

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PABLO R. VALERIO,)
)
 Petitioner,)
)
 vs.) Case No. 97-3500
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION, BOARD)
 OF PROFESSIONAL ENGINEERS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 9, 1997, via video in Tallahassee and Miami, Florida, before Claude B. Arrington, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Pablo R. Valerio, pro se
7741 Wayne Avenue, Apartment 1R
Miami Beach, Florida 33141

For Respondent: R. Beth Atchison, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750

STATEMENT OF THE ISSUES

Whether Petitioner is entitled to additional credit for his responses to the "Principles and Practice" portion of the electrical engineer examination administered by Respondent in October 1996.

PRELIMINARY STATEMENT

Petitioner took the "Principles and Practice" portion of the electrical engineer licensure examination administered by Respondent in October 1996. After being notified that he did not receive a passing grade on this portion of the examination, Petitioner timely challenged the scoring of his answers to Question 130 and Question 132 of the exam. Petitioner thereafter requested a formal hearing, the dispute was referred to the Division of Administrative Hearings, and this proceeding followed.

Respondent caused Petitioner's responses to the "Principles and Practice" portion of the exam to be re-graded. Following the re-grading, Respondent asserted that Petitioner was entitled to no additional points for his answer to Question 130, that 2 additional points should be added to the initial grade for his response to Question 132, but that 2 points should be deducted from the initial grade for his response to Question 131. Respondent's position was that no additional net credit should be awarded.

At the formal hearing, Petitioner testified on his own behalf, but presented no exhibits. During the course of the formal hearing, Petitioner cited certain reference material in support of his position. Petitioner was offered the opportunity to submit a copy of that reference material as a late-filed exhibit, but he did not do so.

Respondent presented the testimony of Amauri Antonio Arroyo, who was permitted to express opinions within the scope of his expertise in electrical contracting. Respondent offered five exhibits, each of which was admitted into evidence.

A transcript of the proceedings has been filed. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. Rule 60Q-2.031, Florida Administrative Code. The Petitioner and Respondent filed post-hearing submittals, which have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner took the electrical engineer licensing examination administered by Respondent in October 1996.

2. Respondent is the agency of the State of Florida with the duty to regulate the practice of electrical engineering in Florida. Pursuant to Section 471.015, Florida Statutes, an applicant for licensure as an electrical engineer is required to successfully pass both parts of a licensure examination.¹

3. The electrical engineer licensure examination at issue in this proceeding was developed and graded by the National Council of Examiners for Engineering and Surveying (NCEES).

4. Following the initial grading of the "Principles and

Practice" section of the exam, Petitioner was awarded a score

of 68. A total score of 70 was required to pass that portion of the examination.

5. Petitioner thereafter timely challenged the grading of two questions on the "Principles and Practice" portion of the exam. His challenge was limited to Questions 130 and 132. Petitioner did not specifically challenge Question 131.

6. In response to that challenge, Respondent sent Petitioner's examination package back to NCEES to have the "Principles and Practice" portion of the examination re-graded. NCEES re-graded all of Petitioner's answers to the "Principles and Practice" portion of the examination, including his responses to Questions 130, 131, and 132.

7. NCEES initially awarded Petitioner a score of 2 points for his answer to Question 130. When the answer was re-graded, Petitioner was not awarded any additional credit for his answer to Question 130. The record in this proceeding established that Petitioner's answer to Question 130 was properly re-graded. Petitioner is not entitled to any additional credit for his response to Question 130.

8. NCEES initially awarded Petitioner a score of 2 points for his answer to Question 132. When the answer was re-graded, Petitioner was awarded a score of 4 points for his answer to Question 132. The record in this proceeding established that Petitioner's answer to Question 132 was properly re-graded. Petitioner is entitled to a score of 4 points for his answer to

Question 132.

9. NCEES initially awarded Petitioner a score of 8 points for his answer to Question 131. When the answer was re-graded, Petitioner was awarded a score of 6 points for his answer to Question 131. The record in this proceeding established that Petitioner's answer to Question 131 was properly re-graded. Petitioner is entitled to a score of 6 points for his answer to Question 131. Petitioner is not entitled to a score of 8 for his answer to Question 131.

10. Each of the three questions at issue in this proceeding is a problem that requires multiple steps and computations to solve. If a candidate correctly answers all parts of the question a score of 10 points is awarded. Partial credit can be awarded based on how many of the parts of the question are correctly answered. There is no allegation that the three questions involved in this proceeding are ambiguous or otherwise inappropriate for a licensure examination.

11. The record is not clear when Respondent notified Petitioner of its position following the re-grading of the questions at issue. It is clear that Petitioner was aware of Respondent's position prior to the start of the formal hearing. During the formal hearing and in his post-hearing submittal, Petitioner challenged Respondent's right to re-grade Question 131 since he had not specifically challenged that question. Petitioner has not asserted that he was provided insufficient notice of Respondent's position.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

13. Pursuant to Chapter 471, Florida Statutes, Respondent has the responsibility to license engineers, including electrical engineers, in Florida. Respondent administers the licensure examination that a candidate, such as Petitioner, must pass before being entitled to licensure as an electrical engineer.

14. Pursuant to Section 471.015, Florida Statutes, Petitioner is entitled to licensure as an electrical engineer if he can establish that he passed that licensure examination.

15. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to additional credit for his responses to the examination question. See Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). Since the examination questions have not been challenged, Petitioner, to prevail, must establish, by a preponderance of the evidence, that for some reason he was arbitrarily or capriciously denied credit through a grading process devoid of logic or reason. Harac v. Department of Professional Regulation, 484 So. 2d 1333 (Fla. 3d DCA 1986); State ex rel. I. H. Topp v. Board of Electrical Contractors for Jacksonville Beach, Florida, 101 So. 2d 583 (Fla. 1st DCA 1958); and State ex rel. Glaser v. J. M. Pepper, 155 So. 2d 383 (Fla. 1st DCA 1963). Petitioner

failed to establish that he was entitled to additional credit for his answer to Question 130. The record established that Petitioner was entitled to 2 additional points for his answer to Question 132. The award of this additional credit is not disputed by Respondent.

16. As the party asserting the affirmative of the issue, the burden shifted to Respondent to establish that 2 points should be deducted from Petitioner's response to Question 131. Respondent met that burden.

17. Petitioner's assertion that Respondent is limited to re-grading only the specific questions he challenged should be rejected. The challenge to the grading of those two questions initiated a de novo² proceeding, not an appeal. Because this is a de novo proceeding, Respondent had the authority and the responsibility to determine whether other questions on that portion of the examination were incorrectly graded. When it discovered what it considered an error in the grading of Question 131, Respondent was entitled to assert that deductions should be made from the initial grading.

18. Petitioner is not entitled to any net additional credit to the "Principles and Practice" portion of the examination. Petitioner did not pass that portion of the examination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent enter a Final Order that

awards Petitioner a score of 68 on the "Principles and Practice" portion of the October 1996 licensure examination.

DONE AND ENTERED this 11th day of December, 1997, in
Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of December, 1997.

ENDNOTES

1/ Rule 61G15-21.002, Florida Administrative Code, describes the two parts of the licensure examination. Rule 61G15-21.004(2), Florida Administrative Code, describes how part two of the exam, the "Principles and Practice" portion of the exam, is to be graded.

2/ See Section 120.57(1)(i), Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

¹ Rule Chapter 61G15-21.002, Florida Administrative Code, describes the two parts of the licensure examination. Rule 61G15-21.004(2), Florida Administrative Code, describes how part two of the exam, the "Principles and Practice" portion of the exam, is to be graded.

² See, Section 120.57(1)(i), Florida Statutes.