

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACINTH E. BROWN,)
)
 Petitioner,)
)
 vs.) CASE NO. 82-754
)
 DEPARTMENT OF PROFESSIONAL)
 REGULATION, BOARD OF NURSING,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on September 3, 1982, in Miami, Florida.

APPEARANCES

For Petitioner: Alan B. Gest, Esquire
Miami, Florida

For Respondent: Percy W. Mallison, Jr., Esquire
Tallahassee, Florida

Petitioner filed an application for licensure by endorsement as a registered nurse. Respondent denied her application for the reasons that Petitioner had twice failed a licensing examination and had practiced nursing prior to being licensed in Florida. At the formal hearing, Respondent moved to amend its denial letter to delete the allegation that Petitioner had practiced nursing without being properly licensed in Florida. Respondent's motion to amend was granted, and the sole ground for denial therefore became Petitioner's failure of a licensing examination subsequent to her original licensure. Accordingly, the issue for determination is whether Petitioner's application for licensure as a registered nurse by endorsement should be approved.

Petitioner's Composite Exhibits numbered 1 through 5 were admitted in evidence, and Respondent presented the testimony of Ruth R. Stiehl.

Both parties have submitted post-hearing findings of fact in the form of a proposed recommended order. To the extent that any proposed findings of fact have not been adopted in this Recommended Order, they have been rejected as not having been supported by the evidence, as having been irrelevant to the issue under consideration herein, or as constituting unsupported argument of counsel or conclusions of law.

FINDINGS OF FACT

1. Petitioner is currently licensed to practice registered nursing in the State of New York and has been so licensed since 1969.

2. Petitioner is a graduate of Kingston Public Hospital and Victoria Jubilee Hospital in Kingston, Jamaica, West Indies, which are registered schools of nursing.

3. Petitioner was required to and did complete the following requirements in order to become licensed as a registered nurse in the State of New York:

- (a) Successful completion of the Matins Examination;
- (b) Successful completion of a 12-week course in medical/surgical nursing;
- (c) Successful completion of a 12-week course in psychiatric nursing; and
- (d) Successful completion of the New York Pediatrics Test.

4. Respondent has determined that the successful completion of the requirements set forth in Paragraph numbered 3 above by applicants licensed in New York in 1969 is equivalent to or more stringent than the requirements which existed in Florida at that time, and that those requirements are equal to or more stringent than the State Board Test Pool Examination.

5. Petitioner sat for the State Board Test Pool Examination in New York on two occasions but failed to pass the examination.

6. Petitioner has never practiced nursing in the State of Florida without being properly licensed.

7. Petitioner has been a registered nurse in New York for ten years and has held positions as staff nurse, head nurse and nurse supervisor. She practiced nursing in the Veterans Administration Hospital in Miami for approximately six months. No evidence was introduced to show that Petitioner has performed her duties in other than a safe and competent manner.

8. The State Board Test Pool Examination is a licensing examination developed by the National Council of State Boards of Nursing. No evidence was presented as to the validity of that examination as a measure of testing the competency of nurses who have been out of nursing school for a number of years and have continually practiced their profession since graduation.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto. Section 120.57(1), Florida Statutes.

10. The requirements for licensure by endorsement of registered nurses in the State of Florida are governed by Section 464.009, Florida Statutes, and Section 210-8.26, Florida Administrative Code. Both the statute and the rule provide that the Department shall issue a license by endorsement to an applicant who files the proper application, pays the requisite fee, and meets the requirements of either of two different methods established for licensure by endorsement. The first of the two alternate methods requires the applicant to demonstrate that she holds a valid license to practice nursing in another state and that the requirements for licensure at the time she secured her license in her original state of licensure were equivalent to or more stringent than those which existed in Florida at that time. The second of the two alternate methods

requires an applicant to demonstrate that she meets the qualifications for licensure by examination and has successfully completed a state, regional or national examination which is substantially equivalent to or more stringent than the examination given by the Department. The parties have stipulated that the requirements for licensure in New York and the examination completed by Petitioner at the time of Petitioner's licensure in New York were equivalent to or more stringent than the requirements which existed or the examination given in Florida at the time.

11. Although Respondent admits that Petitioner has met all the requirements for licensure by endorsement, Respondent contends that it should be able to consider available evidence on the issue of whether an applicant is qualified for licensure and should be able to deny licensure if, in its opinion, such evidence suggests that the applicant is not qualified to safely practice nursing. Respondent contends that Petitioner's failure to pass the State Board Test Pool Examination taken sometime subsequent to her licensure in New York constitutes such evidence and that the Board is impliedly entitled to deny licensure on that basis. Respondent's position is not well-founded.

12. Neither the statute nor the rule grant to Respondent any discretion as to whether licensure will be granted if the requirements of the statute and rule are met; rather, both the statute and the rule provide that licensure shall be granted if the requirements set forth therein are met. The parties have stipulated that the requirements are met, and Petitioner qualifies for licensure by endorsement under either of the two alternate methods provided. Since Petitioner was not required to take or pass the State Board Test Pool Examination, the fact that she took the examination (whether passing or failing it) cannot be used against her as an additional requirement not provided by either the rule or the statute. Perhaps the failing of a licensure examination taken subsequent to original licensure should be a factor to consider in determining whether an applicant qualifies for licensure by endorsement. However, since the Legislature has not seen fit to include that in the criteria for licensure established by statute, Respondent has attempted to arbitrarily create an additional requirement for licensure after the filing of Petitioner's application for licensure without authority and without following the procedures set forth in the Florida Administrative Procedures Act.

13. Respondent had no discretion by statute or rule to deny Petitioner's application at the time it was made. To the extent that Respondent may have attempted to establish incipient agency policy regarding the failure of an examination not required to be taken, Respondent's attempt has fallen short of its goal. Respondent's position that the State Board Test Pool Examination is a valid indicator of competency and that failure to pass such an examination is grounds for denial of licensure is not supported by the testimony produced at the hearing. Respondent was able to produce evidence reflecting the validity of the examination with respect to licensure applicants graduating from nursing school, since recent graduates are the typical examinees. However, the Respondent produced no evidence reflecting the validity of the examination with respect to nurses who have been out of school and practicing nursing for a number of years as is the case with the Petitioner. Even had Respondent been able through the adjudicative process to establish the record foundation necessary to support its desired agency action, the additional criterion Respondent seeks to add to the requirements for licensure by endorsement does not appear in the Nurse Practice Act, and nowhere in that Act has the Legislature given to Respondent the discretion to grant or deny licenses to applicants who meet the statutory qualifications for licensure by endorsement. Respondent's position that it must have the necessary discretion to reject

applicants who have met the statutory requirements based upon other considerations in order to protect the public and assure it that only competent nurses are licensed has much appeal; however, Respondent cannot imply such discretion when the Legislature has prohibited discretion by enacting a statute which states that Respondent shall grant a license to someone meeting the statutory requirements.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered granting Petitioner's application for licensure as a registered nurse by endorsement.

DONE and RECOMMENDED this 7th day of January, 1983, in Tallahassee, Leon County, Florida.

LINDA M. RIGOT, Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 1983.

COPIES FURNISHED:

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