

STATE OF NEW HAMPSHIRE

OFFICE OF PROFESSIONAL LICENSURE AND CERTIFICATION

Order on Petition for Declaratory Ruling

Petition of Robert S. Carey, Esq., on behalf of Doe MD

Doe MD (“Petitioner”), by and through its attorney Robert S. Carey, Esq., requests a declaratory ruling by the Office of Professional Licensure and Certification (the “Office”) on whether the Office would retroactively apply RSA 310:6, V. The Petitioner makes this request in hopes the Office would retroactively issue a second temporary license to account for four days of unlicensed practice by Petitioner. As explained in greater detail below, the Office has determined that it is willing to exercise its discretion and retroactively apply the standard of RSA 310:6, V to extend Petitioner’s temporary licensing period to account for the four days of unlicensed practice.

PROCEDURAL BACKGROUND

On December 4, 2023, pursuant to NH Admin. Rules Plc 210.03, Petitioner submitted a request for declaratory ruling asking whether under the Office’s applicable statutes and rules: 1) it is appropriate for the Office to retroactively apply RSA 310:6, V; and 2) whether, if appropriate, the Office would exercise its discretion to do so?

FACTS PRESENTED BY THE PETITIONER

1. Petitioner, licensed in good standing in two states and with no history of discipline, was issued a temporary license, pursuant to RSA 310-A:1-f, the application for which was handled by a locums tenens agency (the “Agency”).
2. Prior to the expiration of the temporary license, Petitioner submitted an application, through the Agency, for full, or permanent, licensure.

3. The Agency represented to Petitioner that the license application, which required the approval of the NH Board of Medicine, was “in the final review and looked like it would be issue before the date that the temporary license expired” and promised to keep Petitioner updated on the status of the application.
4. Nine days after these representations were made, Petitioner’s temporary license expired.
5. Petitioner, having received no further communications from the Agency, and under the false assumption that the application for full licensure had been granted, continued to practice medicine.
6. When the Agency did reach out to Petitioner, it was to inform Petitioner that the MD license had not been renewed¹, and Petitioner immediately stopped work.
7. Approximately one hour after the communication with Agency, Petitioner received a communication from the Board of Medicine informing Petitioner that the application for full licensure had been approved.
8. Petitioner practiced without a valid license for approximately four days.

STANDARD OF REVIEW

A declaratory ruling is “an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency.”² A declaratory ruling is a statement by the Office regarding whether a particular statute or rule applies to the specific situation presented in the petition.³ Therefore, they do not have precedential value; nor do they apply to anyone other than

¹ An important distinction has not been made between the renewal of the temporary license and the approval of the application for full licensure. Pursuant to NH Admin. Rule Plc 305.02 (c), it is the Office’s position that a temporary license may not be renewed, nor may an individual seek a second temporary license in the same profession.

² N.H. Rev. Stat. Ann. § 541-A:1, V (2001); *See* N.H. Code Admin. R. Ann. Ph. 201.02(c) (2005).

³ *Id.*

the petitioner. The plain language of a statute is considered the legislative intent when it does not define a disputed term.⁴

LEGAL ANALYSIS

Petitioner's first request is for a determination as to whether the Office may retroactively apply RSA 310:6, V, to Petitioner's situation. Retroactive application would be necessary in this instance as prior to July 01, 2023, the period during which the events presented in the petition occurred, repealed RSA 310-A:1-f, II, would have controlled. As of July 1, 2023, RSA 310:6, controls⁵. There exist two important distinctions between the when RSA 310-A:1-f, II, controlled, and when RSA 310:6, V, was the controlling statute.

First, licensing authority transferred from the NH Board of Medicine to the Office on July 1, 2023, with the adoption of HB 655 and the implementation of RSA 310:4, II(c)⁶. The matter now falls under the jurisdiction of the Office.

Second, RSA 310:6, V, contains what RSA 310-A:1-f, II, lacked, and what Petitioner refers to as a "savings clause," specifically the following language, "except that a complete application for full licensure before the expiration of the temporary license shall continue the validity of the temporary license until the office has acted on the application." Under RSA 310-A:1-f, II, a temporary license was "valid for 120 days, or until the board . . . takes action on the application for full licensure, whichever happens first."

Petitioner argues that in repealing RSA 310-A:1-f, II, and enacting RSA 310:6, V, with its saving clause, the Legislature remedied a defect in the previous statute; namely that an individual

⁴ *Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 594-95 (2004).

⁵ Petitioner relies on the effective date of HB 409, July 15, 2023, in its argument, however it should be noted that HB 655, which implemented RSA 310 as the controlling statute governing the Office, went into effect on July 1, 2023. There are differences between the language of HB 655 and HB 409, though none of them are applicable to this analysis other than to clarify that the Office has had authority to act on applications for licensure, both temporary and full, since July 1, 2023.

⁶ See N.H. Rev. Stat. Ann. § 310:6, II(c) (2023).

in possession of a temporary license would see their license expire and lose the ability to lawfully practice in this state if the appropriate professional board failed to act on an application in a timely manner⁷. The “remedial” label is an important one, as Petitioner further argues that “well-established precedent supports the application of RSA 310:6, V”, and directs attention to *Petition of Beaugard*⁸, in which the court recognized that statutory changes impacting substantive rights may not be applied retroactively, whereas changes affecting remedial or procedural rights may be. The court in *Beaugard*, quoting *Carter v. Fred’s Plumbing and Heating Inc.*⁹, defined a remedial statute as “one designed to cure a mischief or remedy a defect in existing laws”

The Office is not quick to find an existing statute to be remedial, as one person’s defect may be considered another’s policy. However, the remedial nature of RSA 310:6, V in curing the defect of RSA 310-A:1-f, II seems apparent. Under the previous iteration of the statute, a licensee could have found themselves in a position where having undertaken all necessary and appropriate steps, for failure of a professional board to act in a timely manner, that individual would become unlicensed. This appears to be the exact situation in which Petitioner found themselves. Under now existing law, a similarly situated licensee would remain licensed until the Office¹⁰ acted on an application for full licensure. As the change in law benefits the licensee, medical employers, and most importantly the citizens of New Hampshire by keeping a licensed individual working in

⁷ See N.H. Rev. Stat. Ann. § 541-A:29-a, I (2023), which creates a statutory exemption for the automatic approval of applications when an agency fails to act for those applications processed under RSA 310, the Office’s governing statute. Prior to July 15, 2023, the same exemption existed for RSA 310-A:1.

⁸ *Petition of Beaugard*, 151 N.H. 445 (2004).

⁹ *Petition of Beaugard*, 151 N.H. 445, 448 (2004); *Carter v. Fred’s Plumbing and Heating Inc.*, 816 A.2d 490, 493 (Vt. 2002).

¹⁰ Statutory authority to act on applications for full licensure shifted from the professional boards to the Office with the passage of HB 655, effective July 1, 2023. See N.H. Rev. Stat. Ann. § 310:4, II(c).

a time of critical health care worker shortages¹¹, the Office agrees with Petitioner that the change is remedial in nature, meant to cure an existing defect.

In addition to finding the change in statute to be remedial, Petitioner requests the Office exercise its discretion and grant Petitioner a second temporary license to fill the four-day gap between the expiration of the temporary license and when the Board of Medicine determined to grant the application for full licensure. Petitioner relies on the New Hampshire Supreme Court in the *Appeal of Morin*¹², recognizing that state agencies have a paramount objective of rendering justice and that, “[t]he essence of judicial [or agency] discretion is the exercise of judgment directed by conscience and reason,” to demonstrate the Office has such discretion. The Office agrees it has such discretion.

Petitioner makes a case that the Office could exercise that discretion and retroactively grant a second temporary license to Petitioner to eliminate the four-day gap, stating, “[n]otably, nothing in the plain language of the statute prevents the OPLC from issuing a second temporary license to an individual who has presented evidence of an active license in good standing from another jurisdiction.” This argument is not persuasive, however, as before its repeal, RSA 310-A:1-f contained the following language:

“Notwithstanding any other state law to the contrary, the office of professional licensure and certification shall be authorized to issue temporary licenses to out-of-state health care professionals who present evidence of an active license in good standing from another jurisdiction, *in accordance with rules adopted by executive director of the office of professional licensure and certification under RSA 541-A*” (emphasis added).

The controlling rule at the time would have been N.H. Administrative Rule Plc 801.03, which read, “As provided in RSA 310-A:1-f, II and RSA 332-G:14, IV, a temporary license issued

¹¹ Petitioner argues recognizing the change in law as remedial benefits the Office because it would be “relieved of the administrative burden of strict deadlines when acting upon the pending application of a physician it has already found qualified.” While the Office does agree the change is remedial, it is not persuaded by this argument.

¹² *Appeal of Morin*, 140 N.H. 515, 518 (1995).

under PLC 801 shall remain valid for 120 days or until the board, council, or commission takes action on application for full licensure, whichever occurs first.” RSA 332-G:14, IV, reads as follows, “After verifying the completeness of the application and information under paragraph III, the office of professional licensure and certification shall issue a temporary license valid for 120 days. *No more than one temporary license shall be issued to any individual*” (emphasis added).

While the Office does agree it has limited discretion to act in accordance with principles of justice, it is not now, nor has it ever been, within the Office’s ability to ignore the law and grant an individual a second temporary license. For that reason, the Office will not retroactively do so. However, the request is rendered moot. As already discussed, the Office does agree it has the authority to retroactively apply RSA 310:6, V to Petitioner’s situation and extend the term of temporary licensure until full licensure had been granted.

CONCLUSION

The Office is persuaded by Petitioner’s argument that RSA 310:6, V is remedial in nature and that it is within the Office’s discretion to apply the statute retroactively. Therefore, the Office would be willing to extend the term of Petitioner’s temporary license until the time of full licensure to cover the four-day period for which Petitioner was unintentionally practicing without a license.

2/2/2024



Lindsey B. Courtney, Executive Director