

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARK HACHENBURG,)
)
 Petitioner,)
)
 vs.) CASE NO. 94-4124
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 CONSTRUCTION INDUSTRY)
 LICENSING BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 1, 1994, in Miami, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Hachenburg, pro se
905 Northeast 199th Street, Number 208
Miami, Florida 33179

For Respondent: Wellington H. Meffert II, Esquire
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
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STATEMENT OF THE ISSUE

Whether Petitioner's challenge to the failing grade he received on the contract administration portion of the May 18, 1994, general contractor's certification examination should be sustained?

PRELIMINARY STATEMENT

By letter dated June 14, 1994, Petitioner initiated a challenge to the failing grade he received on the contract administration portion of the general contractor's certification examination for which he sat on May 18, 1994. Initially, Petitioner took issue with the grading of Questions 3, 14, 21, 29, and 31 on that portion of the examination. Following an examination review, the challenges to Questions 3, 14 and 29 were resolved, leaving Petitioner with a total of 69 points on this portion of the examination, one point short of a passing grade.

Thereafter, Petitioner requested a formal hearing on the matters that remained in dispute. The case was referred to the Division of Administrative Hearings on July 22, 1994, for the assignment of a Hearing Officer to conduct the formal hearing Petitioner had requested.

At the hearing, which was held on September 1, 1994, Petitioner testified on his own behalf. He also offered one exhibit into evidence. Respondent presented the testimony of one witness, Karl Lieblong, a certified general contractor who serves as a consultant for the National Assessment Institute, which prepared and administered the May 18, 1994, certification examination at issue in the instant case. In addition, Respondent offered seven exhibits into evidence. All of Respondent's exhibits, as well as Petitioner's lone exhibit, were received by the Hearing Officer.

Following the conclusion of the evidentiary portion of the hearing on September 1, 1994, the Hearing Officer advised the parties on the record that their post-hearing submittals had to be filed no later than ten days following the Hearing Officer's receipt of the transcript of the hearing. The Hearing Officer received the hearing transcript on September 23, 1994. On September 30, 1994, Respondent timely filed its post-hearing submittal. Respondent's post-hearing submittal contains, among other things, seven proposed findings of fact. All of these proposed findings of fact have been accepted by the Hearing Officer and incorporated in substance [although not necessarily repeated verbatim] in this Recommended Order, with the exception of proposed finding of fact 6, to the extent that it states that "[t]he correct response [to Question 31 of the contract administration portion of the May 18, 1994, certification examination] was 'C'" [as opposed to "B"]. To date, Petitioner has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Petitioner sat for the certification examination for general contractors administered on May 18, 1994.
2. The contract administration portion of the examination consisted of 40 questions.
3. The first twenty questions were worth four points each. The remaining twenty questions were worth one point apiece.
4. To pass this portion of the examination, a total of 70 points was needed.
5. Question 21 of this portion of the examination was a multiple choice question which required the candidate to identify factors which, according to the "Building Estimators Reference Book," should be taken into consideration in estimating the cost of erecting tubular steel scaffolding.
6. According to the "Building Estimators Reference Book," the cost of erecting tubular steel scaffolding "depend[s] on many conditions: the type of job to be done, whether interior or exterior; ground conditions; height and width, as well as load to be carried; and length of time it will be in use."
7. Accordingly, the correct answer to Question 21 was clearly "B."

8. Petitioner selected answer "A," which included "wire rope block size" as one of the factors needed to be considered in estimating the cost of erecting tubular steel scaffolding.

9. Wire rope block, however, is used in suspended scaffolding, not in tubular steel scaffolding.

10. Petitioner's answer to question 21 therefore was clearly incorrect.

11. Question 31 of the contract administration portion of the May 18, 1994, certification examination was also a multiple choice question. It required the candidate to select the number of days within which, according to the "American Institute of Architects' Document A401" (AIA-A401), a contractor must make a progress payment to a subcontractor following the contractor's receipt of payment from the owner.

12. Section 11.3 of AIA-A401 provides, in pertinent part, that "[t]he Contractor shall pay the Subcontractor each progress payment within three working days after the Contractor receives payment from the Owner."

13. Accordingly, the correct answer to Question 31 was clearly "B."

14. Petitioner's answer to the question was "C," which was clearly incorrect.

15. Petitioner erroneously based this answer upon Section 4.7 of AIA-A401, 1/ which addresses the subject of "remedies for nonpayment" and does not, unlike Section 11.3 of that document, specify the time frame within which the contractor must pay the subcontractor.

CONCLUSIONS OF LAW

16. Any person seeking certification to engage in contracting on a statewide basis in the State of Florida must apply to the Department of Business and Professional Regulation to take the certification examination. Section 489.111, Fla. Stat.

17. The certification examination for general contractors consists of three tests: Test 1, which covers business and financial administration; Test 2, which covers contract administration; and Test 3, which covers project management. Fla. Admin. Code Rule 61G4-16.001(1)(a), (b) and (c).

18. An applicant must receive a grade of at least 70 percent (out of 100 percent) on each of these tests to pass the examination. Fla. Admin. Code Rule 61G4-16.001(1)(d).

19. An applicant who fails to attain a passing score on the examination is entitled to review his examination and to submit written objections for evaluation by Department staff. Fla. Admin. Code Rules 61G4-16.003.

20. If, after such reevaluation, the applicant still has a failing score and he believes that an error was made in the grading of his examination, the applicant may request a hearing pursuant to Chapter 120, Florida Statutes. Section 455.229, Fla. Stat.; Fla. Admin. Code Rule 61G4-16.003(6).

21. The burden is on the applicant at hearing to establish by a preponderance of the evidence that his examination was erroneously or improperly graded. See *Harac v. Department of Professional Regulation, Board of Architecture*, 484 So.2d 1333, 1338 (Fla. 3d DCA 1986); *Florida Department of Health and Rehabilitative Services v. Career Service Commission*, 289 So.2d 412, 414 (Fla. 4th DCA 1974).

22. In the instant case, Petitioner requested a hearing to contest the failing score he attained on the contract administration portion (Test 2) of the certification examination for general contractors that he took on May 18, 1994. His challenge is directed to his failure to have received credit for the answers he gave in response to Questions 21 and 31.

23. A review of the record evidence reveals that Petitioner has not made a sufficient showing in support of his position that he was erroneously or improperly denied credit for his answers to these questions.

24. Petitioner has failed to show that either of these questions was unclear, ambiguous or in any other respect unfair or unreasonable. Neither has he established that he correctly answered these multiple-choice questions. That he selected the wrong answers to these questions is readily apparent from a reading of the pertinent portions of the source materials referenced in these questions.

25. Accordingly, in declining to award him any credit for his answers to these questions, those grading his examination did not act arbitrarily or without reason or logic.

26. In view of the foregoing, Petitioner's challenge to the failing score he received on the contract administration portion of the May 18, 1994, certification examination for general contractors is without merit.

RECOMMENDATION

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

RECOMMENDED that the Construction Industry Licensing Board enter a final order rejecting Petitioner's challenge to the failing score he received on the contract administration portion of the certification examination for general contractors for which he sat on May 18, 1994.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 19th day of October, 1994.

STUART M. LERNER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 1994.

ENDNOTE

1/ Section 4.7 of AIA-A401 reads as follows:

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to other available remedies, upon seven additional days written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of shutdown, delay and start-up.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period of time 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.