

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NELSON A. PALMA, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-2629  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 ELECTRICAL CONTRACTORS )  
 LICENSING BOARD, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case pursuant to Section 120.57, Florida Statutes, on November 1, 1999, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nelson A. Palma, pro se  
15489 Miami Lake Way North, No. 109  
Miami, Florida 33014

For Respondent: Lynne A. Quimby-Pennock, Esquire  
Assistant General Counsel  
Department of Business and  
Professional Regulation  
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STATEMENT OF THE ISSUE

Whether Petitioner's challenge to the failing grade he received on the January 1999 Unlimited Electrical Contractor Examination should be sustained.

PRELIMINARY STATEMENT

By letter dated May 19, 1999, and received by the Department of Business and Professional Regulation, Bureau of Testing (Department) on May 26, 1999, Petitioner challenged the failing score he received on the January 1999 Unlimited Electrical Contractor Examination (Examination). More specifically, he contended that his answers to eight questions for which he did not receive credit were correct and that his score should be raised accordingly. The eight questions were Questions 25 and 88 on the morning (or "AM") part of the Examination, and Questions 8, 20, 32, 36, 37, and 39 on the afternoon (or "PM") part of the Examination. On July 2, 1999, the Department referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct an administrative hearing on Petitioner's challenge.

As noted above, the hearing was held on November 1, 1999. At the hearing, two witnesses testified, Petitioner and Cynthia Woodley, Ph.D.

Petitioner testified on his own behalf. During his testimony, he indicated that he was withdrawing his challenge to the scoring of his answers to questions 20 and 32 of the

afternoon part of the Examination. Dr. Woodley, a psychometrician who is the Vice-President of Operations for Professional Testing Service, testified (as an expert witness) for the Department. The Department had intended to present at the hearing the testimony of another expert witness, Richard Widera, Ph.D., but, due to illness, Dr. Widera was unable to attend the hearing. The Department requested, and was granted, without objection by Petitioner, permission to present Dr. Widera's testimony by deposition (taken after the conclusion of the hearing at a time convenient to the parties and Dr. Widera).

There were also six exhibits received into evidence at the hearing. All six exhibits (Respondent's Exhibits 1-3 and 5-7) were offered by the Department.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced on the record that proposed recommended orders had to be filed no later than ten days after the undersigned's receipt of the transcript of the hearing, or ten days after the undersigned's receipt of the transcript of Dr. Widera's deposition, whichever was later. The undersigned received the transcript of Dr. Widera's deposition on November 18, 1999. He received the hearing transcript (which consisted of one volume) on December 2, 1999. Petitioner and the Department filed post-hearing submittals on December 10, 1999, and December 13, 1999, respectively. These post-hearing submittals have been carefully considered by the undersigned.

## 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 electrical contractors in Florida (Unlimited Electrical Contractor Examination, which is referred to herein as the "Certification Examination" or "Examination") administered on January 29, 1999.

2. The Certification Examination consisted of two parts ("AM Part" and "PM Part"). The "AM Part" contained questions testing the candidates' general knowledge of the electrical trade. The "PM Part" contained questions relating to business and financial management.

3. There were a total of 150 Examination questions (100 on the "AM Part" and 50 on the "PM Part"), all of which were multiple choice questions. Each question was worth .666 of a point. To attain a passing score, candidates needed to receive a total of 75 points.

4. Of the 102 applicants who took the Certification Examination on January 29, 1999 (Candidates), almost 62 percent received a passing score.

5. Petitioner was among the Candidates who did not receive a passing score. He attained a score of 73.

6. Prior to the Certification Examination, the Candidates were provided a "Candidate Information Booklet," which provided the following "overview" of the Examination:

The examination is designed to measure how well a candidate has mastered the fundamentals of electrical contracting and to measure his or her ability to interpret and apply the appropriate sections of the National Electrical Code (N.E.C.) and other applicable references to practical problems.

The questions have been designed so that a person who has the required minimum ability to use the N.E.C. and the necessary background knowledge of electrical contracting will find it easy to select the correct answer. A person who is not familiar with electrical contracting and cannot use the N.E.C. will find it hard to guess the correct answer for any question because they present the candidate with a choice of common misconceptions, common faults, incorrect practices, or plausible nonsense. Therefore, the candidate should read each question thoroughly and carefully and select the best answer to the question. Each question has only one correct answer, which will be graded as the correct answer to the question.

In certain areas (e.g., Section 220-10(b)) the N.E.C. stipulates a standard procedure should be followed in normal circumstances and permits alternate procedures or exceptions in other circumstances. If the question does not obviously call for the application of an alternate procedure or exception, the candidate should apply the provision of the N.E.C. in accordance with the procedures stipulated for normal circumstances.

The questions are based on the content outlines listed on the following pages (separately for each examination). Candidates should use appropriate content outlines when studying the suggested references provided later in this booklet.

It is suggested that each candidate become familiar with using the references, so that he or she can find the information necessary to answer the questions within a minimal amount of time. Candidates are NOT required to bring these references to the examination site; however, these references will be allowed if brought. No other references are allowed at the examination site.

Among "the suggested references provided later in this booklet," in addition to the 1996 edition of the National Electrical Code, were the 1996 editions of the Builder's Guide to Accounting, the National Fire Alarm Code, and the Handy Reference Guide to the Fair Labor Standards Act.

Question 25, "AM Part"

7. Question 25 of the "AM Part" of the Certification Examination was a clear and unambiguous multiple choice question that covered subject matter (automatic fire detection devices selected for positive alarm sequence operations) with which the Candidates should have been familiar.

8. The correct answer to the question may be gleaned from a reading of the following excerpt from the 1996 edition of the National Fire Alarm Code, which was among the reference materials that the Candidates were permitted to bring with them to the testing site:

The signal from an automatic fire detection device selected for positive alarm sequence operations shall be acknowledged at the control unit by trained personnel within 15 seconds of annunciation in order to initiate the alarm investigation phase. If the signal is not acknowledged within 15 seconds, all

building and remote signals shall be activated immediately and automatically.

9. This correct answer is among the responses from which the Candidates had to choose.

10. Seventy-four percent of the Candidates chose this correct response. 1/

11. Petitioner was not among these Candidates.

12. The response Petitioner selected is clearly incorrect.

13. He therefore appropriately received no credit for this response.

Question 88, "AM Part"

14. Question 88 of the "AM Part" of the Certification Examination was a clear and unambiguous multiple choice question that covered subject matter (secondary standby power backup) with which the Candidates should have been familiar merely from reading the plans and specifications that were provided with the Examination. (In answering this question, the Candidates were instructed to "use" these plans and specifications.)

15. The correct answer to this question is among the responses from which the Candidates had to choose.

16. Sixty-eight percent of the Candidates chose this correct response.

17. Petitioner was not among these Candidates.

18. The response Petitioner selected is clearly incorrect.

19. He therefore appropriately received no credit for this response.

Question 8, "PM Part"

20. Question 8 of the "PM Part" of the Certification Examination was a clear and unambiguous multiple choice question that covered subject matter (income tax planning) with which the Candidates should have been familiar from reading Appendix D of the 1996 edition of the Builder's Guide to Accounting, which was among the reference materials that the Candidates were permitted to bring with them to the testing site.

21. The correct answer to this question is among the responses from which the Candidates had to choose.

22. Ninety percent of the Candidates chose this correct response.

23. Petitioner was not among these Candidates.

24. The response Petitioner selected is clearly incorrect.

25. He therefore appropriately received no credit for this response.

Question 36, "PM Part"

26. Question 36 of the "PM Part" of the Certification Examination was a clear and unambiguous multiple choice question that covered subject matter (recovery of back pay under wage and hour law) with which the Candidates should have been familiar from reading the 1996 edition of the Handy Reference Guide to the Fair Labor Standard Act, which was among the reference materials that the Candidates were permitted to bring with them to the testing site.



27. The correct answer to this question is among the responses from which the Candidates had to choose.

28. Seventy-six percent of the Candidates chose this correct response.

29. Petitioner was not among these Candidates.

30. The response Petitioner selected is clearly incorrect.

31. He therefore appropriately received no credit for this response.

Question 37, "PM Part"

32. Question 37 of the "PM Part" of the Certification Examination was a clear and unambiguous multiple choice question that covered subject matter (cash management) that the Candidates should have been familiar with from reading the 1996 edition of the Builder's Guide to Accounting, which the Candidates were directed, in the stem of the question, to refer to in answering the question.

33. The correct answer to this question, which can be found by looking at pages 236 and 237 of the 1996 edition of the Builder's Guide to Accounting, is among the responses from which the Candidates had to choose.

34. Fifty-six percent of the Candidates chose this correct response.

35. Petitioner was not among these Candidates.

36. The response Petitioner selected is clearly incorrect.

37. He therefore appropriately received no credit for this response.

Question 39, "PM Part"

38. Question 39 of the "PM Part" of the Certification Examination was a clear and unambiguous multiple choice question that covered subject matter (cash flow statements) that the applicants should have been familiar with from reading the 1996 edition of the Builder's Guide to Accounting, which, as noted above, was among the reference materials that the Candidates were permitted to bring with them to the testing site.

39. The correct answer to this question is among the responses from which the Candidates had to choose.

40. Sixty-three percent of the Candidates chose this correct response.

41. Petitioner was not among these Candidates.

42. The response Petitioner selected is clearly incorrect.

43. He therefore appropriately received no credit for this response.

CONCLUSIONS OF LAW

44. A person seeking certification to engage in the electrical contracting business in the State of Florida must apply to the Department to take the certification examination. Section 489.511, Florida Statutes.

45. The "certification examination requirements" are set forth in Rule 61G6-6.001, Florida Administrative Code, which provides as follows:

(1) The areas of competency to be covered by the certification examination shall be as follows: Technical knowledge; General Business knowledge; and safety knowledge.

(2) The examination shall be open book. The applicant is responsible for bringing and may use during the examination the applicable code books, reference materials and calculators as approved by the Board. Security measures as set forth by the Department shall be followed during the examination.

(3) The content areas of each examination and the approximate weight assigned to each section are as follows:

(a) Unlimited Electrical Contractor. Technical section 64%; General Business Section 33%; and Safety Section 3%.

(b) Residential Electrical Contractor. Technical Section 59%; General Business Section 33%; and Safety Section 8%.

(c) Alarm Systems Contractor I. Technical Section 66%; General Business Section 25%; and Safety Section 9%.

(d) Alarm Systems Contractor II. Technical Section 70%; General Business Section 25%; and Safety Section 5%.

(e) Low Energy Contractor. Technical Section 69%; General Business Section 25%; and Safety Section 6%.

(f) Sign Specialty Contractor. Technical Section 70%; General Business Section 25%; and Safety Section 5%.

(g) Lighting Maintenance Contractor.  
Technical Section 70%; General Business  
Section 25%; and Safety Section 5%.

(4) An applicant shall be required to achieve a score of a general average of not less than seventy-five percent (75%) in order to pass the examination and be certified for licensure. When a cut off score contains a fraction of a percentage point of one-half (.5) or higher that score will be raised to the next highest whole number. When a cut off score contains a fraction of a percentage point of less than one-half (.5) that score will be lowered to the next lowest whole number. There shall not be a practical or clinical examination.

46. The following requirements imposed by Rule 61-11.010(1)(b), Florida Administrative Code, must also be followed in grading the applicant's certification examination:

Departmentally developed objective, multiple choice examinations shall be graded by the Department or its designee. After an examination has been administered the Board shall reject any questions which do not reliably measure the general areas of competency specified in the rules of the Board. The Department shall review the item analysis and any statistically questionable items after the examination has been administered. Based upon this review, the Department shall adjust the scoring key by totally disregarding the questionable items for grading purposes, or by multi-keying, giving credit for more than one correct answer per question. All questions which do not adequately and reliably measure the applicant's ability to practice the profession shall be rejected. The Department shall calculate each candidate's grade utilizing the scoring key or adjusted scoring key, if applicable, and shall provide each candidate a grade report.

47. An applicant who fails to attain a passing score on the certification examination is entitled to a "post-examination review" in accordance with Rule 61-11.017, Florida Administrative Code, which provides as follows:

(1) Pursuant to section 455.217(1)(d), Florida Statutes, a candidate who has taken and failed a departmentally developed objective multiple choice examination, a departmentally developed practical examination, or an examination developed for the department by a professional testing company shall have the right to review the examination questions, answers, papers, grades, and grade keys for the parts of the examination failed or the questions the candidate answered incorrectly only. Review of examinations developed by or for a national council, association, society (herein after referred as national organization) shall be conducted in accordance with national examination security guidelines.

(2) Examination reviews shall be conducted in the presence of a representative of the Department at its Tallahassee headquarters during regular working hours which are defined as 8:00 a.m. through 4:30 p.m., Monday through Friday, excluding official state holidays.

(a) All examination reviews shall be conducted in accordance with that examination's administration procedures to the extent possible and feasible.

(b) All security rules defined in Rule 61-11.007, Florida Administrative Code, shall apply to all review sessions. Any candidate violating said rule shall be dismissed from the review session and may be subject to other sanctions as determined by the Board.

(c) All examination reviews by candidates shall be scheduled and completed no later than sixty (60) days subsequent to the date

on the grade notification. However reviews will not be conducted during the thirty (30) day period immediately prior to the next examination.

(d) A representative from the Bureau of Testing shall remain with all candidates throughout all examination reviews. The representative shall inform candidates that the representative cannot defend the examination or attempt to answer any examination questions during the review. Prior to the review candidates shall be provided written instructions titled "Review Candidates Instructions" form number BPR-TLT-002 incorporated herein by reference and dated 08/01/96 and 'Guidelines Governing Examination Reviews' form number BPR-TLT-001, incorporated herein by reference and dated 08/01/96, concerning the conduct rules and guidelines for the review. Prior to any review, all candidates shall acknowledge receipt of these rules and affirm to abide by all such rules in writing.

(e) Upon completion of all reviews, all candidates shall acknowledge in writing the review's start time, the review's end time, all materials reviewed, and other relevant review information (Acknowledgment of Grade Review).

(3) In addition to the provisions of (2)(a) through (2)(e), examination candidates shall be prohibited from leaving any review with any written challenges, grade sheets, or any other examination materials, unless the respective Board determines by rule that examination security will not be undermined by doing so.

(4) For a practical examination, unless examination security is involved, a candidate may obtain by mail a copy of his/her grade sheets resulting from a practical examination. The request must be made in writing, signed by the candidate and state the address to which the grade sheets are to be mailed.

48. Following the "post-examination review," the applicant "may petition for a formal hearing before the Division of Administrative Hearings," but must do so "no later than twenty-one (21) days after the post-examination review." Rule 61-11.012, Florida Administrative Code.

49. The burden is on the applicant at the "formal hearing" to establish by a preponderance of the evidence that his or her 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).

50. In the instant case, Petitioner requested a hearing before the Division to contest the failing score he received on the January 1999 Unlimited Electrical Contractor Examination. His challenge (as modified at the hearing) is directed to his failure to have received any credit for his responses to six multiple choice questions on the Examination (Questions 25 and 88 on the "AM Part" of the Examination, and Questions 8, 36, 37, and 39 on the "PM Part" of the Examination).

51. 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 responses to these questions.

52. Petitioner has failed to show that any of the questions in dispute was unclear, ambiguous, misleading, or in any other respect unfair or unreasonable. Neither has he established that he correctly answered any of the disputed multiple choice questions.

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

54. In view of the foregoing, Petitioner's challenge to the failing grade he received on the January 1999 Unlimited Electrical Contractor Examination is without merit.

RECOMMENDATION

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

RECOMMENDED that a final order be entered rejecting Petitioner's challenge to the failing grade he received on the January 1999 Unlimited Electrical Contractor Examination.

DONE AND ENTERED this 22nd day of December, 1999, in Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of December, 1999

ENDNOTE

1/ If a question is missed by more than 50 percent of those taking an examination, it is "flagged" for review. None of the questions at issue in the instant case were "flagged" inasmuch as they were answered correctly by 50 percent or more of the Candidates.

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.