

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

ATS INSTITUTE OF TECHNOLOGY,		CASE NO. 11CVF11-14460
Appellant,		JUDGE MCINTOSH
vs.		
OHIO BOARD OF NURSING,		
Appellee.		

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**DECISION AND JUDGMENT ENTRY AFFIRMING, AS MODIFIED,**  
**THE NOVEMBER 18, 2011 ADJUDICATION ORDER OF**  
**THE OHIO BOARD OF NURSING**  
**AND**  
**NOTICE OF FINAL APPEALABLE ORDER**

**MCINTOSH, J.**

This case is a Revised Code 119.12 administrative appeal, by ATS Institute of Technology (Appellant), from an Adjudication Order that the Ohio Board of Nursing issued on November 18, 2011, withdrawing the Board's provisional approval from Appellant's Associate of Applied Science in Nursing Program, and denying the Board's full approval to the program. The record that the Board has certified to the Court reflects the following facts.

**History**

Appellant is a private, for-profit school, established in 2006, that is located in Highland Heights, Ohio. Appellant offers two nursing education programs: a one-year practical nursing program that prepares students to become licensed practical nurses (LPNs); and a two-year associate degree in nursing (ADN) program that prepares students to become registered nurses.

The ADN program, or Associate of Applied Science in Nursing Program, is the subject of this appeal.

Nursing education programs in Ohio are governed by R.C. Chapter 4723 (Nurse Practice Act), and by Ohio Adm. Code Chapter 4723-5 (Nursing Education Program). There are three types of approval that the Ohio Board of Nursing grants to nursing education programs.

“Conditional approval” is the initial approval status granted by the Board to a proposed nursing education program that meets and maintains the requirements of Ohio Adm. Code Chapter 4723-5. Ohio Adm. Code 4723-5-01(H). Conditional approval authorizes implementation of a program and is required prior to the final acceptance of a student into a program. *Id.* “Full approval” is the approval status granted by the Board to a nursing education program that meets and maintains the requirements of Ohio Adm. Code Chapter 4723-5. Ohio Adm. Code 4723-5-01(O). “Provisional approval” is the approval status granted by the Board to a nursing education program that was previously granted full approval, but fails to meet and maintain the requirements of Ohio Adm. Code Chapter 4723-5. Ohio Adm. Code 4723-5-01(AA).

In May 2006, Appellant applied to the Board for its approval of Appellant’s ADN program, and the Board granted conditional approval to the program. *Hearing Examiner’s Report and Recommendation, Oct. 6, 2011 (RR.) p. 3.*

In March 2008, because of deficiencies in Appellant’s ADN program, which the Board discovered in 2007, Appellant and the Board entered into a Consent Agreement, in which Appellant acknowledged the deficiencies in the program (March 2008 Consent Agreement). *RR. p. 3.* Pursuant to the March 2008 Consent Agreement, the Board granted full approval to the

program, subject, however, to terms and conditions that would apply for a minimum of three years. *Id.*

In July 2008, the Board determined that Appellant had violated the March 2008 Consent Agreement. *RR. p. 4.* However, rather than exercising its authority to change the ADN program's approval status from full approval to provisional approval, the Board permitted Appellant to enter into an Addendum to the Consent Agreement, which became effective in July 2008 (July 2008 Addendum). *Id.* In the July 2008 Addendum, Appellant acknowledged that it had failed to comply with the March 2008 Consent Agreement. *Id.*

In September 2008, the Board conducted an announced survey visit to Appellant, to ensure that Appellant was complying with the March 2008 Consent Agreement and the July 2008 Addendum, as well as with R.C. Chapter 4723 and Ohio Adm. Code Chapter 4723-5. *RR. p. 6.* During the September 2008 survey visit, the Board discovered deficiencies in the ADN program, which the Board identified to Appellant in a letter in October 2008. *Id.* In November 2008, Appellant responded to the Board's letter. *Id.*

On January 15, 2009, having found that Appellant's November 2008 response was insufficient, the Board issued a "Notice of Automatic Placement on Provisional Approval Status" to Appellant, as well as a "Notice of Opportunity for Hearing." *RR. p. 6.* The Notice of Opportunity for Hearing detailed the deficiencies that the Board discovered during the September 2008 survey visit, and notified Appellant that the Board had automatically placed the ADN program on provisional approval status for a minimum of two years. *Id.*

Appellant requested a hearing on the Board's action, which was conducted on October 19, 2009. *RR. p. 6.* On November 9, 2009, a Hearing Examiner issued a "Report and

Recommendation,” finding that Appellant had not complied with the March 2008 Consent Agreement and the July 2008 Addendum. *Id.*

In an “Adjudication Order” issued on January 22, 2010, the Board continued the ADN program’s provisional approval status for a minimum of two years, retroactive to January 2009 (January 2010 Adjudication Order). *RR. p. 7.* In the January 2010 Adjudication Order, the Board notified Appellant that the Board would review the ADN program’s approval status in January 2011. *Id.* Appellant did not appeal the January 2010 Adjudication Order pursuant to R.C. 119.12, and it therefore became final.

On May 5, 2010, the Board conducted an announced survey visit to Appellant. *RR. p. 7.* That visit focused on the ADN program’s pass rates for the NCLEX (National Council Licensure Examination), the national licensing examination for nurses. *Id.* Ohio Adm. Code 4723-5-23 requires the Board to review any program with a pass rate below ninety-five percent of the national average, and at that time, Appellant’s pass rate had fallen below the mark for three consecutive years. *Id.*

On September 20-21, 2010, the Board conducted another announced survey visit to Appellant. *RR. p. 7.* That visit was for the purpose of ensuring that the ADN program was in compliance with Ohio Adm. Code Chapter 4723-5 and the Board’s January 2010 Adjudication Order. *Id.* On November 24, 2010, the Board issued a survey visit report to Appellant, identifying deficiencies in the ADN program. *Id.* On December 20, 2010, the Board received Appellant’s response to the survey visit report. *Id.*

On January 24, 2011, the Board mailed a “Notice of Opportunity for Hearing” to Appellant, alleging deficiencies in the ADN program and notifying Appellant that the Board

proposed to withdraw the Board's provisional approval from the program, pursuant to R.C. 4723.06(A)(7) and Ohio Adm. Code 4723-5-04(B).

Appellant requested a hearing on the Board's proposed action, and on September 12-14, 2011, a Hearing Examiner conducted the requested hearing.

On October 6, 2011, the Hearing Examiner issued a 45-page "Report and Recommendation," containing an exhaustive summary of the evidence, detailed findings of fact, and conclusions of law. The Hearing Examiner concluded that Appellant violated the Board's January 22, 2010 Adjudication Order by failing to comply with Ohio Adm. Code Chapter 4723-5, and that, pursuant to R.C. 4723.06(A)(7), the Board was authorized to withdraw its provisional approval from the ADN program. The Hearing Examiner recommended that the Board withdraw its provisional approval and permit Appellant to reapply for conditional approval after a stated period of time, "when it is able to demonstrate a plan for an RN program that meets all of the requirements of R.C. Chapter 4723 and [Ohio Adm. Code Chapter] 4723-5." *RR. pp. 44-45.*

In an "Adjudication Order" issued on November 18, 2011, the Board adopted the Hearing Examiner's October 6, 2011 Report and Recommendation, withdrew the Board's provisional approval from Appellant's ADN Program, denied full approval to the program, and directed that, in two years, Appellant may apply to the Board for its conditional approval of the program. In explaining its decision, the Board stated:

\*\*\* The [ADN program] has been provided opportunities to correct the issues that resulted in the [program's] failure to meet and maintain the minimum requirements established for registered nursing education programs and has demonstrated a lengthy, historic inability to comply with these minimum requirements. In addition, the [program] places the public at risk by graduating students who do not obtain an education that meets the minimum standards established in the Nurse Practice Act and rules, including, for example, failing to provide students clinical experience in specified practice areas (Findings of Fact Nos. 3, 4, and 6) and graduating students who had not obtained passing grades in

clinical areas, as required by the [program's] own progression policies (Finding of Fact No. 2).

On November 22, 2011, pursuant to R.C. 119.12, Appellant appealed the Board's November 18, 2011 Adjudication Order to this Court. On December 22, 2011, on Appellant's motion, the Court ordered the Adjudication Order stayed "until this appeal is fully adjudicated or the end of the Spring semester \*\*\*, whichever occurs first. Until further order of the Court, Appellant shall not admit any new students to its [ADN program] until this matter is finally adjudicated."

The parties have filed their briefs and the appeal now comes before the Court for a decision on its merits.

### **Standards of Appellate Review**

Revised Code 119.12, which governs this appeal, provides:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

"Reliable" evidence is dependable; that is, it can be confidently trusted. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 571, 589 N.E. 2d 1303 (1992). In order to be reliable, there must be a reasonable probability that the evidence is true. *Id.* "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.* "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.*

A common pleas court, when reviewing an order of an administrative agency under R.C. 119.12, must consider the entire record to determine whether reliable, probative, and substantial

evidence supports the agency's order and the order is in accordance with law. *Beach v. Ohio Bd. of Nursing*, 10th Dist. No. 10AP-940, 2011-Ohio-3451, 2011 Ohio App. LEXIS 2922, ¶ 13, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St. 2d 108, 110-111, 407 N.E. 2d 1265 (1980). The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are by no means conclusive. *Id.*

On questions of law, the common pleas court conducts a *de novo* review, exercising its independent judgment in determining whether the administrative order is in accordance with law. *Beach*, citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St. 3d 466, 471, 613 N.E. 2d 591 (1993). Although the standard of review on questions of law is plenary, courts give due deference to an agency's interpretation of its own statutes and regulations. *Leon v. Ohio Bd. of Psychology*, 63 Ohio St. 3d 683, 687, 590 N.E. 2d 1223 (1992). In *Farrand v. State Medical Bd.*, 151 Ohio St. 222, 85 N.E. 2d 113 (1949), the Ohio Supreme Court recognized the policy reason for such deference, when it observed that the purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing decisions "with boards or commissions composed of [individuals] equipped with the necessary knowledge and experience pertaining to a particular field." *Id.* at 224.

### **Analysis**

Appellant has set forth six assignments of error in support of this appeal.

Appellant's first assignment of error is that the Board's November 18, 2011 Adjudication Order is not in accordance with law, because the Board did not possess the authority to impose a two-year waiting period on Appellant, before it may apply to the Board for its conditional approval of the ADN program. Appellant argues that the Board's imposition of the two-year waiting period is an *ultra vires* act, inasmuch as it is beyond the legal authority of the Board.

Revised Code 4723.06(A)(7) provides that the Board shall:

\*\*\* [p]lace on provisional approval, for a period of time specified by the board, a program that has ceased to meet and maintain the minimum standards of the board established by rules adopted under section 4723.07 of the Revised Code. At the end of the period, the board shall reconsider whether the program meets the standards and shall grant full approval if it does. *If it does not, the board may withdraw approval, pursuant to an adjudication under Chapter 119. of the Revised Code.* (Emphasis added.)

Ohio Adm. Code 4723-5-04(B) provides that, when a program does not meet and maintain the requirements of Ohio Adm. Code Chapter 4723-5, the Board has the authority, pursuant to R.C. 119.12, to issue an order that provides for “continuance of provisional approval, withdrawal of approval, or granting of full approval[.]”

The Court concludes that, in the proceedings below, Ohio law authorized the Board to do one of three things: continue its provisional approval of Appellant’s ADN program; withdraw its approval from the program; or grant its full approval to the program. The law did not authorize the Board to impose a two-year waiting period on Appellant before Appellant could apply to the Board for its conditional approval of the program. Appellant’s first assignment of error is therefore well taken.

Having so held, however, the Court observes that the fact that the Board did not have the authority to impose the two-year waiting period on Appellant does not change the fact that the Board did have the authority to withdraw its provisional approval from the ADN program, which the Board did in its November 18, 2011 Adjudication Order. Accordingly, with respect to Appellant’s first assignment of error, the Court can do no more, pursuant to R.C. 119.12, than modify the Adjudication Order by removing the two-year waiting period, leaving undisturbed the Board’s withdrawal of its provisional approval of Appellant’s ADN program.

Appellant's second assignment of error is that it was denied its right to due process because the November 18, 2011 Adjudication Order was not issued by an impartial tribunal. Specifically, Appellant contends that two of the Board members, Judith Church and Melissa Meyer, who voted in favor of the Adjudication Order, possessed information they acquired apart from the adjudicatory process, and therefore they should not have voted on the Adjudication Order.

Ms. Church is the "Board Supervising Member for Disciplinary Matters." Prior to the adjudicatory hearing in September 2011, the parties engaged in settlement negotiations. Appellant asserts that Ms. Church, in her capacity as the Board Supervising Member for Disciplinary Matters, had the authority to approve or reject settlement terms and was therefore privy to information shared by the parties during their settlement negotiations, but not provided to the other Board members in the adjudicatory process.

Counsel for the Board has represented to the Court that, although Ms. Church has a supervisory role for cases involving the discipline of nurses, she does not have a supervisory role for cases involving nursing education programs. *Brief of the Ohio Board of Nursing, Feb. 17, 2012, p. 4.* The Board "categorically denies" that Ms. Church had any involvement in Appellant's settlement negotiations with the Board. *Id.* More importantly, there is no evidence in the record to support Appellant's assertion that Ms. Church had any such involvement.

Ms. Meyer is the "Nursing Education Program Board Liaison." In that capacity, Ms. Meyer is authorized to act on behalf of the Board to address questions concerning nursing education programs and determine whether issues warrant further review by the Board. Appellant asserts that the September 20-21, 2010 survey visit by the Board was conducted under Ms. Meyer's supervision, in her capacity as Nursing Education Program Board Liaison, and that

she was therefore privy to information obtained during the survey visit that was not provided to the other Board members.

However, the record reflects, and Appellant admits, that the Board issued a survey visit report to Appellant on November 24, 2010, which “outlined all areas of concern found.” *Brief of Appellant, ATS Institute of Technology, Associate of Applied Science in Nursing Program, Jan. 31, 2012, p. 5.* The survey visit report was admitted into evidence as State’s Exhibit 5 at the September 2011 adjudicatory hearing. Consequently, the information obtained during the survey visit was, in fact, provided to the other Board members.

The Court finds that the record does not support Appellant’s assertion that Ms. Church and Ms. Meyer possessed information they acquired apart from the adjudicatory process. Ms. Church and Ms. Meyer were not, therefore, prohibited from voting on the Board’s November 18, 2011 Adjudication Order.

Furthermore, assuming solely for the sake of argument that Ms. Church and Ms. Meyer should not have voted, the Court concludes that Appellant was not prejudiced by their participation in the vote, inasmuch as the outcome of the vote would have been the same without their participation.

Revised Code 4732.02 provides, “Seven members of the board including at least four registered nurses and at least one licensed practical nurse shall at all times constitute a quorum.” On November 18, 2011, when the vote was taken, eleven Board members were present, eight of whom were registered nurses and two of whom were licensed practical nurses. *Board Minutes, Nov. 16-18, 2011 (Minutes) p. 1.* In accordance with R.C. 4732.02, therefore, there was a quorum present to conduct the Board’s business.

Pursuant to Ohio Adm. Code 4723-1-01(F), the Board's meetings are conducted in accordance with the Tenth Edition of "Robert's Rules of Order Newly Revised," published in 2000. "[T]he basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a *majority vote*. (Emphasis in original.)" *Robert's Rules of Order Newly Revised* §44, p. 387 (10th Ed. 2000). "The word *majority* means 'more than half'; and when the term *majority vote* is used without qualification – as in the case of the basic requirement – it means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum is present. (Emphasis in original.)" *Id.*

On November 18, 2011, four of the Board members abstained from voting, leaving seven Board members, including Ms. Church and Ms. Meyer, to participate in the vote. *Minutes p. 1.* Those seven Board members unanimously voted to approve the November 18, 2011 Adjudication Order. *Minutes p. 1.* If Ms. Church and Ms. Meyer's votes are excluded, there would still be five votes, constituting a majority, in favor of approving the Adjudication Order. Appellant's second assignment of error is therefore not well taken.

Appellant's third assignment of error is that the November 18, 2011 Adjudication Order is contrary to law because the Board erred in its interpretation of Ohio Adm. Code 4723-5-13(F)(8). Ohio Adm. Code 4723-5-13(F) provides:

4723-5-13 Curriculum for a registered nursing education program.

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(F) The curriculum shall consist of course content in nursing art and science, the physical biological and technological sciences, and social and behavioral sciences. This content may be integrated, combined, or presented as separate courses as follows:

- (1) Nursing art and science applied in a variety of settings to individuals or groups across the life span[;]
- (2) Safe and effective care environment[;]
- (3) Health counseling and health teaching;
- (4) Psychological integrity;
- (5) Physiological integrity[;]
- (6) Physical, biological, and technological sciences[;]
- (7) Social and behavioral sciences that are necessary to understand the effect of a client's religious, spiritual, cultural, and growth and developmental experiences on the client's health, the client's attitude toward health maintenance, and to effectively communicate with the client;
- (8) *Clinical and laboratory experiences that:*
  - (a) Meet the established course objectives or outcomes;
  - (b) *Provide a nursing student with the opportunity to practice cognitive, psychomotor, and affective skills in the performance of a variety of nursing functions with individuals or groups across the life span;*
  - (c) Provide a nursing student with the opportunity to practice technical skills including skills pertaining to intravenous therapy;
  - (d) Are provided concurrently with the related theory instruction. (Emphasis added.)

Appellant asserts that the rule does not mandate clinical and laboratory experiences across the life span, and that the Board erred in interpreting the rule to mandate such experiences. The Court does not agree.

The Board has directed that a registered nursing education program in Ohio shall provide course content in nursing art and science, the physical biological and technological sciences, and social and behavioral sciences. Ohio Adm. Code 4723-5-13(F). That course content may be integrated, combined, or presented as separate courses. *Id.* However, in providing the course

content, a program must provide “[c]linical and laboratory experiences that \*\*\* [p]rovide a nursing student with the opportunity to practice cognitive, psychomotor, and affective skills in the performance of a variety of nursing functions with individuals or groups across the life span[.]” Ohio Adm. Code 4723-5-13(F)(8)(b).

In the Court’s opinion, the rule is straightforward: A registered nursing education program in Ohio must provide the mandatory course content to its students through clinical and laboratory experiences that provide a nursing student the opportunity to practice his or her nursing skills “with individuals or groups across the life span.” Giving due deference to the Board’s interpretation of its own regulations, the Court concludes that the Board did not err in interpreting Ohio Adm. Code 4723-5-13(F)(8) to mandate clinical and laboratory experiences “across the lifespan.” This is certainly a reasonable interpretation of the rule. Appellant’s third assignment of error is therefore not well taken.

Appellant’s fourth assignment of error is that the Board violated R.C. 119.07, and thereby Appellant’s right to due process, by considering evidence of allegations that were not contained in the January 24, 2011 Notice of Opportunity for Hearing. Specifically, Appellant asserts that the Hearing Examiner acted contrary to law by admitting evidence that Appellant lost its clinical privileges at the Cleveland Clinic Hospitals shortly after a medication error was made by one of Appellant’s students.

Revised Code 119.07 provides that “in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing the party of the party's right to a hearing. Notice \*\*\* shall include the charges or other reasons for the proposed action[.]” Furthermore, “[t]he failure of an agency to give the notices for any hearing required by sections 119.01 to

119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing.”

Appellant asserts that the Board failed to comply with these procedural safeguards because the Hearing Examiner admitted evidence of the student’s medication error, even though no such allegations were set forth in the January 24, 2011 Notice of Opportunity for Hearing. The Court concludes, however, that the Hearing Examiner did not commit error by admitting the evidence, for the following reasons.

In the January 24, 2011 Notice of Opportunity for Hearing, the Board notified Appellant that the Board proposed to withdraw its provisional approval of Appellant’s ADN program for several reasons, one of which was Appellant’s failure to implement a nursing education program that provided students with clinical patient-care experiences across the life span. At the adjudicatory hearing in September 2011, Appellant took the position, and presented evidence in support of that position, that it lost its clinical privileges at the Cleveland Clinic Hospitals because the Cleveland Clinic Hospitals preferred students who were working towards a bachelor’s degree in nursing, and therefore were no longer willing to accept students from ADN programs. *RR. pp. 26-28.* The State, on the other hand, presented evidence that Appellant lost its clinical privileges at the Cleveland Clinic Hospitals shortly after a medication error was made by one of Appellant’s students. *RR. pp. 26-28.* The Court concludes that evidence of the student’s medication error was relevant to the issue of why the Cleveland Clinic Hospitals terminated Appellant’s clinical privileges, because that evidence rebutted Appellant’s evidence that the privileges were terminated for other reasons.

Moreover, even if the Hearing Examiner erred in admitting the evidence, Appellant has not demonstrated that it was prejudiced by such error. Although the Hearing Examiner discussed the

evidence in her summary of the evidence, she made no mention of it in her Findings of Fact, her Conclusions of Law, her Discussion, or her ultimate Recommendation to the Board. Furthermore, there is nothing in the record to suggest that the Board members considered the student's medication error in its decision. Appellant has not demonstrated that it was prejudiced by the Hearing Examiner's admission of the evidence. Appellant's fourth assignment of error is therefore not well taken.

Appellant's fifth assignment of error is that the November 18, 2011 Adjudication Order is not supported by reliable, probative, and substantial evidence. In support of this assignment of error, Appellant asserts that four of the Board's factual findings (Nos. 2, 3, 4, and 6) are not supported by the requisite evidence. However, all of the factual findings that Appellant challenges are, indeed, supported by the requisite evidence.

Appellant asserts that Finding of Fact No. 2 is not supported by reliable, probative, and substantial evidence. In that finding, the Board found that Appellant failed to comply with Ohio Adm. Code 4723-5-12(A)(4) because Appellant failed to implement its own written policies for student progression in the course titled "NUR 2130: Nursing of Children." The Board found that Appellant's policy stated that all students were required to achieve an "S" (satisfactory) grade in all clinical objectives in order to pass the course. The Board found, however, that numerous students were passed at the end of the course, even though their evaluations showed that they received a grade of "N/A" for some of the clinical objectives in the course. The Board found that Appellant's initial written explanation, that some of the experiences were "not available," was not an acceptable justification for the fact that students passed the course without completing some of the objectives. Likewise, the Board found, Appellant's explanation that some of the objectives were "not applicable" to that pediatric course, because Appellant was using a flawed

evaluation tool that included maternity objectives, was also not acceptable. The Board found that, while it was true that some of the objectives related specifically to maternity aspects of nursing, many of the other objectives on which students received “N/As” concerned more routine aspects of pediatric nursing, such as medication and delegation skills.

Finding of Fact No. 2 is supported by the record. Appellant’s written progression policy stated, “Students must achieve a grade of ‘Satisfactory’ in all clinical objectives in order to pass the course.” *RR. p. 8; State’s Ex. 21*. The syllabus for the course stated that the course included forty-five hours of lab/clinical experiences, and that, in those clinical experiences, a student “must receive satisfactory grades in all clinical objectives to pass the course.” *RR. p. 8; State’s Ex. 14*. For some of the clinical objectives stated on the student evaluation forms, students received an “N/A” instead of an “S” for “satisfactory.” *RR. p. 9*. While some of the objectives were more applicable to a maternity course than a pediatric course, most of the objectives were relevant to a pediatric nursing course. *RR. p. 9; Transcript (Tr.) pp. 144-145, 168-172; State’s Ex. 15*. Moreover, Appellant stipulated that, despite its student progression policy requiring a grade of “Satisfactory” in all clinical objectives, its documentation for thirty student files did not reflect that students had received a “Satisfactory” grade in all clinical objectives, but instead reflected in several areas that students were awarded an “N/A.” *RR. p. 12; Joint Ex. 1*.

Appellant asserts that Finding of Fact No. 3 is not supported by reliable, probative, and substantial evidence. In that finding, the Board found that Appellant failed to comply with Ohio Adm. Code 4723-5-13(C) and 4723-5-13(F)(8)(b) because the syllabus for the course titled “NUR 2031: Advanced Concepts in Adult Nursing” stated that clinical experience in an acute care setting would be provided. The Board found that Appellant had no contract with an acute care or critical care facility, and instead used three long-term care facilities for the clinical

experience in that course. Therefore, the Board found, Appellant did not implement its curriculum as written, and it did not provide clinical experiences in the performance of a variety of nursing functions with individuals or groups across the life span. Finding of Fact No. 3 is supported by the record. The facilities that Appellant used for the clinical experience in that course were all skilled long-term care centers, and not acute care settings or critical care settings. *RR. p. 16; Tr. Pp. 184-186; State's Ex. 20; Joint Ex. 1.*

Appellant asserts that Finding of Fact No. 4 is not supported by reliable, probative, and substantial evidence. In that finding, the Board found that Appellant failed to comply with Ohio Adm. Code 4723-5-13(C) and 4723-5-13(F)(8)(b) because the syllabus for the course titled "NUR 2110: Mental Health Nursing" stated that clinical experience would be provided in "acute and community settings." The Board found that Appellant had no contract with an acute care or critical care facility, and instead used two long-term care facilities for the clinical experience in that course. Therefore, the Board found, Appellant did not implement its curriculum as written, and it did not provide clinical experiences in the performance of a variety of nursing functions with individuals or groups across the life span. Finding of Fact No. 4 is supported by the record. The facilities that Appellant used for the clinical experience in that course were all skilled long-term care centers, and not acute care settings or critical care settings. *RR. p. 16; Tr. Pp. 184-186; State's Ex. 20; Joint Ex. 1.*

Appellant asserts that Finding of Fact No. 6, in part, is not supported by reliable, probative, and substantial evidence. In that finding, the Board found that Appellant failed to comply with Ohio Adm. Code 4723-5-13(F)(8)(b) because the course titled "NUR 2120: Maternity Nursing" included no actual clinical experience. The Board found that, since Appellant had no contract with a facility that provided clinical obstetrics experiences, it used a

simulation laboratory exclusively, instead of a clinical experience. The Board found that, since Appellant provided no clinical experience in maternity or obstetrics, it failed to provide a clinical experience at that point on the life span. Finding of Fact No. 6 is supported by the record, inasmuch as the students in the course worked on a medical mannequin that simulated the delivery of a baby. *RR. p. 20; Tr. pp. 42-45, 71-75.*

The Court therefore concludes that the Board's Findings of Fact Nos. 2, 3, 4, and 6 are supported by reliable, probative, and substantial evidence.

In addition, Appellant does not challenge other factual findings made by the Board, as follows.

Appellant does not dispute that the Board's January 2010 Adjudication Order permitted Appellant's ADN program to remain on provisional approval for an additional two years beyond the original provisional period. *Finding of Fact (FF.) No. 1.* Appellant does not dispute that the Board's January 2010 Adjudication Order required Appellant to comply with all of the requirements established in R.C. Chapter 4723 and Ohio Adm. Code Chapter 4723-5 for nursing education programs, during that time period. *Id.*

Appellant does not dispute that it failed to comply with Ohio Adm. Code 4723-5-13(C)(3) because it did not implement its curriculum for "NUR 2120: Maternity Nursing" as written, since some students passed the course without completing the requisite number of simulation laboratory hours stated on the course syllabus. *FF. No. 6.* Appellant does not dispute that its explanation (that most of the students were deficient because class was not held on the Fourth of July holiday, and that the school did not at that time have a policy for make-up classes due to holidays) is not acceptable. *Id.*

Appellant does not dispute that it failed to comply with Ohio Adm. Code 4723-5-17(A) because it did not have executed affiliation agreements with eleven out of seventeen of the sites it used for clinical experiences, at the time of the May 5, 2010 survey visit. *FF. No. 7.*

Appellant does not dispute that, by the time of the September 20-21, 2010 survey visit, it still did not have executed affiliation agreements with four of those clinical sites. *Id.* Appellant does not dispute that, although it had agreements with the sites for clinical experiences in its LPN program, the agreements did not apply to the ADN program until an amendment was added later. *Id.*

Finally, Appellant does not dispute that, by failing to comply with Ohio Adm. Code 4723-5-13(C)(3) and Ohio Adm. Code 4723-5-17(A), as set forth above, Appellant failed to comply with the provision in the Board's January 2010 Adjudication Order, that Appellant shall comply with all of the requirements of R.C. Chapter 4723 and Ohio Adm. Code Chapter 4723-5 for nursing education programs. *FF. No. 9.*

Revised Code 4723.06(A)(7) provides:

§ 4723.06. Powers and duties of board

(A) The board of nursing shall:

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(7) Place on provisional approval, for a period of time specified by the board, a program that has ceased to meet and maintain the minimum standards of the board established by rules adopted under section 4723.07 of the Revised Code. At the end of the period, the board shall reconsider whether the program meets the standards and shall grant full approval if it does. If it does not, the board may withdraw approval, pursuant to an adjudication under Chapter 119. of the Revised Code.

Ohio Adm. Code 4723-5-04(B) provides:

4723-5-04. Procedure for board determination of a program's status.

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(B) The following procedures shall be followed by the board when a program does not meet and maintain the requirements of this chapter:

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(3) If a program on provisional approval continues to fail to meet and maintain the requirements of this chapter at the end of the time period established for provisional approval, the board may propose to continue provisional approval for a period of time specified by the board or may propose to withdraw approval pursuant to an adjudication under Chapter 119. of the Revised Code. The adjudication may result in the continuance of provisional approval, withdrawal of approval, or granting of full approval;

(4) If a program on provisional approval in accordance with this chapter demonstrates that an additional requirement is not being met and maintained, the board shall propose to withdraw approval pursuant to an adjudication under Chapter 119. of the Revised Code. The adjudication may result in the continuance of provisional approval, withdrawal of approval, or granting of full approval.

The Board's Findings of Fact Nos. 2, 3, 4, and 6, which Appellant challenges, are supported by reliable, probative, and substantial evidence, as discussed above. Furthermore, Appellant does not dispute that it failed to comply with Ohio Adm. Code 4723-5-13(C)(3) (nursing program must implement its course objectives as written) or that it failed to comply with Ohio Adm. Code 4723-5-17(A) (nursing program must have signed affiliation agreements with clinical programs). As a result of these multiple violations, Appellant ceased to meet and maintain the minimum standards of the Board established by rules adopted under R.C. 4723.07. Accordingly, pursuant to R.C. 4723.06(A)(7) and Ohio Adm. Code 4723-5-04(B)(3) and (4), the Board was authorized to withdraw its provisional approval from Appellant's ADN program.

The Court finds that the Board's November 18, 2011 Adjudication Order is supported by reliable, probative, and substantial evidence. Appellant's fifth assignment of error is therefore not well taken.

Appellant's sixth, and final, assignment of error is that the November 18, 2011 Adjudication Order is not in accordance with law because the Board did not find that the ADN program continued to fail to meet or maintain the requirements of Ohio Adm. Code Chapter 4723-5 at the end of the provisional period, in January 2011. In support of this argument, Appellant cites Ohio Adm. Code 4723-5-04(B)(3), which provides:

4723-5-04. Procedure for board determination of a program's status.

\*\*\*

(B) The following procedures shall be followed by the board when a program does not meet and maintain the requirements of this chapter:

\*\*\*

(3) If a program on provisional approval *continues to fail to meet and maintain the requirements of this chapter at the end of the time period established for provisional approval*, the board may propose to continue provisional approval for a period of time specified by the board or may propose to withdraw approval pursuant to an adjudication under Chapter 119. of the Revised Code. \*\*\*  
(Emphasis added.)

However, Ohio Adm. Code 4723-05-04(B)(4), provides an alternative mechanism for the Board to initiate proceedings to withdraw its provisional approval from a program:

4723-5-04. Procedure for board determination of a program's status.

\*\*\*

(B) The following procedures shall be followed by the board when a program does not meet and maintain the requirements of this chapter:

\*\*\*

(4) If a program on provisional approval in accordance with this chapter *demonstrates that an additional requirement is not being met and maintained*, the board shall propose to withdraw approval pursuant to an adjudication under Chapter 119. of the Revised Code. \*\*\* (Emphasis added.)

Subsection (B)(3) of the regulation permits the Board to take action if, at the end of a provisional period, a program has not been able to meet and maintain minimal standards.

Subsection (B)(4) of the regulation requires the Board to take action if an additional requirement is not being met by a program. The January 24, 2011 Notice of Opportunity for Hearing cited both sections of the regulation. Appellant's final assignment of error is therefore not well taken.

### Conclusion

Upon consideration of the entire record on appeal, the Court finds that the November 18, 2011 Adjudication Order of the Ohio Board of Nursing, withdrawing the Board's provisional approval from Appellant's ADN Program and denying the Board's full approval to the program, is supported by reliable, probative, and substantial evidence and is in accordance with law, with the sole exception that the Board did not have the authority to impose a two-year waiting period on Appellant before Appellant "may apply for conditional approval to operate a registered nursing education program, in accordance with the requirements specified in the Nurse Practice Act and Chapter 4725-5, OAC[.]"

In accordance with R.C. 119.12, therefore, the November 18, 2011 Adjudication Order is hereby **MODIFIED** by removing the two-year waiting period. The Adjudication Order, as modified, is hereby **AFFIRMED**.

It is so **ORDERED**.

This is a final, appealable Order. Costs to Appellant. Pursuant to Civ. R. 58, the Franklin County Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry.

Electronically signed by:

JUDGE STEPHEN L. MCINTOSH

Copies to:

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Franklin County Court of Common Pleas

**Date:** 04-26-2012  
**Case Title:** ATS INSTITUTE -VS- OHIO BOARD OF NURSING  
**Case Number:** 11CV014460  
**Type:** DECISION/ENTRY

It Is So Ordered.



/s/ Judge Stephen L. McIntosh

Court Disposition

Case Number: 11CV014460

Case Style: ATS INSTITUTE -VS- OHIO BOARD OF NURSING

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes