam for the first time upon graduation was not only reasonable, but actually the only logical interpretation in light of the Board's purpose of assuring that nursing programs prepare graduates for the licensure exam. Accordingly, the Court's reliance on Hagan was misplaced, and the Court should have deferred to the Board's longstanding interpretation.

Moreover, the Court of Appeals overlooked substantial precedent by this Court that an agency's longstanding interpretation of its own regulation is entitled to controlling weight. For years this Court has ruled that courts "**must defer** to an administrative agency's interpretation of its own regulations." Camera Center, Inc., 34 S.W.3d at 41 (emphasis added); *See also* Hagan, 807 S.W.2d at 490 ("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**.") (emphasis added); Grantz, 302 S.W.2d at 367 (interpretation "continued without interruption for a very long period is entitled to **controlling weight**.") (emphasis added).

At a minimum, the Board's longstanding interpretation was a reasonable interpretation of the Board's own regulation. *See* Grantz, 302 S.W.2d at 367 (holding that a "[p]ractical construction of an ambiguous law by administrative officers continued

without interruption for a very long period is entitled to **controlling weight**.") (emphasis added). Accordingly, the Court of Appeals was required to defer to the Board's longstanding interpretation that the pre 2009 regulation applied to graduates taking the exam for the first time upon completion of the program.

In summary, whether the Board's longstanding interpretation of the pre 2009 regulation is viewed as the only logical interpretation or merely a reasonable interpretation, the Court of Appeals was required to give "controlling weight" to that interpretation. Therefore, this Court should vacate the decision of the Court of Appeals and reinstate the Circuit Court's grant of summary judgment in favor of the Board.

C. The Court of Appeals' Ruling has Far Reaching Adverse Effects on the Board, its Public Safety Mission and Other Agencies.

Although reversal is mandated under this Court's governing precedent, this Court should also recognize the adverse effects that the Court of Appeals' ruling would have on the Board, other agencies, and the general public.

First, the Court of Appeals' ruling would undermine the Board's future institutional authority with both Spencerian and the 102 other educational institutions under its jurisdiction. It would allow programs with a pervasive history of non-compliance to get a free pass on their record prior to the 2009 amendments. Indeed, Circuit Court Judge Olu Stevens acknowledged this negative effect when he observed that:

> Spencerian cannot point to a single year in which it achieved the 85% pass rate. Even under the old regulations, Spencerian was out of compliance ... 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.

[Exhibit B: Opinion and Order at 5].

Since its inception, Spencerian knew it had to achieve an 85% pass rate for its graduates taking the exam for the first time. A clarifying amendment should not be interpreted to grant Spencerian a "do-over" by extinguishing its extensive record of non-compliance.

In addition, given Spencerian's pervasive history of non-compliance, the Board must continue to monitor its program in the future and in doing so must also be allowed to consider its past history of being placed on probation. If allowed to stand, the Court of Appeals' ruling would effectively "expunge" Spencerian's past probation and undermine the Board's future regulation of the program. Furthermore, the ruling would undermine the Board's goal of protecting and safeguarding public health and safety by depriving it of the ability to consider Spencerian's past probation and history of deficient pass rates as well as the pass rate histories of other programs.

The Court of Appeals' ruling also has a broader negative impact on all other state agencies with regulatory functions. The ruling creates a confusing framework for administrative agencies to follow when promulgating, interpreting and amending their regulations. In future cases, both agencies and courts would be left with the difficult task of reconciling the ruling with the substantial contrary precedent cited and discussed above. The end result would be to inhibit an agency's ability to interpret its own regulations, even when that interpretation has been consistent for a quarter of a century. Likewise, the ruling would have a chilling effect on agencies seeking to memorialize their longstanding interpretations through subsequent amendments, as the Board did in this case. Finally, the Court of Appeals' ruling would introduce a permanent cloud of uncertainty upon both state regulatory bodies and the individuals and entities falling under their jurisdiction.

II. The Original Appeal Issues are not before the Court as Spencerian did not File a Cross-Motion for Discretionary Review.

Pursuant to CR 76.21, if the prevailing party in the Court of Appeals wishes further consideration of issues in addition to those for which discretionary review has been granted, "the prevailing party *must* file a cross motion for discretionary review." CR. 76.21; Perry v. Williamson, 824 S.W.2d 869, 871 (Ky. 1992). This rule applies to all issues which the appellee lost in the Court of Appeals or that the Court of Appeals decided not to address. Id. ("Our rules are specific that if the motion for discretionary review made by the losing party in the Court of Appeals is granted, it is then incumbent upon the prevailing party in the Court of Appeals to file a cross-motion for discretionary review if respondent wishes to preserve the right to argue issues which respondent lost in the Court of Appeals, or **issues the Court of Appeals decided not to address.**") (emphasis added); Gailor v. Alsabi, 990 S.W.2d 597, 602 (Ky. 1999) ("We will not address issues raised but not decided by the Court below. It is the rule in this jurisdiction that issues **raised on appeal but not decided** will be treated as settled against the appellant in that court upon subsequent appeals unless the issue is preserved by cross-motion for discretionary review.") (emphasis added); Commonwealth v. Smith, 5 S.W.3d 126, 129-130 (Ky. 1999) (held it was procedurally inadequate for appellee to request a remand of claims raised on appeal **but not decided by the Court of Appeals** because appellee did not file a cross-motion for discretionary review) (emphasis added).

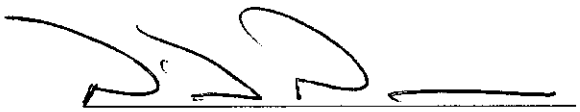
Here, Spencerian originally appealed three issues to the Court of Appeals, claiming that: (1) the Board acted arbitrarily and capriciously in placing Spencerian on probation; (2) the Board violated Spencerian's due process rights by placing it on probation; and (3) "the Board retroactively applied the new standards contained in the

July 2009 amendment" by applying the new regulation to test results that occurred prior to its effective date. [Spencerian's Appellate Brief at 25 (emphasis added)]. However, as discussed above, in reaching its decision to overturn the Circuit Court's ruling, the Court of Appeals did not decide these issues. Instead, the Court of Appeals determined that the separate issue of the Board's interpretation of the pre 2009 regulation was dispositive and ruled on that basis. Spencerian has not filed a cross-motion for discretionary review. Accordingly, pursuant to CR 76.21, the only issue before this Court is the Board's interpretation of the pre 2009 regulation.

CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court vacate the decision of the Court of Appeals (which ordered a judgment reversing the Board's probation decision) and reinstate the Jefferson Circuit Court's grant of summary judgment in the Board's favor.

Respectfully submitted by:



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APPENDIX

Tab:

A. Court of Appeals Opinion Reversing and Remanding (COA-R. 18)

B. Jefferson Circuit Court Opinion and Order (R. 515-521)