

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLINE LEWIS,)
)
 Petitioner,)
)
 vs.) CASE NO. 93-6792
)
 THE BARBERS' BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on May 18, 1994, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Leatrice E. Williams, Esquire
604 Hogan Street
Jacksonville, Florida 32202

For Respondent: W. Frederick Whitson, Esquire
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

STATEMENT OF THE ISSUES

Whether petitioner is entitled to a passing grade on the September 1993 barber examination.

PRELIMINARY STATEMENT

This matter arose on September 29, 1993, when respondent, The Barbers' Board, issued an examination grade report to petitioner, Marline Lewis, advising her that she had received a failing grade on the September 1993 licensure examination. Thereafter, petitioner filed a letter on November 18, 1993, requesting a hearing to contest her score. As grounds, she stated that "she (had) successfully completed a taper cut in accordance (with the) professional barber styling handbook" and she was not properly awarded points "for doing the haircut," she had performed the "sanitation" correctly, and during the examination she was distracted by conversations of the examiners which caused her to "second guess" (her)self. The matter was referred by respondent to the Division of Administrative Hearings on November 23, 1993, with a request that a Hearing Officer be assigned to conduct a formal hearing.

By notice of hearing dated December 29, 1993, a final hearing was scheduled on February 18, 1994, in Jacksonville, Florida. At petitioner's request, the matter was subsequently rescheduled to May 19, 1994, at the same location. On May 16, 1994, the case was reassigned from Hearing Officer Charles C. Adams to the undersigned.

At final hearing, petitioner testified on her own behalf and presented the testimony of her husband, David Lewis, Jr., and Terry Collier, a barber styling instructor. Respondent presented the testimony of Pamela J. Ford, a Department of Business and Professional Regulation psychometrician; Jeri Scott, a barber stylist; and Roland F. Bordelon, a barber stylist. Also, it offered respondent's exhibits 1-8. All exhibits were received in evidence.

The transcript of hearing was filed on June 2, 1994. Proposed findings of fact and conclusions of law were filed by respondent and petitioner on June 14 and 21, 1994, respectively. A ruling on each proposed finding of fact is made in the Appendix attached to this Recommended Order.

FINDINGS OF FACT

Based upon the entire record, the following findings of fact are determined:

1. This case involves an appeal by petitioner, Marline Lewis, challenging the score she received on the September 1993 barber licensure examination. The examination is administered by the Department of Business and Professional Regulation on behalf of respondent, the Barbers' Board (Board). According to the examination grade report issued on September 29, 1993, petitioner received a grade of 69 on the practical portion of the examination. The Board requires a grade of at least 74.5 in order to be licensed.

2. The barber examination consists of two parts: written and practical. The practical portion of the examination is in issue here and has five categories: haircut, permanent wave, shampoo, sanitation and technique. As clarified at hearing, petitioner contends that the examiners who assessed her performance did not assign a proper score on the haircut category, and that one examiner improperly gave her no credit on one item of the sanitation category. She also contends that there were conversations between two examiners during the examination that disrupted her concentration, and that other individuals entered the examination room and momentarily congregated around her work area.

3. Petitioner took the practical portion of the examination on the afternoon of September 20, 1993, at Lively Vocational/Technical Center in Tallahassee, Florida. The examination room contained four work areas, one in each corner of the room, with each area having four work stations consisting of a mirror, chair, cabinet, counter and sink. Each candidate was assigned to one of the work stations. When petitioner took the examination, there were fourteen candidates, including herself. Each candidate was required to be accompanied by a model on whom the procedures could be performed. Petitioner brought her husband as a model.

4. Four examiners were assigned the task of grading the fourteen candidates. The room was divided in half for testing purposes, and two examiners graded seven candidates at two work areas while the other two examiners graded the remaining seven candidates. Each set of examiners circulated around their assigned work areas so that they could observe and monitor the skills of the candidates. Thus, it was not possible for an examiner

to observe a candidate for every moment during the entire examination. In petitioner's case, her examiners were Roland Bordelon and Jeri Scott, two licensed barber stylists with nine and eleven years experience, respectively, in grading the examination. According to examiner Scott, she always gave the benefit of the doubt to the candidate. On the other hand, examiner Bordelon said he tended to grade more rigidly.

5. Before the examination, all examiners were given standardization training, which was designed to insure that the examiners graded in a "standardized" or consistent fashion. This training included the grading of live models during a simulated or mock examination. In addition, they reviewed a grader's manual which provided criteria and instructions on how to grade the examination. The examiners were told to grade independently of one another, and they were not to confer on the grades to be given a candidate. After the grading was completed, the two grades were compiled, and an overall grade was given the candidate.

6. The haircut category contains nine separate items to be rated by the examiner. A maximum of forty-five points can be attained in this category. The sanitation category contains ten items with a maximum of twenty-five points. The examiner was required to give a "yes" or "no" score on each category, with a "yes" meaning full credit and a "no" meaning zero credit. This rating was then recorded contemporaneously on a scoring sheet. In the event a "no" score was given, the examiner was required to fill in a comments section on the scoring sheet which identified the basis for the negative rating. Finally, if one examiner gave a "yes" and the other a "no," the candidate received one-half credit on the item.

7. In the haircut portion of the test, examiner Bordelon gave a "no" on items B-8, B-9, B-10, B-12, and B-14 while examiner Scott gave a "no" on items B-11, B-12, and B-15. In all other respects, the two were consistent in their grading. Their combined scores resulted in petitioner receiving a total grade of 24 out of 45 points. Petitioner contends that she successfully completed a taper haircut on her model and did not deserve to receive a "no" on so many items. She also questions the consistency of the examiners' grading. The more credible and persuasive evidence, however, is that the items were graded in a fair manner and that a number of deficiencies were noted in her performance. They included sides not proportional, holes in the sides and back, side burns not shaven, holes in the top, blending problems, and uneven outlines. Although the two examiners disagreed on several items, such inconsistencies were not shown to be unreasonable or illogical. Moreover, the scores are averaged to adjust for any potential bias by the examiners. In other words, the averaging process reduces the subjectivity of the examiner's scoring and takes into account the fact that one examiner may grade too leniently or too severe. Therefore, the grade given in the haircut category should not be changed.

8. In the sanitation category of the examination, petitioner contests the "no" grade she received from examiner Bordelon on item B-1. That item requires a candidate to wash her hands before beginning the haircut. Examiner Scott stated that she did not see petitioner wash her hands, but since she did not observe petitioner every moment before the haircut began, she gave her the benefit of the doubt. Examiner Bordelon stated he did not observe petitioner wash her hands and thus gave her a "no." Since petitioner stated that she washed her hands prior to the beginning of the haircut, and examiner Bordelon did not testify that he had petitioner in his eyesight for every moment prior to

the time she began cutting hair, it is found that petitioner should be given a "yes" rating on item B-1 and an additional two points. After adjusting her score, her total score is 71, or still less than the required 74.5.

9. Besides her own testimony, petitioner presented the testimony of her former instructor, Terry Collier, who is a licensed barber stylist. Collier suggested that the examiners did not have sufficient experience and training in cutting the hair of African-Americans. From this premise, he drew the conclusion that the examiners likewise were insufficiently trained to judge the merits of a haircut given to a black model. The evidence shows, however, that during the past decade both examiners have graded numerous candidates who used black models. This is confirmed by the fact that approximately one-half of all test candidates and models are black. In addition, both examiners operate barbershops serving African-American clients. Finally, both Collier and the Board's witnesses agreed that subjective judgment calls must be made by the examiners while grading a candidate. Therefore, petitioner's contention regarding the qualifications of the examiners is deemed to be without merit.

10. Finally, petitioner claims she was distracted by conversations between the two examiners during the examination. Both examiners denied discussing the merits of the candidate's skills, but admitted they made have engaged in "small talk" at various times, particularly during the permanent wave part of the examination, a category not in issue here. Also, petitioner stated that four or five unidentified persons came into the examination room during the examination and stood behind her for a few moments. This was confirmed by her husband. Even if these events occurred, however, all candidates would have been subjected to the same testing conditions and thus no candidate would have received an unfair advantage during the examination process. Moreover, petitioner concedes that during the examination she never complained that she was being distracted. Therefore, petitioner is not entitled to relief on this ground.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Subsection 120.57(1), Florida Statutes.

12. As the petitioner in this case, Lewis bears the burden of proving by a preponderance of the evidence that she is entitled to a passing grade. See, e. g., Fla. Department of Transportation v. J. W. C. Company, Inc., 396 So.2d 778, 789 (Fla. 1st DCA 1981). Further, unless the grading of the examination is shown to be devoid of logic and reason, the subjective evaluation of petitioner's examination should not be disturbed. Harac v. Dept. of Professional Regulation, Board of Architecture, 484 So.2d 1333, 1338 (Fla. 3rd DCA 1986).

13. Subsection 476.144(2), Florida Statutes, provides that the Board shall certify for licensure any applicant "who passes the examination administered by the department, achieving a passing grade as established by board rule." Among

other things, Rule 61G3-16.001, Florida Administrative Code, establishes the points necessary to achieve a passing grade. Section (9) thereof provides in relevant part as follows:

(9) The score necessary to achieve a passing grade shall be no less than seventy-five (75) percent out of one hundred (100) percent (based on the average of the examiners' scores) on the practical examination. . .

14. Petitioner has failed to meet her burden of showing that the grade she received in the haircut category was "devoid of logic and reason." Harac at 1338. This being so, that portion of her examination score should not be changed. The more persuasive evidence supports a conclusion, however, that on item B-1 in the sanitation category the "no" rating given by examiner Bordelon should be changed to a "yes" and that she be given an additional two points. In all other respects, petitioner's request to change her score should be denied.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Barbers' Board enter a final order changing petitioner's grade on the September 1993 barber stylist examination from 69 to 71.

DONE AND ENTERED this 22nd day of June, 1994, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-6792

Petitioner:

1. Partially accepted in finding of fact 2.
2. Partially accepted in finding of fact 3.
3. Rejected as being unnecessary.
4. Partially accepted in finding of fact 7.
5. Partially accepted in finding of fact 6.
6. Partially accepted in finding of fact 1.
7. Partially accepted in findings of fact 1 and 7.
8. Partially accepted in finding of fact 3.
- 9-11. Partially accepted in finding of fact 4.

- 12-13. Partially accepted in finding of fact 7.
- 14-16. Partially accepted in finding of fact 6.
- 17-24. Partially accepted in finding of fact 7.
- 25-26. Partially accepted in finding of fact 5.
- 27-29. Partially accepted in finding of fact 10.
- 30-31. Partially accepted in finding of fact 7.
- 32. Rejected as being unnecessary.
- 33. Partially accepted in finding of fact 7.
- 34. Partially accepted in finding of fact 9.

Respondent:

- 1. Partially accepted in finding of fact 2.
- 2. Partially accepted in finding of fact 3.
- 3. Partially accepted in finding of fact 2.
- 4. Rejected as being unnecessary.
- 5. Partially accepted in finding of fact 1.
- 6. Partially accepted in finding of fact 2.
- 7. Partially accepted in finding of fact 7.
- 8. Partially accepted in finding of fact 2.
- 9. Partially accepted in finding of fact 3.
- 10. Partially accepted in finding of fact 4.
- 11. Rejected as being unnecessary.
- 12. Partially accepted in finding of fact 6.
- 13-15. Partially accepted in finding of fact 7.
- 16. Partially accepted in finding of fact 9.
- 17. Partially accepted in finding of fact 7.
- 18-22. Partially accepted in finding of fact 10.
- 23-24. Rejected as being unnecessary.
- 25-26. Partially accepted in finding of fact 9.
- 27. Partially accepted in finding of fact 5.
- 28. Partially accepted in finding of fact 9.
- 29. Rejected as being unnecessary.
- 30. Partially accepted in finding of fact 4.
- 31. Partially accepted in finding of fact 8.

NOTE: Where a proposed finding of fact has been partially accepted, the remainder has been rejected as being irrelevant, unnecessary, subordinate, not supported by the evidence, or a conclusion of law.

COPIES FURNISHED:

Suzanne Lee, Executive Director
Barbers' Board
1940 North Monroe Street
Tallahassee, FL 32399-0769

Jack L. McRay, Esquire
1940 North Monroe Street
Suite 60
Tallahassee, FL 32399-0792

Leatrice E. Williams, Esquire
604 Hogan Street
Jacksonville, Florida 32202

W. Frederick Whitson, Esquire
1940 North Monroe Street
Suite 60
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.