

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TANA SHIVER,)
)
 Petitioner,)
)
 vs.) Case No. 99-0155
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION, BARBER'S)
 BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On March 12, 1999, a formal administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tana Shiver, pro se
2049 Old Gunn Highway
Odessa, Florida 33556

For Respondent: R. Beth Atchison, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner should be awarded additional points for the practical portion of the September 14, 1998, Barber Examination.

PRELIMINARY STATEMENT

By Examination Grade Report mailed September 30, 1998, the Department of Business and Professional Regulation notified Tana Shiver that she had not passed the practical portion of the September 14, 1998, Barber Examination. By letter dated October 9, 1998, the Department notified Ms. Shiver of her right to challenge the grading of the examination. Ms. Shiver requested a formal administrative hearing. The Department forwarded the request to the Division of Administrative Hearings, which scheduled the dispute for hearing.

At the hearing, the Department presented two witnesses and had Exhibits numbered 1-4 admitted into evidence. Ms. Shiver presented the testimony of one witness, testified on her own behalf, and had Exhibits numbered 1-5 admitted into evidence.

A transcript of the hearing was filed. Neither party filed a proposed recommended order. Ms. Shiver filed a post-hearing letter restating her request for licensure.

FINDINGS OF FACT

1. On September 14, 1998, Tana Shiver took the practical portion of the examination for licensure as a barber.

2. A passing score for the practical portion of the examination is a 75. Ms. Shiver scored a 69.

3. A passing score on the written portion of the examination is a 75. Ms. Shiver scored a 90.

4. Essentially, the practical portion of the barber examination consists of a haircutting session. Approximately 10 candidates for licensure give haircuts under the observation of two examiners.

5. The practical examination is scored on a scale of 100 points. Each grader completes a score sheet and the scores are averaged to provide a candidate's final grade.

6. Elements of the practical examination include haircut (45 points), technique (10 points), shampoo (10 points), sanitation (25 points), and chemical services (10 points).

7. Ms. Shiver received the maximum number of points for technique, shampoo, and chemical services.

8. Ms. Shiver received an average score of 15.50 points out of a possible total of 45 on the haircut.

9. Ms. Shiver received a score of 23.50 points out of a possible total of 25 on sanitation.

10. Ms. Shiver noted that there is substantial discrepancy between the examiners on numerous test items. There is no evidence that such scoring discrepancy is indicative of error by the examiners.

11. Substantial scoring discrepancies can result from a "borderline" haircut. In this circumstance, individual opinions of examiners can differ as to the level of performance, which, though of marginal quality, is still acceptable.

12. At the hearing, the examiners testified as to the training provided to examiners prior to testing sessions.

13. With ten candidates simultaneously performing haircuts and only two examiners in the room, it is not possible for both examiners to see each candidate perform each procedure.

14. Examiner no. 307 opined that if he did not observe a procedure being correctly performed, he assumed that it was not, and would award no credit.

15. Examiner no. 209 testified that examiners are instructed to give candidates credit for items not observed even through they might have been performed incorrectly. Examiner no. 209's testimony as to this issue is credited.

16. Score sheet items B-1 through B-4 relate to the sanitation portion of the examination.

17. Item B-1 states "[t]he candidate washed hands before beginning the haircut." Both examiners gave credit for this item.

18. Item B-2 states "[t]he candidate used the proper linen setup for the haircut." Examiner no. 209 gave credit for this item. Examiner no. 307 gave no credit for this item, noting that the candidate "did not open collar."

19. At the hearing, Examiner no. 307 testified that he did not give Ms. Shiver credit on item B-2 because he did not see her open the model's collar.

20. According to the training provided to the examiners, Ms. Shiver should have received credit from both examiners on item B-2.

21. Item B-3 states "[d]uring the haircut, the candidate replaced tools in the sanitizer after each use." Both examiners gave credit for this item.

22. Item B-4 states "[t]he candidate properly stored clean and dirty linen during the haircut." Both examiners gave credit for this item.

23. Score sheet items B-5 through B-7 relate to the technique portion of the exam.

24. Item B-5 states "[t]he candidate held and used all tools in a safe manner during the haircut." Both examiners gave credit for this item.

25. Item B-6 states "[t]he model's skin was not cut or pinched by clippers or other tools during the haircut." Both examiners gave credit for this item.

26. Item B-7 states "[t]he candidate used the freehand technique when doing the haircut." Both examiners gave credit for this item.

27. Items B-8 through B-16 are related to the haircut portion of the examination.

28. Item B-8 states "[t]op is even and without holes, gaps, or steps." Neither of the examiners gave credit for this item. Examiner no. 209 noted "holes" and Examiner 307 noted "not even."

29. Item B-9 states "[t]op (horseshoe) blends with the sides and back." Examiner no. 209 gave credit for this item. Examiner no. 307 gave no credit for this item, noting that the hair "did not blend." There is no evidence that either examiner erred in scoring this item.

30. Item B-10 states "[f]ront outline is even." Neither of the examiners gave credit for this item. Examiner no. 209 noted "uneven" and Examiner 307 noted "not even."

31. Item B-11 states "[h]aircut is proportional and sides are equal in length." Examiner no. 209 gave credit for this item. Examiner no. 307 gave no credit for this item, noting that the hair was "not proportional (and) not equal." There is no evidence that either examiner erred in scoring this item.

32. Item B-12 states "[s]ides and back are without holes, gaps, or steps." Neither one of the examiners gave credit for this item. Examiner no. 209 noted "holes" and Examiner 307 noted "steps."

33. Item B-13 states "[s]ides blend with back." Examiner no. 209 gave credit for this item. Examiner no. 307 gave no credit for this item, noting "sides too long." There is no evidence that either examiner erred in scoring this item.

34. Item B-14 states "[s]ideburns and outlines are even." Examiner no. 209 gave no credit for this item, noting "around R. ear." Examiner no. 307 gave credit for this item. There is no evidence that either examiner erred in scoring this item.

35. Item B-15 states "[s]ideburns, outline and neckline are clean shaven." Examiner no. 209 gave credit for this item. Examiner no. 307 gave no credit for this item, noting "not cleanly shaven." There is no evidence that either examiner erred in scoring this item.

36. Item B-16 states "[n]eckline is properly tapered." Examiner no. 209 gave credit for this item. Examiner no. 307 gave no credit for this item, noting "not tapered." There is no evidence that either examiner erred in scoring this item.

37. At the hearing, Ms. Shiver offered the testimony of the man whose hair she cut during the practical portion of the examination, and whose hair she has cut for approximately three years. He testified that neither examiner spent much time looking at the haircut after it was completed, and that only Examiner no. 307 actually touched his hair during the review of Ms. Shiver's performance. He also testified that that his sideburns were uneven but that he was satisfied with the haircut.

CONCLUSIONS OF LAW

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

39. The Respondent is the agency charged with licensure and regulation of barbers in the State of Florida. Chapter 476, Florida Statutes.

40. In an administrative challenge to the results of an examination process, an applicant must establish by a preponderance of the evidence that the questions are misleading, that scoring of his exam was erroneous, and that the exam responses should receive additional consideration. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). In this case, the burden has not been met,

41. In relevant part, Rule 61G3-16.001, Florida Administrative Code, Examination for Licensure, provides as follows:

(7) The practical portion of the examination for licensure shall have a maximum time limit of 1 3/4 hours. Effective October 1, 1988, candidates will be required to perform a taper haircut to satisfy the practical portion of the examination. The areas to be tested and relative weights are as follows:

CATEGORIES	POSSIBLE POINTS
Haircut	45
Permanent Wave	10
Shampoo	10
Sanitation	25
Technique:	
Razor, Shears, Clippers	10

The grade sheet for the practical examination will contain spaces for comments by the grading examiner. The areas of comment should be drawn from the following criteria:

- (a) Haircut:
1. Top is even and without holes, gaps, or steps
 2. Top (horseshoe) blends with sides and back
 3. Front outline is even
 4. Haircut is proportional and sides are equal in length

5. Sides and back are without holes, gaps or steps
6. Sides blend with the back
7. Sideburns and outlines are even
8. Sideburns, outline and neckline are clean shaven
9. Neckline is properly tapered

(b) Permanent Wave:

1. Blocking of the permanent wave is clean, uniform, and matches rod diameter and length
2. Hair is wound uniformly across the rods with the proper amount of tension
3. Rods are parallel to subsection parting, not more than one-half off base and are not over-directed
4. Hair is evenly spread in end paper(s) and does not extend beyond edge of paper

(c) Shampoo: After the shampoo, the model's hair and scalp were clean and free of shampoo

(d) Sanitation:

1. The candidate used the proper linen setup for a shampoo
2. The candidate properly stored clean and dirty linen during the shampoo
3. The candidate washed hands before beginning haircut
4. The candidate used the proper linen setup for haircut
5. During the haircut, the candidate replaced tools in sanitizer after each use
6. The candidate properly stored clean and dirty linen during the haircut
7. The candidate washed hands before beginning the permanent wave
8. The candidate used the proper linen/cotton wrap setup for the permanent wave
9. The candidate kept tools sanitized during the permanent wave
10. The candidate properly stored clean and dirty linen during the permanent wave

(e) Technique:

tools in a safe manner during the haircut

by clippers or other tools during the haircut

when doing the haircut

(8) Failure of the examinee to complete the

tested in the practical portion of the examination, e.g., haircut, shall result in

assigned to that area.

(9) The score necessary to achieve a passing

percent out of one hundred (100) percent (based on the average of the examiners'

seventy five (75) percent out of one hundred (100) percent on the written examination. In

point five (.5) or above shall be rounded up to the next whole number. Percentages less

the next whole number.

42. Ms. Shiver correctly notes that her score of 15.50 on

to the next whole number, giving her a score of 16 on "haircut,"

and 24 on "sanitation," for a total score of 70 points, still shy

43. It should be noted that the haircut scoring items on the practical examination do not appear to address the

license and regulate barbers. As set forth at Section 476.024,

Florida Statutes, the purpose of regulating barbers is as

476.024 Purpose. --The Legislature recognizes that barbering is potentially dangerous to the public in that barbers work in close proximity to patrons, thus risking transmission of disease and vermin, apply various caustic chemical agents to the hair and scalp of patrons, and employ instruments which could harm patrons if improperly used. Therefore, it is deemed necessary in the interest of public health, safety, and welfare to regulate the practice of barbering in this state. However, restrictions should be imposed only to the extent necessary to protect the public from these recognized dangers and in a manner which will not unreasonably affect the competitive market. (Emphasis supplied)

44. In relevant part, Section 476.134, Florida Statutes, sets forth the specific authority for the Barber Board's examination rules. Subsection (2) provides as follows:

(2) The board shall adopt rules specifying the areas of competency to be covered by the examination. Such rules shall include the relative weight assigned in grading each area. All areas tested shall be reasonably related to the protection of the public and the applicant's competency to practice barbering in a manner which will not endanger the public. (Emphasis supplied.)

45. Score sheet items B-1 through B-4 are directly related to sanitation and safety issues and address the purpose statement set forth at Section 476.024, Florida Statutes.

46. Score sheet items B-8 through B-16 clearly relate to the aesthetic quality of the haircut. Such issues are not within those addressed by the Legislature in the statement of purpose. In fact, such considerations appear to be directly prohibited by the language that states "restrictions should be imposed only to

the extent necessary to protect the public from these recognized dangers

competitive market." The sole danger against which the public is being protected by exam items B-8 through B-16 is that of a poor

47. It is reasonable to assume that a barber who gives aesthetically poor haircuts would be negatively impacted from the haircut is uneven or poorly proportioned has no relevance to whether the barber poses a threat related to "transmission of agents to the hair and scalp of patrons," and improper use of barbering instruments. These elements are addressed by test

48. Test items B-8 through B-16 appear unrelated to the purpose for which the Legislature authorized the licensure and However, absent a successful challenge to the rules under Section 120.56, Florida Statutes, the rule remains in effect.

examiner's differing opinions as to how credit is awarded for unseen activities during the practical exam, the following

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Business and Professional Regulation, Barber's Board, enter a final order:

1. Allowing Tana Shiver to retake the practical portion of the barber examination at no cost, and

2. Allowing Tana Shiver's passing score on the written portion to remain valid without reexamination.

DONE AND ENTERED this 29th day of April, 1999, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 1999.

COPIES FURNISHED:

Tana Shiver
2049 Old Gunn Highway
Odessa, Florida 33556

R. Beth Atchison, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

William Woodyard, General Counsel
Department of Business and

1940 North Monroe Street
Tallahassee, Florida 32399-1007

Barber's Board
Department of Business and

1940 North Monroe Street
Tallahassee, Florida 32399-1007

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to issue the Final Order in this case.