

New Hampshire Board of Nursing
Order on Petition for Declaratory Ruling

Petitioner: Office of Professional Licensure and Certification

The Office of Professional Licensure and Certification (“OPLC”) filed a Petition for Declaratory Ruling requesting the Board of Nursing (“Board”) find that Nur 802.01(b) is unenforceable as exceeding the scope of the Board’s authority under the Nurse Practice Act, RSA chapter 326-B, or in the alternative, issue a Declaratory Ruling that affirms the validity of Nur 802.01(b) entirely.

The Board considered this matter at its February 22, 2024, meeting. The Board hereby finds that Nur 802.01(b) is enforceable as it sets standards for educational programs relative to licensed nursing assistants (“LNAs”) becoming certified as medication nursing assistants (“MNAs”), within the scope of the Board’s authority under RSA 326-B:32, I.(a).

I. BACKGROUND

Petitioner OPLC is the state agency responsible for processing and approving or denying applications for licensure, certification, or registration for all license types governed by OPLC or a board listed in RSA 310:2, based on set objective standards developed by the boards, and in accordance with RSA 541-A. N.H. Rev. Stat. Ann. 310:4.

The Petitioner seeks guidance as to whether Nur 802.01(b)¹ exceeds the scope of the Board’s authority under RSA 326-B:9. Petitioner contends that setting a requirement for LNA experience prior to entering an education program for a MNA certificate exceeds the scope of the Board’s rulemaking authority as there is no statutory requirement for work experience to become certified as a MNA under RSA 326-B:27². Petitioner does not deny that the Board has the rulemaking authority to adopt rules establishing the standards to be met by, and the process of

¹ Nur 802.01 Eligibility To Be a Student in A Board Approved Medication Administration Education Program. A person shall be eligible to be a student in board-approved medication administration education program if such person:

- (a) Holds a valid and unencumbered nursing assistant license issued by the board;
- (b) Has been employed as a licensed nursing assistant within the past 5 years for the hours-equivalent of 2 years of full time employment;
- (c) Possesses proficiency in English and basic mathematics as determined by the sponsoring institution;
- (d) Has not been convicted of a felony; and
- (e) Meets the requirements for enrollment set forth in Nur 802.02.

² 26-B:27 Certificate of Medication Administration for Licensed Nursing Assistants. –

I. The board may issue a certificate of medication administration to a current LNA who:

- (a) Has participated in and completed a board-approved medication administration education program;
- (b) Has passed an examination approved by the board; and
- (c) Has paid the certification fee.

II. Certification may be renewed on a biennial basis.

approval of, education programs. In support of the Petitioner’s argument, it cites: “[T]he rulemaking authority which may be delegated by the legislature is limited.” Opinion of the Justices, 121 N.H. 552, 557 (1981). “The administrative agency’s authority allows it to ‘fill in details to effectuate the purpose of the statute, and administrative rules which go beyond the filling in of details are invalid.” Id. (internal quotations and citations omitted). “Rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law.” Opinion of the Justices, 121 N.H. 552, 557 (1981) (internal quotations and citations omitted).

II. STANDARD OF REVIEW

A declaratory ruling is “an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency.” RSA 541-A:1, V, *See* N.H. Admin. R. Pt. Nur (“Nur”) 202.01(e). A declaratory ruling is a ruling by the board as to the specific applicability of any statutory provision or of any rule or order of the board. Nur 202.01(e). Therefore, they do not have precedential value; nor do they apply to anyone other than the petitioner.

III. ANALYSIS

RSA 326-B:2, VI defines “Medication nursing assistant” to be “a licensed nursing assistant holding a currently valid certificate authorizing the delegation to the nursing assistant tasks of medication administration.” The OPLC may issue a current LNA a certificate of medication administration if the LNA has participated in and completed a board-approved medication administration education program, has passed an examination approved by the Board, and has paid a certification fee. N.H. Rev. Stat. Ann 326-B:27.

Petitioner contends that the Board cannot add a requirement for work experience as RSA 326-B:27 does not plainly require an LNA to have experience to obtain certification as an MNA. Statutory interpretation requires the interpreter to examine the statute and statutory scheme as a whole, rather than reading words or phrases in isolation. Franklin v. Town of Newport, 151 N.H. 508, 509 (2004); Appeal of Ashland Elec. Dept., 141 N.H. 336, 340 (1996).

The Board must adopt rules to set “[t]he standards to be met by, and the process for approval of, education programs designed to prepare applicants to qualify for licensure or certification in any of the disciplines regulated by the Board under RSA 326-B:32.” N.H. Rev. Stat. Ann. 326-B:9, IV. The Board must further “establish standards for the establishment and outcomes for nursing and nursing assistant education programs intended to prepare students for

licensure or for certification.” N.H. Rev. Stat. Ann. 326-B:32, I(a). “The delegation of some lawmaking authority is a necessary feature of modern government because the current degree of regulatory activity can only be performed by administrative agencies.” Opinion of the Justices, 121 N.H. 552, 557, 431 A.2d 783, 786 (1981). Here, the Board has the expertise to “fill in details to effectuate the purpose of the statute,” through the rulemaking authority that was granted by the legislature. *See* Opinion of the Justices, 121 N.H. 552, 557 (1981). The Board has set forth their eligibility requirements and education program requirements in Nur 802.

Nur 802.02(b) does not establish additional licensing criteria. The rule sets a criterion for the educational programs designed to prepare LNAs for MNA certification in that such programs cannot accept students who do not have practice experience as an LNA within the past five years for the hours-equivalent of two years’ full-time employment. The Board in establishing this educational criterion balanced the State’s interest in public safety and the objective minimum educational requirements of the MNA certification. It is clearly within the Board’s authority to set these standards for education programs under RSA 326-B:32. Nur 802.01(b) is enforceable under the Nurse Practice Act.

IV. CONCLUSION

For the foregoing reasons, the Board concludes that Nur 802.01(b) is enforceable in full under the Nurse Practice Act.