



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADONI HEALTH INSTITUTE,
Appellant Below,
Appellant/Cross Appellee.

No. 470, 2018

v.

DELAWARE BOARD OF NURSING,
Appellee Below,
Appellee/Cross Appellant

THIRD AMENDED APPELLEE'S AND CROSS-APPELLANT'S REPLY
BRIEF ON CROSS-APPEAL

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NATURE AND STAGE OF THE PROCEEDINGS

The Cross Appellant and Appellee in the instant appeal is the Delaware Board of Nursing (“Board”). On July 8, 2015, the Board issued an Opinion and Order withdrawing approval of Adoni Health Institute FKA Leads School of Technology (“Adoni”).¹ Adoni appealed the Board’s order to the Superior Court, and on July 29, 2016, the Superior Court issued an Opinion reversing the Board’s decision in part, and remanding in part.² The Superior Court found that the Board failed to provide Adoni the requisite notice and opportunity to cure its deficiencies in regard to student enrollment numbers, program deficiencies, misleading hearing testimony, and inconsistent enrollment dates.³ The Superior Court further found that the Board provided Adoni proper notice that the school’s 2014 Annual Report misstated the length of time it takes to complete the school’s curriculum and remanded the matter to the Board to determine whether the misstated curriculum length justified withdrawing the school’s approval.⁴

Upon remand, the Board requested documentation from Adoni in an attempt to determine Adoni’s true curriculum length.⁵ After review of the documentation submitted by Adoni regarding its curriculum length, the Board unanimously voted

¹ A103.

² A6-54.

³ *Id.*

⁴ *Id.*

⁵ B164.

to propose to withdraw the school's approval, based upon the misstated curriculum length.⁶ Adoni was notified of the Board's proposal to withdraw and the basis therefore by letter dated February 8, 2017.⁷ Adoni requested a hearing on the Board proposal, and after Adoni requested several postponements, the Board scheduled the hearing for July 12, 2017.⁸ At the conclusion of the hearing, the Board voted to withdraw approval of Adoni's nursing program based on the program's misstated curriculum length in its 2014 Annual Report.⁹ The Board signed its order memorializing that decision on September 13, 2017.¹⁰

Adoni filed a timely appeal of the Board's order to the Superior Court. The Superior Court issued an Opinion affirming the Board's decision on August 9, 2018. Adoni appealed the Superior Court's 2018 decision, and the Board filed a cross-appeal to the Superior Court's July 2016 decision. Adoni filed its Opening Brief with this Court on November 12, 2018. The Board timely filed an Answering Brief on appeal and Opening Brief on cross appeal on December 12, 2018. On January 21, 2019, Adoni filed an Answering Brief in Opposition to the Board's Opening Brief on cross appeal. This is the Board's Reply Brief to Adoni's Answering Brief, timely filed in accordance with Supreme Court Rule 15(a)(v).

⁶ B166-171.

⁷ *Id.*

⁸ B180.

⁹ A295.

¹⁰ A351-376.

SUMMARY OF ARGUMENT

1. Denied. The Board did not waive its argument that the record included more than one communication to the school.
2. Denied. The Board's April 25, 2012 notice provided the school notice and an opportunity cure its deficiencies, which were in no way trivial.

STATEMENT OF FACTS

The Delaware Board of Nursing's conduct for any case decision it issues is governed by the Delaware Administrative Procedures Act ("APA").¹¹ As such, when the Board proposed to withdraw Adoni's Board approval in 2015 based upon a review of the entire record, it did so pursuant to 29 *Del. C.* §§ 10126-10127.¹² Adoni appealed the Board's decision to the Superior Court arguing that the Board did not provide the school enough notice and opportunity to cure its noted deficiencies.¹³ In support of this argument, the school alleged that the Board could only rely upon the exhibits from the hearing, specifically the Board's April 25, 2012 and April 9, 2015 proposal to withdraw notices.¹⁴ Relying upon the APA, the Board challenged this argument noting it advised the school of its deficiencies and how it expected the school to correct those deficiencies beginning in 2008. Alternatively, the Board asserted that even if it was bound by only the April 2012 notice letter, that letter provided the school an overabundance of notice and opportunity to cure its deficiencies.

As to the pre-2012 notice, the Board's 2015 Answering Brief "Statement of Facts" laid out all of its communications with the school pre-dating April 25, 2012,¹⁵

¹¹ 29 *Del. C.* § 10161(a)(28).

¹² Title 29, Chapter 101, Subchapter III.

¹³ B150.

¹⁴ A18-19.

¹⁵ B134-136.

and its “Argument” outlined how these communications provided the school countless opportunities to correct its deficiencies.¹⁶ The Board noted that it asked the school for corrective action plans in 2008, 2009, 2010, and 2011 and invited the school’s various program administrators to meet with the Board in 2009 and 2012.¹⁷ As to the April 25, 2012 notice, the Board has repeatedly pointed out how this extensive, detailed letter clearly spelled out what was expected of Adoni and when.¹⁸

¹⁶ B150-151.

¹⁷ B150-151.

¹⁸ B90, 99, 101, 131, 147.

ARGUMENT

I. THE BOARD DID NOT FAIL TO PRESERVE ITS POSITION THAT THE RECORD IS THE RECORD.

1. Question Presented

Did the Delaware Board of Nursing fail to preserve its argument that communications pre-dating the April 2012 letter provided Adoni notice and an opportunity to cure its deficiencies? B150-154.

2. Scope of Review

This Court has jurisdiction to entertain this appeal from an administrative board's final order pursuant to the Delaware Administrative Procedures Act. *29 Del. C. § 10102(4)*. The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board's decision and the board's ruling is free from legal error. *29 Del. C. § 10142(d)*; *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). Moreover, "[t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted." *29 Del. C. § 10142(d)*. This Court's limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal

error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

3. Merits of Argument

Adoni argues that “we are faced with a unique scenario where the Board is both an Appellant¹⁹ and the ‘trial court’”²⁰ However, this scenario is not remotely unique for the Board.²¹ Just as the Board is accustomed to this scenario, it is accustomed to complying with the APA, and in particular, the mandate that an “agency shall make its decision *based upon the entire record of the case . . .*”²² Here, the Board was well within its rights to consider communications pre-dating the April 2012 Letter when it determined that Adoni had adequate notice and an opportunity to cure its deficiencies. As the Board has repeatedly noted, the APA defines the record as “*all notices, correspondence between the agency and the parties*, all exhibits, documents and testimony admitted into evidence and all recommended orders, summaries of evidence and findings and all interlocutory and final orders of the agency”²³ In other words, the Board would have erred if it had

¹⁹ The Board’s true posture when Adoni argues it did not preserve its argument, was not appellant, but appellee.

²⁰ Answering Br., 9.

²¹ See e.g. *Camtech Sch of Nursing and Technological Scis. v. Del. Bd. of Nursing*, 2014 WL 4179199 (Del. August 22, 2014); *Del. Institute of Health Sciences, Inc. v. Del. State Bd. of Nursing*, 2012 WL 175815 (Del. January 20, 2012); and *Michael v. Del. Bd. of Nursing*, 181 A.3d 152 (Table) (Del. February 22, 2018).

²² 29 Del. C. § 10128(a).

²³ Definition of the “record” under the APA. 29 Del. C. § 10128(a) (emphasis added).

not considered all that occurred between the parties beginning with the submission of Adoni's application.

To that end, when Adoni argues that the Board only relied upon one or two communications, it ignores the reality that the school and Board truly communicated back and forth for years. This is likely why no Court has ever held that an agency such as the Board should ignore the APA and attempt to forget or ignore everything that took place prior to a hearing. At no stage in this appeal has Adoni argued that the Board's pre-2012 notice letters were fraudulent, lost in the mail, or inaccurate. Rather the school would ask the Court to ignore what actually occurred, merely because the Board did formally move and admit every single piece of correspondence as an exhibit in the 2015 hearing.²⁴ Such a tedious task is simply not required by the APA. As Adoni aptly notes, the "Board could have concluded that communications and evidence outside of the April 2012 Letter amounted to proper notice and an opportunity to cure...."

Adoni also argues that the Board's notice argument runs afoul of Supreme Court Rule 8 as the Board did not preserve its notice argument at the Board hearing or appeal level.²⁵ Again, this is simply untrue. When the Board acted as trier in fact, it did so in accordance with the APA. It appropriately relied upon the entire record

²⁴ Answering Br., 6.

²⁵ Answering Br., 9.

when reaching its decision and thus did not waive any notice argument at the hearing. Then when the matter was appealed to the Superior Court, the Board raised this argument in its defense. The Board most certainly relied upon the April 25, 2012 notice letter, but it did not do so exclusively. The Board cited to communications between the school in 2008, 2009, 2010, 2011, and February 2012.²⁶ The Board noted that the school was on probation for seven years, including five years pre-dating April 25, 2012²⁷ and cited to the APA's definition of the record.²⁸ In other words, the Board clearly preserved its position that all of its communications with Adoni, not just one letter, were relevant to its review of the school.

Finally, Adoni argues that the Board relied upon *Denham v. Del. Bd of Mental Health and Chemical Dependency Professionals*²⁹ to argue that it could present a novel argument at the Supreme Court level.³⁰ Again, this is simply not true. The Board relied upon *Denham* for its holding in the face of the *exact facts* Adoni notes in its Answering Brief—that is, *Denham* made clear that a Board is not confined to reviewing only the evidence entered as an exhibit during a hearing when deciding a case, and it may consider the entire record.³¹ Just as in *Denham*, in 2015 when the Board voted to revoke Adoni's approval, it relied upon then entire APA-defined

²⁶ B151-152.

²⁷ B153.

²⁸ B148-149.

²⁹ *Denham*, 2017 WL 5952763, at *6 (Del. Super. Nov. 30, 2017).

³⁰ Answering Br., 9.

³¹ Answering Br., 10.

record, not just the hearing exhibits; it relied upon everything that had actually happened between the school and Board prior to July 9, 2015.

II. THE BOARD'S APRIL 25, 2012 NOTICE PROVIDED THE SCHOOL NOTICE AND AN OPPORTUNITY CURE ITS DEFICIENCIES, WHICH WERE IN NO WAY TRIVIAL.

1. Question Presented

Did the "April 2012 letter" provide Adoni adequate notice and an opportunity to cure its deficiencies? B131, 136, 147.

2. Scope of Review

This Court has jurisdiction to entertain this appeal from an administrative board's final order pursuant to the Delaware Administrative Procedures Act ("APA"). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board's decision and the board's ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). Moreover, "[t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted." 29 *Del. C.* § 10142(d). This Court's limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

3. Merits of Argument

Adoni argues in its Answering Brief that the Board’s April 2012 letter was insufficient because it did not say that the school “cannot make a single mistake ever again.”³² By citing to multiple passages from the April 2012 letter in which the Board advised the school to accurately report student populations going forward,³³ Adoni appears to understand that the school was on notice of this deficiency. However, Adoni now contends that it, in fact, accurately reported student populations with the exception of one typo. Adoni contends the Board “seized” upon the fact that Adoni’s 2014 Annual Report indicated it had 25 students in one section and 40 in another in order to revoke the school’s approval.³⁴ While this discrepancy (or typographical error) is problematic, it is only one of a myriad of reasons the Board found Adoni wholly failed to correct the identified deficiency.

For example, in 2015, Dr. Aliu testified that there were 25 students enrolled in the school,³⁵ or 40 students if you include those who are not graduating, or about 22, though “about” was a mistake,³⁶ and finally that there were currently 30 students enrolled.³⁷ In addition, Adoni’s Program Administrator advised the Practice and

³² Answering Br., 14.

³³ Answering Br., 13.

³⁴ Answering Br., 8.

³⁵ B92.

³⁶ B100-101.

³⁷ B104.

Education Committee in June of 2014 that the 2012 cohort included 30 students,³⁸ while Dr. Aliu testified that it was only 24 students.³⁹ This repeated conflicting information, not a single typographical or “trivial discrepancy,”⁴⁰ is why the Board found that Dr. Aliu’s testimony lacked credibility⁴¹ and the school in no way corrected its inability to accurately report student populations.⁴²

The Board pointed all of this out in its 2015 Opinion and Order, wherein it stated:

-The Board finds that Dr. Aliu, despite testifying that he is in charge of academics at his school, could not provide a concise answer in regard to the number of students currently enrolled in the school.⁴³

-Leads also argued that, save for a misuse of a word here, and a typo there, its 2014 Annual Report was clear, concise and wholly in compliance with the Board’s statute and regulations. However, the Board finds that the Annual Report was another example of Leads’ clouded or misleading representations....⁴⁴

-In addition to Dr. Aliu’s lack of transparency, the Board finds that Dr. Aliu’s explanations regarding the annual report typos and incorrect word usage did not address the Board’s chief concern in regard to the report. In its April 9, 2015 notice of withdrawal letter, the Board stated the following:

Back on April 25, 2012, the Board advised Leads that it was unable to determine if Leads was maintaining a faculty and administration of adequate size and

³⁸ B51.

³⁹ B103.

⁴⁰ Answering Br., 15.

⁴¹ A100.

⁴² A100-101.

⁴³ A100.

⁴⁴ *Id.*

qualifications as required by Board Rule 2.5.10.6.3, **as the school had not submitted an accurate report of the student population.** Despite that advisement, the Board is still unable to make that determination as **it remains, to this day, wholly unclear from all of Leads Annual and Interim Reports how many students are enrolled in the school at any one time.**

Yet, after numerous written advisements to Leads and over four hours of hearing testimony, the Board finds that it is still wholly unclear how many students are enrolled in the school at any one time.⁴⁵

Clearly the school's 2014 Annual Report discrepancy was not a lone mistake that the Board needed to "seize upon." In reality, the Board did not have a single piece of consistent information upon which to seize. Accordingly, the Board was absolutely correct in its determination that Adoni's inability to correctly report its student populations was an adequate basis to revoke Adoni's approved status as a nursing school in the state of Delaware.

⁴⁵ A101.

CONCLUSION

Consequently, the Board of Nursing respectfully requests this honorable Court affirm its July 8, 2015 and September 13, 2017 Orders withdrawing Adoni's approval.

Respectfully submitted,

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