

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NINA D. ODOM,)
)
 Petitioner,)
)
 vs.) Case No. 97-5395
)
 BARBERS' BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 27, 1998, in Jacksonville, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nina D. Odom, pro se
1230 East 7th Avenue, Apartment 9
Jacksonville, Florida 32206

For Respondent: R. Beth Atchison, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner should have received a passing grade on the written part of her barber examination.

PRELIMINARY STATEMENT

This case began on June 30, 1997, when Petitioner, Nina D.

Odom, filed a letter with the Bureau of Testing, Department of Business and Professional Regulation, requesting a hearing to contest her failure of the written portion of the April 1997 barber examination. Among other things, Petitioner questioned whether she had actually failed the questions pertaining to "implements." She also contended that she should not be required to pay the full examination fee if she were taking only one part of the examination. Finally, she requested that she not be required to take both the practical and written portions of the examination if she only failed one part. The matter was referred by the agency to the Division of Administrative Hearings on November 18, 1997, with a request that an Administrative Law Judge be assigned to conduct a hearing.

By notice of hearing dated January 30, 1998, a final hearing was scheduled on March 2, 1998, in Jacksonville, Florida. At the request of Respondent, Barbers' Board, the case was rescheduled to April 27, 1998, at the same location. On April 23, 1998, the case was transferred from Administrative Law Judge P. Michael Ruff to the undersigned.

At final hearing, Petitioner testified on her own behalf. Respondent presented the testimony of Edwin Stewart, Jr., a licensed barber. Also, it offered Respondent's Exhibits 1-4. All exhibits were received in evidence.

The transcript of hearing was filed on May 7, 1998. Proposed findings of fact and conclusions of law were due no

later than May 21, 1998. None were filed by either party.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. Petitioner, Nina D. Odom, was a candidate on the April 1997 barber examination. The test is administered by the Bureau of Testing, Department of Business and Professional Regulation (Bureau), while licensure is conferred by Respondent, Barbers' Board (Board).

2. There are two parts to the barber examination, a written portion and a practical portion. On an examination taken more than one year earlier, Petitioner had received a passing grade on the practical part of the examination. For the April 1997 examination, Petitioner received a score of 72 on the written part of the examination. In order to pass that part, a minimum score of 75 is required. Contending that she "wasn't pleased with [her] results," Petitioner requested a formal hearing to challenge her grade.

3. In her letter requesting a hearing, Petitioner contended that the Bureau advised that her "weak area" was "implements," but the questions she failed were not in that subject area. As clarified at hearing, she challenged questions 2, 58, and 63, all multiple choice questions, contending that she should have received credit for her answers. Also, she questioned whether she should be required to pay a \$150.00 reexamination fee even if

she had already passed the practical part of the examination. Finally, Petitioner complained that she was required to retake both parts of the examination even if she failed only one part. The letter prompted this proceeding.

4. The written portion of the barber examination is not an open book examination. Prior to the examination, however, candidates are given a copy of a "Candidate Information Booklet" (Booklet), which identifies in general terms the contents of the test and the reference materials from which the questions will be drawn. The questions are multiple choice and the correct answers are always taken from one of the reference materials in the Booklet. Because the questions are confidential, and may be used on future examinations, the actual text of the challenged questions will not be repeated here.

5. In this case, Petitioner has contended that she should have been given credit for her answers to questions 2, 58, and 63. Prior to the hearing, the Bureau agreed that Petitioner should have been given credit for question 58. This results in Petitioner's grade being raised to slightly above 73, which is still short of a passing grade.

6. Question 2 tests the candidate's knowledge of a procedure to be used on a client. Petitioner selected an incorrect answer but contended that it was based on information she received from her instructors in 1992 while attending the Hair Design School in Jacksonville, Florida. However, witness

Stewart, who helped draft the test questions, established that the correct answer is drawn from a recognized textbook, and that the information Petitioner received during her schooling was in error.

7. Question 63 tests the candidate's knowledge of another procedure which licensed hair stylists must perform. Again, Petitioner selected an incorrect answer. Witness Stewart established that the correct answer was drawn from a recognized textbook cited in the Candidate's Information Booklet, and that Petitioner's answer was incorrect.

8. The Board has promulgated Chapter 61G3-16, Florida Administrative Code, which contains the requirements for examination for licensure, reexamination, and examination review. Rule 61G3-16.001(5), Florida Administrative Code, provides that "[t]here shall be two parts to the examination, a written portion and a practical portion." The evidence shows that Petitioner has successfully completed the practical part of the examination but has failed the written part on four consecutive occasions.

9. Rule 61G3-16.002(1), Florida Administrative Code, provides that "[a]n applicant who fails the state examination for licensure in whole or in part shall be required to pay the reexamination fee as set forth in Rule 61G3-20.007." Therefore, under the terms of the rule, Petitioner is required to pay the reexamination fee of \$150.00 even if she passes one part of the two-part examination.

10. Rule 61G3-16.002(2), Florida Administrative Code, provides that "[a]n applicant shall be required to retake only the portion of the examination on which he or she failed to achieve a passing grade. However, an applicant must pass both portions of the examination within a one year period in order to qualify for licensure." Because Petitioner had not passed the practical part of the examination within one year of when she sat on the written part of the examination, she was properly required to retake both parts of the examination.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

12. As the party seeking licensure as a barber, Petitioner must prove by the preponderance of the evidence that she is entitled to the requested relief. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

13. The more persuasive evidence shows that Petitioner gave incorrect responses to questions 2 and 63 and that she should not receive a passing grade on the April 1997 practical portion of the barber examination.

14. As to Petitioner's remaining contentions, while sincere and well-intended, they must also be denied on the ground

existing agency rules validate the Bureau's present testing procedures. More specifically, Rule 61G3-16.002(1), Florida Administrative Code, provides that "[a]n applicant who fails the state examination for licensure in whole or in part shall be required to pay the reexamination fee as set forth in Rule 61G3-20.007." Therefore, Petitioner is required to pay the \$150.00 fee each time she retakes the examination. Finally, Rule 61G3-16.002(2), Florida Administrative Code, provides that while "[a]n applicant shall be required to retake only the portion of the examination on which he or she failed to achieve a passing grade," the applicant "must pass both portions of the examination within a one year period in order to qualify for licensure." Therefore, under the terms of the rule, unless Petitioner has passed the practical portion of the examination within the prior twelve months, the Bureau may properly require Petitioner to retake both parts of the examination.

RECOMMENDATION

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

RECOMMENDED that the Barbers' Board enter a Final Order denying Petitioner's request for a passing grade on the written portion of the April 1997 barber examination.

DONE AND ENTERED this 27th day of May, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of May, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within fifteen days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Barbers' Board.