

**STATE OF NEW HAMPSHIRE
OFFICE OF PROFESSIONAL
LICENSURE AND CERTIFICATION**

BOARD OF NURSING

**In Re: Nashua Community College- RN,
Program # US51402300**

Docket No.: 22-NUR-047

**ORDER ON APPEAL OF PROBATION
ORDER - 08/25/22**

I. ATTENDEES:

Joni Menard, Vice Chair and Board Member
Dwayne Thibeault, Board Member
Wendy Stanley Jones, Board Member
Melissa M. Tuttle, Board Member
Melissa A. Underhill, Board Member
Maureen Murtagh, Board Member
Mathew Kitsis, Board Member
Michele Melanson-Schmitt
Nikolas Frye, Presiding Officer
Lauren Warner, Board Counsel
Ashley Czechowicz, Board Administrator
Jeanne Webber, Board Administrator
John Garrigan, Hearing Counsel
Marissa Schuetz, Hearing Counsel
Demetrio F. Aspiras, III, Counsel for the Program

II. CASE SUMMARY/PROCEDURAL HISTORY:

On or about 04/14/22, the Office of Professional Licensure and Certification, Division of Enforcement (“OPLC Enforcement”), acting on behalf of the Board of Nursing (“Board”), received a reliable anonymous communication from an informant alleging Nashua Community College- RN Program (“Program”) was running into issues keeping full-time and part-time staff. On 05/13/22, pursuant to RSA

326-B:32, III, (2)(b) and N.H. Code Admin. R., Title Nur 603.07 (“Rules”), members of the Board and OPLC staff, conducted a review of the nursing education program at the Program to determine whether the school was in compliance with statutes and rules governing nursing education programs. As part of that review, the Board approved a deficiency improvement plan for the Program, which was presented to it in a letter from OPLC Enforcement dated 06/24/22. On 08/24/22, due to ongoing concerns about the staffing issues at the Program and the first day of fall classes being 08/29/22, a non-recused quorum of the Board voted to place the program on probation, pursuant to RSA 326-B:32 and Rule 603.05. The Program filed a notice of appeal pursuant to Rule 603.05 and the Board held a hearing on 12/14/22. This Order on Appeal of Probation Order – 08/25/22 follows.

III. SUMMARY OF THE HEARING AND ARGUMENTS:

A. Procedure

At the request of the Program, the Board held a hearing on the “Appeal of Probation Order – 08/25/22” pursuant to Rule 603.05. Pursuant to Rules 603.05 and 207.10, the burden of proof was placed on the Program to establish “[w]hether the Board should affirm its “Order of Probation – 08/25/22” in this matter, terminate it, or otherwise alter it pursuant to Rule 603.05 et seq.” Notice of Hearing at II.c.1. Since the burden of proof was on the Program, it presented its arguments first and Hearing Counsel second. The Board was provided the opportunity to question the Program and Hearing Counsel on its respective presentations. After questioning, the parties were provided an opportunity to address the Board again briefly before the record closed.

B. Program

The Program generally summarized the contents of its Prehearing Memorandum of Law dated 12/05/22 during its presentation.

C. Hearing Counsel

Hearing Counsel generally summarized the contents of Hearing Counsel’s Memorandum of Law dated 12/05/22 during its presentation.

IV. LEGAL ANALYSIS AND CONCLUSIONS:

Although provided the opportunity to address both mistakes of fact and law, the Program focused its arguments solely on alleged errors of law. As a preliminary matter, the Board agrees with the Program’s position that should the Board determine that it erred as a matter of law for any of the reasons argued in Sections III or IV of the Program’s Memorandum, then it need not address any of the other issues. Therefore, the Board starts its inquiry with respect to those sections.

A. Section III of Program’s Memorandum

Section III of the Memorandum generally argues that “RSA 541-A and RSA 326-B:38 required the Board to provide notice and hold an adjudicatory hearing before modifying the Program’s approval status.” Prog. Mem at 5. The Program’s attention focuses on the wording of RSA 541-A:30, II which requires the following:

[a]n agency shall not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice to the licensee of the facts or conduct upon which the agency intends to base its action, and gives the licensee an opportunity, through an adjudicative proceeding, to show compliance with all lawful requirements for the retention of the license.

RSA 541-A:30, II.

The Program posits that the Board’s approval of it as a nursing program is a “license” within the meaning of RSA 541-A and RSA 326-B.¹ It then argues the Board failed to follow the notice and opportunity to be heard requirements of RSA 541-A:30, II before modifying its program status from “Approved” to “Approved on Probation”. Hearing Counsel does not dispute that the Program holds a license but argues that the Board changing the Program’s status from “Approved” to “Approved on Probation” was akin to a renewal of its approval, as opposed to a modification or amendment of the license. Consequently,

¹ See RSA 541-A:1, VIII, which defines a license to include an “approval”.

Hearing Counsel contends there is no “contested case”, RSA 541-A:1, IV, and therefore the notice requirements for a Board “adjudicative proceeding”,² as contemplated in RSA 541-A:30, II, are inapplicable.

The Board agrees with the parties that RSA 541-A:30, II generally applies to adjudicative proceedings held pursuant to RSA 326-B et seq. Broadly speaking, there are multiple references to RSA 541-A et seq within RSA 326-B et seq., including RSA 326-B:32.³ All these references apply RSA 541-A et seq. to RSA 326-B et seq., as opposed to carving out exceptions to it. This indicates an intent by the legislature to make RSA 541-A generally applicable to RSA 326-B, as does the fact that the Board meets the statutory definition of an “agency” contained within RSA 541-A:1, II.⁴ Likewise, the Board agrees with the parties that an “approval” granted pursuant to RSA 326-B:32 is a “license” within the meaning of RSA 541-A:1, I, *compare* RSA 541-A:1, I to RSA 326-B:32, I(b), because the definition of license contains “approval”.⁵

Therefore, the Board focuses its attention on whether there is a “contested case”, RSA 541-A:1, IV, such that the requirements for an “adjudicative proceeding”, RSA 541-A:1, I, must be followed pursuant to RSA 541-A et seq. “‘Contested case’ means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.” RSA 541-A:1, IV. RSA 326-B:32, III sets forth the process by which nursing educational programs are reviewed once they have obtained approval. The Board is tasked with “... periodically

² See RSA 541-A:1, I, RSA 541-A: 31, and RSA 326-B:38, IX.

³ See RSA 326-B:4, XIII; RSA 326-B:9; RSA 326-B:9-a, I and II; RSA 326-B:14, II-a(b); RSA 326-B:16, V; RSA 326-B:22, II(d); RSA 326-B:23, I and III; RSA 326-B:28; RSA 326-B:32, I(d); RSA 326-B:37, II(q)(2); RSA 326-B:38, IX; and RSA 326-B:43, VI.

⁴ The definition includes “state board”.

⁵ See *supra* fn. 1. RSA 326-B:32, I(b) authorizes the Board to approve, disapprove, and withdraw approval for nursing education programs. Therefore an “approval” within the meaning of RSA 326-B:32 is a “license” within the meaning of RSA 541-A:1, VIII.

review[ing] nursing and nursing assistant education programs and require[ing] such programs to submit evidence of compliance with standards.” RSA 326-B:32, III(b). It “... shall grant continuing approval [of a nursing education program] if, upon review of evidence, the board determines that the program meets the established standards. The board shall publish a list of approved programs.” RSA 326-B:32, III(c). In contrast, it “... [s]hall deny or withdraw approval **or take such action as deemed necessary** when nursing or nursing assistant education programs fail to meet the standards established by the board.” RSA 326-B:32, III(d) (emphasis added).

Here the Board changed the Program’s status from “Approved” to “Approved on Probation” by issuing an order before providing the notice and opportunity to be heard afforded by RSA 541-A et seq. in the context of an adjudicative proceeding. In doing so, the Board relied upon Rule 603.05, which provides no such requirement. Although RSA 326-B:32 makes no explicit reference to the Board’s ability to place a program on “probation”, it authorizes the Board to promulgate rules pursuant to RSA 326-B:32, II. Nonetheless, the scope of these rules are constrained by the statutes which govern the Board. *See In re Mooney*, 160 N.H. 607, 611-12 (2010). The Board’s authority to create the status “Approved on Probation” derives from the highlighted language referenced in RSA 326-B:32, III(d) above—namely “...or take such action as deemed necessary...”. RSA 326-B:32, III(d).⁶ That the legislature sought fit to include the language “such action as deemed necessary” with the options of denying or withdrawing approval of an educational program, as opposed to “continuing approval”, means the Board should consider the rule created status of “Approved on Probation” accordingly. This position is also supported by what occurs to a program when its status is changed to “Approved on Probation.” For example, the public is notified of the change in status, the educational program becomes subject to Board orders issued pursuant to Rule 603.05, and the program is a step closer to withdrawal of approval.

⁶ RSA 326-B:32, III(c), on its face, does not authorize any type of approval other than full approval, which was not granted in this case.

Based on the foregoing, the Board finds and concludes that a change in status for a nursing educational program from “Approved” to “Approved on Probation” is more akin to a modification or an amendment to a license as described in RSA 541-A:30, II than a “renewal” or “continuing approval” of a license, meaning the matter at bar was a “contested case” that required an “adjudicative proceeding”. *See* RSA 541-A:1, I and IV. The Board also finds and concludes that while it properly followed the procedure set forth in Rule 603.05 for changing a nursing educational program’s status from “Approved” to “Approved on Probation”, the portion of that rule allowing the Board to issue an order of probation before an adjudicatory hearing occurs contradicts the plain wording and intentions of RSA 541-A:30, II. Consequently, the Board erred as a matter of law in issuing its “Order of Probation – 08/25/22” before providing notice and an opportunity to be heard to the Program pursuant to RSA 326-B:38, IX and RSA 541-A et seq.

Pursuant to RSA 326-B:38, IX, the Board shall forthwith issue a notice of hearing addressing the concerns it has with the Program and provide it with an opportunity to be heard. Since the Board has determined that the statutory process required by RSA 326-B:38, IX and RSA 541-A:30, II was not properly followed, it need not address any of the other issues on appeal at this time.

B. Section IV of the Programs Memorandum.

As explained in Paragraph I.A. above, the Board’s decision that it did not follow the statutory process required by RSA 326-B:38, IX and RSA 541-A:30, II means it need not address any of the other issues on appeal at this time, including the federal and state constitutional issues. As a matter of pure academic exercise, the Board notes it found the Program’s federal and state constitutional arguments unpersuasive because Rule 603.05 establishes a right of appeal whereby the Program need not comply with Rule 603.05’s requirements during the appeal. *See* Rule 603.05(b). The Program filed such an appeal pursuant to Rule 603.05 on 09/23/22. Therefore, the risk of an erroneous deprivation occurring due to the

application of Rule 603.05 was sufficiently offset in this case. *See In re Mullen*, 169 N.H. 392, 397 (2016)(internal citations and quotations omitted).

V. ORDERS:

1. The Board’s “Appeal of Probation Order – 08/25/22” is hereby vacated; and
2. The Program’s status is reinstated to “Full Approval”; and
3. The Board shall issue a notice of hearing in this matter that complies with RSA 326-B:38, IX; and
4. The parties shall tentatively reserve time for an adjudicatory hearing to be held at the next Board meeting on 01/26/23 at 9:00 AM EST. At this time, 2 hours shall be allotted; and
5. On or before 12/23/22, the parties shall provide the Board Administrator dates and times of availability for a prehearing conference to occur in early January of 2023.

DATED: 12/21/2022

_____/s/ Nikolas K. Frye, Esq._____
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