



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 31, 2019

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Howard L. Highland
1634 Hunting Creek Drive
Alexandria, VA 22314

Charis A. Mitchell
Office of the Attorney General
202 N. 9th Street
Richmond, VA 23219

Re: Hyunsook Highland v. Virginia Board of Nursing, CL 2018-11852

Dear Mr. Highland and Ms. Mitchell:

This matter is before the court on Highland's motion for reconsideration of the court's order of December 14, 2018 granting the Board's motion to dismiss Highland's Petition for Judicial Review. For the reasons that follow, the motion is denied in part, granted in part, and remanded in part.

1) The Board's Purported Judicial Admission

Highland contends that the Board "admitted conclusively that Ms. Highland has 'successfully completed a professional nursing program, which satisfies the educational requirement for licensure as a registered/professional nurse.'" Motion 1. Further, Highland asserts that the Board "concedes unambiguously" that Highland "'presented a CGFNS credential evaluation regarding her professional nursing education, not a practical nursing education.'" Motion 1. According to Highland, this court:

must accept the Board's judicial admission that CGFNS has approved Ms. Highland's RN education as meeting the meaning of "approved nursing program" at Va. Code § 54.1-3017(A)(2) and "evidence that [her] nursing education [is] comparable to those required for registered nurses in the Commonwealth" at 18 VAC 90-19-130(B)(1).

Motion 1.

In response, the Board states that "the record contained evidence that Ms. Highland was educated as a registered/professional nurse in Korea and that she had a license as a registered/professional nurse in Korea." Objection 2. As to Highland's assertion that the Board conceded that there was a CGFNS credential evaluation of her education, the Board now admits that it made a "misstatement of fact" in that the record included a letter from CGFNS (at Tab VI, Page 4) which expressly stated that it does not "contain a 'comparison to US standards of education and licensure for their profession.'" Objection 2.

Highland misapprehends the concept of a "judicial admission." *Va.-Carolina Chem. Co. v. Knight*, 106 Va. 674, 56 S.E. 725 (1907), explained:

While the attorney of a party to a litigation has very broad powers in the management of his case, and his admissions generally bind his client in all matters relating to the progress and trial of the cause, yet to have this effect they must be distinct and formal, and made for the purpose of dispensing with the formal proof of some fact at the trial.

106 Va. 674, 678, 56 S.E. 725, 727.

In the case at bar, the Board's counsel's "admission" could not reasonably be viewed as "distinct and formal, and made for the purpose of dispensing with the formal proof of some fact at the trial," because there will not be a trial in this matter as this matter is a judicial review of an administrative agency decision. Indeed, it is the Board, not the court, which is tasked with making findings of fact. See Code § 2.2-4027 ("the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision") and *Va. Real Estate Comm. v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, ___ (1983) ("The 'substantial evidence' standard, adopted by the General Assembly, is designed to give great stability and finality to the fact-findings of an administrative agency").

More recently, the Virginia Supreme Court held that, "[t]o constitute a judicial admission, the admission must conclusively establish a *fact in issue*." *General Motors Corp. v. Lupica*, 237 Va. 516, 520, 379 S.E.2d 311, ___ (1989) (emphasis added). In light of Code § 2.2-4027, the Board's counsel's admitted misstatement of fact was not concerned with "a fact in issue" because the Board, not the court, has the duty to make findings of fact.

As the fact-finder, the Board found that Highland "did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth." Order of June 12, 2018. That finding was supported by a letter of September 12, 2017 which "authenticated" documents showing that Highland completed Chonnam National University - College of Nursing. The letter did not address whether completion of Chonnam National University - College of Nursing satisfied the Virginia educational requirement for licensure as a registered/professional nurse. On the contrary, the letter states that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Tab VI, Exhibit 2, page 4.

Finally, while decisions of the United States Supreme Court are not binding on this court with respect to issues of state law, that Court's succinct explanation of the limited role of agency counsel in judicial review of agency

actions is persuasive: a court "may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). If a court cannot accept appellate counsel's *post hoc* rationalizations for agency action, it certainly cannot accept counsel's admitted misstatement of fact which is contradicted by a finding of the Board which is supported by the record.

In sum, this court does not accept the purported "judicial admission" of the Board's counsel and does not "accept the fact that Ms. Highland has 'successfully completed a professional nursing program, which satisfies the educational requirement for licensure as a registered/professional nurse.'" Motion 2. On this issue, Highland's motion for reconsideration is denied.

2) The Board's Purported Finding Regarding Highland's Education

Highland contends that the Board "accepted" the "CGFNS evidence" as "proof of Ms. Highland's RN education in Korea," based upon Highland's contention that the Board's counsel made the above-discussed "judicial admission." Motion 2. Further, Highland argues that the Board necessarily must have determined that Highland "'successfully completed a professional nursing program, which satisfies the educational requirement for licensure as a registered/professional nurse'" (Motion 1) because the Board:

regularly reviews CGFNS evidence, and has presumably encountered other applicants educated at Chonnam National University who, like Ms. Highland, were also licensed as RNs in Korea before coming to Virginia.

Motion 3.

The Board responds that it "never found" that Highland "completed a registered/professional nursing program" Objection 3. Rather, the Board "made a finding that Ms. Highland did not submit evidence of being educated as a practical nurse (Tab III at 2, findings 3 and 4)," and "never found that Ms. Highland received an education comparable to a registered/professional nurse." *Id.*

The court agrees with the Board that it did not "accept" the "CGFNS evidence" as "proof of Ms. Highland's RN education Korea" because the Board's counsel did not make a "judicial admission" that "Ms. Highland has 'successfully completed a professional nursing program, which satisfies the educational requirement for licensure as a registered/professional nurse.'" Motion 1. Indeed, the Board expressly found that Highland "did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth." Order of June 12, 2018.

The court also rejects Highland's argument that the Board must necessarily have determined that Highland "'successfully completed a professional nursing program, which satisfies the educational requirement for licensure as a registered/professional nurse'" (Motion 1) because the Board "regularly reviews CGFNS evidence, and has presumably encountered other applicants educated at Chonnam National University who, like Ms. Highland, were also licensed as RNs in Korea before coming to Virginia." Motion 3.

The evidence in the record from CGFNS which the Board would have reviewed was the letter of September 12, 2017 which "authenticated" documents showing that Highland completed Chonnam National University - College of Nursing, but which did not address whether completion of Chonnam National University - College of Nursing satisfied the Virginia educational requirement for licensure as a registered/professional nurse. On the contrary, the letter states that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Tab VI, Exhibit 2, page 4. Accordingly, assuming the Board regularly reviews CGFNS evidence, the Board would certainly have been familiar with the difference between merely authenticating documents on the one hand and, on the other hand, comparing the standards of a foreign university to the U.S. standards. It follows that the Board did not implicitly find that Ms. Highland's education "'satisfies the educational requirement for licensure as a registered/professional nurse'"

That the Board implicitly found that Highland's education "'satisfies the educational requirement for licensure as a registered/professional nurse'" is belied by the finding of the Board that Highland "did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth." Order of June 12, 2018.

Further, the court rejects Highland's contention that the court may not consider evidence in the record when resolving a legal issue raised by a petitioner. As discussed above, it is the Board, not the court, which is tasked with making findings of fact; the court may only reexamine those findings of fact if there is not "substantial evidence in the agency record to support the agency decision." Code § 2.2-4027.

In the case at bar, the Board made no finding of fact that Highland received an education comparable to a registered/professional nurse. On the contrary, the Board found that Highland "did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth." Order of June 12, 2018. The only way the court can determine if there is "substantial evidence in the agency record to support the agency decision" (Code § 2.2-4027) is to examine the record.

The evidence in the record, to wit, Tab VI, Exhibit 2, page 4, shows that the CGFNS letter of September 12, 2017 merely "authenticated" documents showing that Ms. Highland completed Chonnam National University - College of Nursing. The letter plainly, and in no uncertain terms, states that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Accordingly, the court finds that there was substantial evidence in the agency record to support the Board's finding that Highland "did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth." Order of June 12, 2018.

The court thus denies the motion for reconsideration as to this issue.

3) Interpretation Of 18 VAC 90-19-130(C)(1)

Highland asserts that "18 VAC 90-19-130(C)(1) may be interpreted to make applicants with RN educations eligible for LPN license consistently with Va. Code § 54.1-3020(A)(2)" (Motion 3), and asserts that this court stated that, "if Ms. Highland did in fact have an RN education, that her education would satisfy

the meaning of 18 VAC 90-19-130(C)(1), since an approved RN education is 'comparable' to what LPNs must complete in Virginia." Motion 3-4.

At the outset, the court must correct Highland's understanding of what the court stated. In fact, what the court stated was that, if Highland had an RN education *that was comparable to that required for RNs in Virginia*, then her education might satisfy 18 VAC 90-19-130(C)(1)¹ because an RN education appears to encompass what is required for an LPN and thus would be "comparable to [the secondary education and nursing education] required for practical nurses in the Commonwealth"

The court did *not* indicate, however, that Highland's RN education was comparable to that required for RNs in Virginia, as there was no such finding in the agency record. Indeed, as noted above, the Board found that Highland "did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth." Order of June 12, 2018. This finding was supported by the letter of September 12, 2017, which merely "authenticated" documents showing that Highland completed Chonnam National University - College of Nursing, but did not address whether completion of Chonnam National University - College of Nursing satisfied the educational requirement for licensure as a registered/professional nurse, and stated that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Tab VI, Exhibit 2, page 4.

Accordingly, while, as a theoretical question, 18 VAC 90-19-130(C)(1) could be in conflict with Va. Code § 54.1-3020(A)(2)² where an applicant had an RN education that was comparable to that required for RNs in Virginia, that is assuredly not the case in the instant matter as there was a finding by the Board that Highland had not presented any evidence that her RN education was comparable to that required for RNs in Virginia, a finding that was supported by the letter of September 12, 2017.

On this issue, the motion for reconsideration is denied.

4) Highland's Remaining Objections

A) The court rejects Highland's contention that "the Board's 5/14/18 order unlawfully denies her an LPN license in Virginia." Motion 5.

Va. Code § 54.1-3020(A)(2) is clear that an applicant for a license to practice as a practical nurse "shall furnish evidence satisfactory to the Board that the applicant: . . . 2. Has received a diploma from an approved practical nursing program" Highland has not shown that she received a diploma from an approved practical nursing program.

¹ "[A]pplicants for practical nurse licensure shall: 1. Submit evidence from the CGFNS that the secondary education and nursing education are comparable to those required for practical nurses in the Commonwealth"

² "An applicant for a license to practice as a practical nurse shall furnish evidence satisfactory to the Board that the applicant: . . . 2. Has received a diploma from an approved practical nursing program"

Highland has also not complied with 18 VAC 90-19-130(C) (1) in that she has not submitted evidence "from the CGFNS that the secondary education and nursing education are comparable to those required for practical nurses in the Commonwealth" As noted above, the only document from the CGFNS stated expressly that it merely "authenticated" documents showing that Highland completed Chonnam National University - College of Nursing and that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Tab VI, Exhibit 2, page 4.

The court denies the motion for reconsideration on this issue.

B) The court rejects Highland's contention that the Board "erroneously interpreted the phrase 'approved practical nursing program' in Va. Code § 54.1-3020(A) (2)." Motion 5. The basis of Highland's contention that the Board "erroneously interpreted the phrase 'approved practical nursing program' in Va. Code § 54.1-3020(A) (2)" is that the Board:

erroneously decided that an approved RN education program does not fit the meaning of "an approved practical nursing program" for an LPN license. Va. Code § 54.1-3020(A) (2).

Opening Brief 8.

The flaw in Highland's reasoning is her conclusion that she completed "an approved RN education program"; there is nothing in the agency record so indicating. On the contrary, the only document concerning her RN education is the letter from the CGFNS, which stated expressly that it merely "authenticated" documents showing that Highland completed Chonnam National University - College of Nursing and that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Tab VI, Exhibit 2, page 4.

The court denies the motion for reconsideration on this issue.

C) The court rejects Highland's argument that "the Board erroneously found that Ms. Highland 'did not present evidence from the CGFNS that the education program she graduated from in Korea was comparable to those required by the Commonwealth.'" Motion 5.

As discussed above, the only evidence in the agency record from the CGFNS is the letter of September 12, 2007 from the CGFNS, which stated expressly that it merely "authenticated" documents showing that Highland completed Chonnam National University - College of Nursing and that it "does NOT provide an evaluation of the applicant's education and license, or a comparison to U.S. standards of education and licensure for their profession." Tab VI, Exhibit 2, page 4.

The court denies the motion for reconsideration on this issue.

D) The court agrees with Highland's argument that "the Board has arbitrarily and capriciously failed to consider Ms. Highland's submissions on 18 VAC 90-19-120(A) (2) (a)." Motion 5.

While decisions of the United States Supreme Court are not binding on this court with respect to issues of state law, that Court's succinct explanation of

the limited role of agency counsel in judicial review of agency actions is persuasive: a court "may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962).

It is not disputed that the Board's Order of June 12, 2018 (Tab III) does not address Highland's argument with respect to her eligibility pursuant to 18 VAC 90-19-120(A)(2)(a). Thus, the court cannot, under *Burlington Truck Lines*, consider the Board's counsel's arguments concerning 18 VAC 90-19-120(A)(2)(a). The court will thus remand this issue to the Board for decision.

An appropriate order will enter.

Sincerely yours,



Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

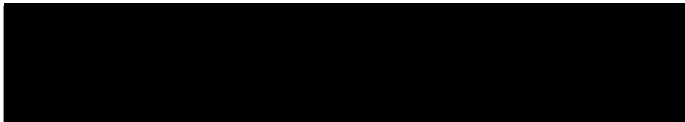
HYUNSOOK HIGHLAND)
)
Petitioner)
)
v.) CM 2018-11852
)
VIRGINIA BOARD OF NURSING)
)
Respondent)

ORDER

THIS MATTER came before the court on Petitioner's motion for reconsideration of the court's December 14, 2018 order dismissing Petitioner's Petition.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Plaintiff's motion to reconsider in part, GRANTS Plaintiff's motion to reconsider in part, and remands the matter to the Board of Nursing to decide whether Petitioner is eligible for licensure pursuant to 18 VAC 90-19-120(A)(2)(a).

ENTERED this 31st day of January, 2019.



Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Howard L. Highland
Counsel for Petitioner

Charis A. Mitchell
Counsel for Respondent