

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN BISANTI,)
)
 Petitioner,)
)
 vs.) Case No. 98-1797
)
 DEPARTMENT OF HEALTH,)
 BOARD OF CHIROPRACTIC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Notice was provided and on August 4, 1998, a formal hearing was conducted in this case under authority set forth in Sections 120.569(1) and 120.57(1), Florida Statutes. By agreement of the parties and the administrative law judge, all persons participated in the hearing at the offices of the Division of Administrative Hearings, Tallahassee, Florida, with the exception that Petitioner participated by telephone from Springfield, Massachusetts. Charles C. Adams was the Administrative Law Judge.

APPEARANCES

For Petitioner: John Bisanti, pro se
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Springfield, Massachusetts 01108

For Respondent: Ann Marie Frazee, Esquire
Department of Health
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STATEMENT OF THE ISSUES

Should Petitioner receive a passing grade for the technique portion for the November 1997 chiropractic licensure examination (the examination) administered by Respondent?

PRELIMINARY STATEMENT

By mail dated January 5, 1998, Petitioner was informed that he had received a score of 70 points for the technique portion of the examination. To pass, Petitioner must have received a score of 75 points on that portion of the examination. In all other respects Petitioner had passed the examination. In response, Petitioner challenged the scores that he received for technique in relation to the examiner score sheets at lines 1, 4, and 7. To resolve those issues Petitioner requested a formal hearing. In turn, the case was transmitted to the Division of Administrative Hearings and the formal hearing ensued.

Petitioner testified in his own behalf. Petitioner's Exhibits A through C were admitted. Respondent presented the testimony of Zohre Bahrayni, Ph.D., and Darrel Thomas Mathis, D.C. Respondent's Exhibits 1 through 8 were admitted.

The parties filed a prehearing statement in which the parties stipulated to certain facts.

Respondent's counsel requested that official recognition be made of Chapters 61-11 and 64B2-11.001 through 11.013, Florida Administrative Code. That request was granted.

The parties were provided the opportunity to submit proposed recommended orders following the filing of the hearing transcript. The transcript was filed on August 13, 1998. Respondent's counsel filed a proposed recommended order. Petitioner did not. The submission by the Respondent has been considered in preparing the recommended order.

FINDINGS OF FACT

1. Petitioner practices chiropractic in Massachusetts. In November 1997, Petitioner took the Florida chiropractic licensure examination. To pass that examination it was necessary for Petitioner to score 75 points on the technique portion of the examination. Petitioner received a score of 70 points. Petitioner disputes the scores received on several questions, described as questions 1, 4, and 7. Each contested question is worth five points.

2. As a candidate for licensure, Petitioner received an information booklet which contained a reading list informing the candidates of writings of experts in various subjects covered by the examination, upon whom the candidates should rely. This included a list of experts in the technique portion of the examination. Respondent intended to defer to the opinions of those experts in grading the candidates.

3. Additionally, Petitioner and other candidates in the November 1997 examination, were provided written instructions concerning the technique portion of the examination. Those instructions stated:

TECHNIQUE EXAMINATION

FORM 1

Demonstrate the following chiropractic techniques on the patient. For each technique, indicate the

- a. patient and doctor position.
- b. location of the segment.
- c. patient and doctor contact point.
- d. line of drive.

Do not actually perform the techniques, but set them up and indicate how you would perform them.

If the technique is grossly inadequate and/or clinically inappropriate, no credit will be given for that technique.

- Technique 1: Bilateral Anterior-Superior Iliac
- Technique 2: Posterior Radial Head on Left
- Technique 3: Plantar Cuboid
- Technique 4: Posterior Superior Occiput on Right
- Technique 5: L-2, Left Posterior Spinous

Yes or No for position, location, contact, and line of drive/correction

CHIROPRACTIC PRACTICAL EXAMINATION
11/97 TECHNIQUE (EXAMINER)

4. The expectation was that each candidate in the examination would set up and indicate the manner in which the candidate would perform the five techniques and the four specific positions, locations, contact points, and lines of drive related to the five techniques, without actually performing to conclusion.

5. Petitioner and other candidates were graded by two examiners. The examiners, in scoring the candidates, used a grading sheet which described the activities by referring to the five techniques as cases. The various positions, locations, contact points, and lines of drive were numbered 1 through 20,

with the first four numbers referring to case 1, numbers 5 through 8 referring to case 2, et cetera.

6. Before performing as examiners in the November 1997 session, the examiners who graded Petitioner underwent training to ensure that they followed the same criteria for scoring the Petitioner.

7. Petitioner contests the scores that he received in relation to technique 1 position a./case 1 position 1; technique 1 line of drive d./case 1 line of drive 4; and technique 2 patient and contact point c./case 2 contact point 7. Those items respectively correspond to questions 1, 4, and 7, referred to by the parties.

8. After the two examiners entered the individual scores for the various items within a technique, the scores by the individual examiners were added to arrive at an aggregate score. The aggregate score was then divided by two to reach the final results on the technique portion of the examination. By that arrangement Petitioner received a score of 70 points, insufficient to pass the technique portion of the examination.

9. Although examiner 07, in the score sheet reference case 1 position 1, marked "Y" to point out that the Petitioner had achieved compliance with the expectations of that technique, the examiner did not assign five points to the Petitioner indicating credit for that item. Instead the score sheet reflects zero points for the item. Examiner 15 in relation to that item, wrote "N" on the score sheet signifying non-compliance and provided zero points for non-compliance. In all other respects the scores

of the two examiners in relation to the technique portion of the examination, to include the disputed items, were in accord.

10. Notwithstanding the determination by the initial examiners that Petitioner had failed the technique portion, Respondent instituted a non-rule policy to have three additional examiners review Petitioner's performance on the technique portion, by resort to the audio-video tape that had been made during the pendency of the technique portion of the examination. Apparently, Respondent in view of the reference by examiner 07 to "Y," indicating compliance with case 1 position 1, treated the item in a manner which signified compliance. Thus Petitioner was entitled to 5 points on the score sheet of examiner 07. The activities of the discrepancy reviewers were designed to determine whether that view finding compliance should be upheld in a setting where examiner 15 had entered "N" for that item signifying non-compliance. The review was expected to break the impasse. The three reviewers determined that Petitioner had not complied with the requirements of case 1 position 1. As a result, the score of 70 points, the average arrived at by adding and then dividing the two 70-point scores assigned by the original examiners was upheld. When Petitioner was given notice of the examination results, the 70-point score for the technique portion was reflected in those results.

11. By inference it is found that the original examiners and discrepancy reviewers practiced chiropractic in Florida.

12. In reference to case 1 position 1, examiner 15 commented about "contact P.S.I.S. should be ischium." P.S.I.S. stands for Postier Superior Iliac Spine. Examiner 07 made no comment concerning that item.

13. In reference to case 1 line of drive 4, both examiners felt that Petitioner had not complied with that requirement. Examiner 07, in commenting, stated "not on ischium." Examiner 15 commented "wrong line of drive."

14. In reference to case 2 contact point 7, examiner 07 commented, "Not thumb-thenar." Examiner 15 commented, "No thumb contact."

15. At the hearing to contest the preliminary determination finding Petitioner to have failed the technique portion of the examination, Petitioner offered his testimony as an expert in chiropractic concerning the several items at issue. To rebut that testimony, Respondent presented Dr. Darryl Thomas Mathis, an expert who practices chiropractic in Florida. Dr. Mathis also served as an examiner in the licensure examination, but did not test Petitioner. In his opinion Petitioner feels that he is entitled to additional points on each of the several questions at issue. In his opinion, Dr. Mathis disagrees.

16. In explaining his performance related to case 1 position 1, Petitioner opined that his placement of the patient in the side posture position was correct.

17. Petitioner also opined that his position for the case was correct.

18. By contrast to the Petitioner's opinion concerning case 1 position 1, Dr. Mathis expressed the opinion that Petitioner's position in addressing the patient was incorrect. According to Dr. Mathis, Petitioner had his hand pointing upward parallel to the spine of the patient and not 90 degrees to the spine when contacting the ischium as required. In Dr. Mathis' opinion the table height for the examination area Petitioner was working in did not prohibit Petitioner from positioning himself appropriately to demonstrate his position reference to the patient. Dr. Mathis' opinion is accepted. Petitioner is not entitled to receive points for case 1 position 1.

19. In reference to case 1 line of drive 4, Petitioner offered his explanation in the examination that he would use the opposite of the actual listing. He opined that given the way that the inter-joint subluxates, one would go in the opposite direction to get a more neutral setting. Therefore when dealing with anterior-superior, one would go posterior and inferior to accomplish the opposite of the listing. In contrast, Dr. Mathis, in offering his opinion about this item, referred to the anterior-superior listing as one in which the pelvis, in the circumstance that is bilateral, makes it such that both hip bones, or the pelvis in its entirety, has tipped forward and up over the femur heads or leg bones. Noting that Petitioner stated

in his examination that he would thrust in the opposite manner, posterior to anterior, meaning back to front, and superior to inferior, from top to bottom, Dr. Mathis opined that Petitioner was partially correct. However, Dr. Mathis was persuaded that additional information was required as to the actual angle or direction of thrust determined by the shaft of the femur or leg bone, and this additional information was not addressed by Petitioner. Dr. Mathis criticizes Petitioner's explanation of the technique to be employed on this item by leaving out the shaft of the femur as constituting the determinate of the angle employed. Moreover, Dr. Mathis did not believe that Petitioner could, in the attempt to demonstrate the technique at issue, perform adequately. The Petitioner was on the upper portion of the pelvis or ilium as opposed to being on the ischium, or lower portion of the pelvis. Consequently, according to Dr. Mathis, if Petitioner was going to thrust in the direction that Petitioner stated he would, he could not get the correction that he was attempting to obtain because Petitioner was on the wrong segment or portion of the pelvis. As Dr. Mathis perceives it, Petitioner could not physically accomplish by demonstration, what he claimed he could do because Petitioner was in the wrong location to make that correction.

20. Dr. Mathis' opinion about case 1 line of drive 4 is accepted. Petitioner is not entitled to receive points for this item.

21. Case 2 contact point 7 is what Petitioner refers as to tennis elbow. Petitioner concedes that normally he would use the thumb as the contact point; however, he offers his opinion that during the time of his practice, he has learned other techniques. According to Petitioner, those other techniques are especially useful to address an acute patient with a lot of swelling, where a thumb contact can be painful. Therefore, Petitioner believes that the thenar, the soft part of the palm of the hand below the thumb, is appropriate as a contact point in an acute situation. Given this alternative, Petitioner did not believe that his use of the thenar in the examination was harmful. By contrast Dr. Mathis believes that the thumb is the only acceptable answer. Further, Dr. Mathis stated that the reference list provided to Petitioner and other candidates prior to the examination, in association with A.Z. States' description of the appropriate technique, upon which the Respondent relied in determining the appropriate answer for this item, concludes that the thumb is to be employed in this technique. Dr. Mathis' opinion is accepted. Petitioner is not entitled to receive points for case 2 contact point 7.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569(1), and 120.57(1), Florida Statutes.

23. Petitioner was notified that he failed the technique portion of the chiropractic licensure examination given in November 1997. To set aside that preliminary determination, Petitioner must prove by a preponderance of the evidence that he did pass the technique portion of the examination. As a party asserting the affirmative, Petitioner bears the burden of proof. See Florida Dept. of Trans. v. J. W. C. Co., Inc., 396 So. 2d 778 (1st DCA 1981).

24. As required, Petitioner's performance on the technical portion of the licensure examination was independently evaluated by two examiners, with those independent grades assigned being averaged to produce a final score. See Rule 61-11.009(2), Florida Administrative Code. Following the averaging, the score was 70 points. To pass the technique portion of the examination, it was necessary for Petitioner to receive 75 points of the possible 100 points. See Rule 64B2-11.003(2), Florida Administrative Code.

25. From the evidence presented, and based upon the facts found, Petitioner failed to prove that he was entitled to sufficient additional points to pass the technique portion of the 1997 chiropractic licensure examination.

RECOMMENDATION

It is, RECOMMENDED:

That a Final Order be issued finding that Petitioner did not pass the technique portion of the 1997 chiropractic licensure examination.

DONE AND ENTERED this 1st day of September, 1998, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 1998.

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.