



State of Confusion



By Dale Atkinson, Partner,
Atkinson & Atkinson

Dale Atkinson is a partner with the Illinois law firm that is counsel to ASWB. He is also executive director of the Federation of Associations of Regulatory Boards (FARB).

Social work boards are created and empowered to regulate the practice of social work in the interest of public protection. One such grant of authority includes the renewal of licensure for practitioners who successfully complete the requirements set forth in law. Most jurisdictions have some level of continuing education as a prerequisite to renewal. Continuing education is designed to ensure that practitioners maintain some level of knowledge of the profession and remain competent to safely and effectively practice. Failure to complete the continuing education requirements generally constitutes grounds for discipline. Equally important is the fact that licensees must be truthful and accurate on their licensure renewal applications. Failure to accurately complete a renewal application may also constitute grounds for discipline. Consider the following.

In August 2012, a licensed occupational therapist (Licensee) renewed her license online through the State of Delaware website. On her online application, the Licensee attested to having completed the required continuing education (CE) necessary for licensure renewal. As a matter of course, the Licensee's renewal application was selected for a random audit by the Delaware Board of Occupational Therapy (Board). After the audit, it was determined that while

the Licensee had completed the required number of CE hours, she had not done so in "more than one" of the seven permitted categories as was required. Consequently, a Rule to Show Cause Hearing was held to determine if discipline was warranted.

At the hearing, the Licensee admitted that the mistakes related to her attestations were "partly" her fault, but also blamed the **Counsel's Column** rules and the website program for her confusion. In part, the Licensee argued that she never worked in Delaware. The hearing officer found that the Licensee failed to satisfy the CE requirements and recommended discipline to the Board. A notice letter was sent to the Licensee informing her of the discipline recommendation and invited exceptions, comments, or arguments within 20 days of March 13, 2013. The notice letter also advised the Licensee that the discipline is a recommendation and "no action is required on your part at this time," as the Board would review the recommendation and make the final decision. The Licensee did not submit any exceptions, comments, or arguments to the Board.

In May 2013, the Board accepted the recommendations of the hearing

officer and disciplined the Licensee for failure to complete the required continuing education hours for licensure renewal and for a false attestation of completion. The sanctions included a requirement that the Licensee earn at least one acceptable CE credit in a category other than coursework and submit proof of compliance within 75 days. Failure to complete the CE and submit proof of compliance would result in an automatic licensure suspension without further notice or hearing. The Licensee was also issued a letter of reprimand and flagged for an audit in the following renewal period.

The Licensee filed an appeal and argued that a deficient website and confusing correspondence from the Board were to blame for her noncompliance. She argued that the website did not give her an opportunity to note that her CE was in a single category rather than the two required. She argued that she did not submit false information but was unable to provide accurate data due to the limitations of the online form. She claimed that she contacted the Board office and was told to check “Yes” so that she could continue the renewal application. Only online renewal application is allowed via the website.

The Licensee also argued that the language in the Board’s letter informing her of the hearing

officer’s recommendation was confusing and caused her to not submit any more information. As a result, she claimed that the discipline was arbitrary, that she was being punished for a confusing and contradictory order, and that she was not given the opportunity to carry out the recommended disciplinary action before the issuance of the letter of reprimand. The Board countered such arguments, stating that its order was based only on the facts and that the Licensee failed to satisfy the required CE. Indeed, the Board argued that the Licensee admitted to noncompliance; her lack of working in Delaware was irrelevant to the renewal requirements. In short, the board argued that it was incumbent on the Licensee to determine the licensure renewal requirements.

The Superior Court outlined the standard of review and noted its limited role in determining whether substantial evidence supported the findings and whether the Board’s decision was legally correct. The record is reviewed in light most favorable to the prevailing party. According to the judicial opinion, the Licensee acknowledged that she failed to comply with the CE requirements and subsequently falsely attested to having completed them. The Licensee was aware of the availability of the rules online and had the opportunity to continue to contact

the Board. The court also held that in order to rely on the “no action required” portion of the letter, she would have had to completely disregard the language in the letter offering her the opportunity to respond and object. Finally, the court found that no clear errors of law occurred that would require a reversal of the Board action. As a result, the order of the Board was upheld and the sanctions affirmed.

Confusion on the part of persons accused of violating the practice act and/or rules are generally subject to opportunities for clarification or legal advice. Attempts by respondents to argue confusion will likely, from a legal perspective, be rejected by the courts. Further, requests for clarification from licensees to board staff must be carefully answered. As a matter of policy and based on legal advice, individual requests for advisory opinions should likely be denied. Of course, individual advisory opinions can be distinguished from blanket policy statements provided by the board to all relevant parties.

Arya v. Delaware Board of Occupational Therapy Practice, 2014 Del. Super. LEXIS 99 (Superior Ct. 2014)