

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARY RANDALL OSTOSKI,)
)
 Petitioner,)
)
 vs.) Case No. 99-5247
)
 DEPARTMENT OF HEALTH, BOARD)
 OF PHYSICAL THERAPY PRACTICE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

An administrative hearing was conducted on March 6, 2000, in Tallahassee, Florida, by Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Wilson Jerry Foster, Esquire
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For Respondent: Ann Cocheu, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent should grant Petitioner's request for licensure by endorsement as a physical therapist pursuant to Sections 486.031 or 486.081, Florida Statutes (1997), and Florida Administrative Code Rule 64B17-3.003. (All statutory references are to Florida Statutes (1997) unless otherwise stated. All references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.)

PRELIMINARY STATEMENT

By order filed on July 8, 1999 ("Denial Order") the Board of Physical Therapy Practice (the "Board") denied Petitioner's application for licensure as a physical therapist. Petitioner timely filed a Petition for DOAH Hearing on August 4, 1999. On December 13, 1999, the Board referred the matter to DOAH for assignment of an ALJ to conduct the hearing.

At the hearing, Petitioner testified in his own behalf and called no other witnesses. Respondent called one witness. The parties submitted four joint exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the Transcript of the hearing filed on March 17, 2000. The parties timely filed their respective proposed recommended orders on March 31, 2000.

FINDINGS OF FACT

1. It is uncontroverted that Petitioner is 48 years old and of good moral character within the meaning of Section 486.031(1) and (2). Petitioner has been a resident of Florida for 34 years. He is licensed in Florida as a chiropractor and is a graduate of a four-year degree program at Palmer College of Chiropractic ("Palmer College").

2. Petitioner is board certified as a chiropractor orthopedist and as a chiropractic neurologist. Both board certifications required additional training after graduation from Palmer College.

3. In June 1995, Petitioner attended the University of Health Sciences Antigua School of Allied Health Professionals and

received a Bachelor of Science in Physical Therapy from that institution in August 1996. Petitioner traveled to the University of Antigua eight times in two years for education sessions. Each session lasted approximately two weeks.

4. In addition to the hours Petitioner spent at the University of Antigua, Petitioner spent approximately 1,200 hours during an eight-month period at a physical therapy facility associated with the hospital in Antigua. In addition, Petitioner spent approximately 650 hours interning at the Spinal Rehabilitation Institute in Titusville, Florida. The University of Antigua required Petitioner to complete the 1,200 hours at the physical therapy facility and the 650 hours as an intern as part of its educational program.

5. After obtaining a degree in physical therapy from the University of Antigua, Petitioner applied to the State of Colorado to take an examination prepared under the auspices of Profession Examination Services ("PES"). Colorado evaluated Petitioner's education and allowed Petitioner to take the PES exam. Petitioner passed the PES exam and has been licensed as a physical therapist in Colorado since April 11, 1997.

6. On February 9, 1999, Petitioner applied to the State of Florida for a license as a physical therapist. Petitioner received and relied upon application materials provided by Respondent. In particular, Petitioner utilized Respondent's "List of Currently Qualified Credentialing Agencies" to select the International Education Research Foundation (the "Foundation") to evaluate Petitioner's foreign education. The

Foundation is the appropriate agency identified by the Board, within the meaning of Section 486.031(3)(b), to determine whether Petitioner has educational credentials equivalent to those required for the educational preparation of physical therapists in the United States.

7. The Foundation gave Petitioner credit for 60 semester hours of physical therapy education including six clinical hours. The Foundation determined that Petitioner has the U.S. equivalent of a Bachelor of Science in Physical Therapy (non-traditional program awarded by nonaccredited colleges and universities). The Foundation prepared its evaluation:

. . . in accordance with guidelines developed by several state licensing boards and was completed in close collaboration with a physical therapy consultant. Records from the institution attended showing coursework completed, hours of study and grades earned, were used as the basis for this report.

Joint Exhibit 1 at 399.

8. The Board denied Petitioner's application for the following reasons:

The applicant does not meet the requirements of Sections 486.031(3)(b) or 486.081(1) . . . and Rules 64B17-3.001(3) and (4) or 64B17-3.003 . . . in that the applicant does not

possess credentials that are deemed equivalent to a bachelor's degree in physical therapy in the United States.

At best the applicant's training is a six week lecture series that would constitute a continuing education course. It is not the length and content of a CAPTE approved bachelors or masters in science program in physical therapy that would be the bulk of the final year of training.

Denial Order at 1.

9. The actual basis for Respondent's denial has little to do with factual disputes concerning Petitioner's educational hours. As Respondent admits in its PRO:

While there may be some factual disputes about Petitioner's educational hours, both in modules and clinical time, these are not really material facts for the [ALJ] to resolve. The real issue is the legal interpretation of . . . Sections 486.031 and 486.081. . . .

Respondent's PRO at 5.

The findings in paragraphs 12-15 of Respondent's PRO are not material to the real issue concerning the interpretation of Sections 486.031 and 486.081.

10. Respondent does not approve the physical therapy program at the University of Antigua for the educational preparation of physical therapists within the meaning of Section 486.031(3)(a). The record does not show whether the United States Department of Education approves the program.

11. Petitioner has received a diploma from a program in a foreign country within the meaning of Section 486.031(3)(b). The Foundation, as the appropriate agency identified by the Board, has determined that Petitioner possesses educational credentials required for the educational preparation of physical therapists in this country.

12. Petitioner passed the Colorado PES exam in 1997. Petitioner passed a national examination approved by the Board to determine Petitioner's fitness to practice as a physical therapist within the meaning of Section 486.031(3)(a) and (b).

13. Petitioner is entitled to licensure in Florida without examination, pursuant to Section 486.031(3)(c), as provided in Section 486.081. Petitioner passed the PES exam in 1997. The written examination taken by Petitioner for licensure in Colorado was an examination prepared under the auspices of the Professional Examination Services within the meaning of Rule 64B17-3.003.

14. Respondent has long construed applicable Florida Statutes to require an applicant for licensure without examination to pass the requisite national examination and to meet those educational requirements approved by the Commission on Accreditation for Physical Therapy ("CAPTE") in accordance with the requirements of Section 486.031(3)(a). Respondent's legal interpretation of applicable statutes and rules is a legal interpretation rather than a matter within the ambit of agency expertise.

CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the parties and the subject matter. Section 120.57(1). The parties were duly noticed for the hearing.

16. The burden of proof is on Petitioner. Petitioner must show by a preponderance of evidence that Petitioner's application for licensure satisfies the requirements of Sections 486.031 or 486.081. Section 120.57(1)(h); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

17. Petitioner satisfied his burden of proof. Petitioner showed by a preponderance of the evidence that he satisfies the requirements of Sections 486.031 and 486.081.

18. To be eligible for licensing as a physical therapist, Section 486.031(3), in relevant part, requires that an applicant must:

(a) Have been graduated from a school of physical therapy which has been approved for the educational preparation of physical therapists by the appropriate accrediting agency recognized by the Commission on Recognition of Postsecondary Accreditation or the United States Department of Education at the time of her or his graduation and have passed, to the satisfaction of the board, the American Registry Examination prior to 1971 or a national examination approved by the board to determine her or his fitness for practice as a physical therapist as hereinafter provided;

(b) Have received a diploma from a program in physical therapy in a foreign country and have educational credentials deemed equivalent to those required for the educational preparation of physical therapists in this country, as recognized by the appropriate agency as identified by the board, and have passed to the satisfaction of the board an examination to determine her or his fitness for practice as a physical therapist as hereinafter provided; or

(c) Be entitled to licensure without examination as provided in s. 486.081. (emphasis supplied)

19. When the legislature uses the disjunctive "or" after Section 486.031(3)(b), it should be given its common and ordinary meaning unless such a meaning would frustrate legislative intent.

Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404, 410 (Fla. 1st DCA 1997); Eager v. Florida Keys Aqueduct Authority,

580 So. 2d 771, 772 (Fla. 3d DCA 1991). Section 486.031(3)(a) prescribes the licensing requirements applicable to graduates of educational programs in the United States and does not apply to graduates of foreign universities including Petitioner. Section 486.031(3)(b) prescribes the licensing requirements applicable to graduates of educational programs outside the United States and applies to Petitioner. Section 486.031(3)(c) prescribes a third alternative for licensing. Section 486.031(3)(c) also applies to Petitioner and incorporates by reference the provisions of Section 486.081.

20. Petitioner is entitled to licensure in Florida pursuant to Section 486.031(3)(b). The Foundation, as the agency identified by Respondent, determined that Petitioner possesses educational credentials equivalent to those required for the educational preparation of physical therapists in this country.

21. Respondent's disapproval of the University of Antigua educational program is statutorily authorized as a consideration only for graduates of educational programs in the United States pursuant to Section 486.031(3)(a). Respondent's disapproval of the University of Antigua program is not statutorily authorized as a consideration for graduates of educational programs outside the United States pursuant to Section 486.031(3)(b).

22. Neither the Board nor DOAH can adopt an interpretation of Section 486.031(3)(b) that enlarges, modifies, or contravenes the prerequisites prescribed in the statute. Sections 120.52(8)(c); 120.58(7)(3)4. See also DeMario v. Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 213-214 (Fla.

4th DCA 1994), rev. denied, 659 So. 2d 1086 (Fla. 1995) (agency lacks authority to impose time requirement not found in statute); Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 362 (Fla. 1st DCA 1984) (agency action that ignores some statutory criteria and emphasizes others is arbitrary and capricious).

23. Rule 64B17-3.001(3) requires graduates of foreign universities to satisfy the requirement in Section 486.031(3)(b) for an equivalency determination by an identified agency such as the Foundation and to satisfy the requirement in Section 486.031(3)(a) to obtain a bachelor's degree in a course of study approved by CAPTE. See Respondent's PRO at 3-4. However, a rule cannot impose a requirement not found in a statute or otherwise enlarge, modify, or contravene the terms of a statute. Section 120.52(8)(c). See also DeMario, 648 So. 2d at 213-214 (agency lacked authority to impose time requirement not found in statute); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419, 423 (Fla. 5th DCA 1988) (agency cannot vary impact of statute by creating waivers or exemptions) reh. denied. Where an agency rule conflicts with a statute, the statute prevails. Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Johnson v. Department of Highway Safety & Motor Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997), reh. denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992), reh. denied;

Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991) reh. denied. See also Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117.

24. Neither Respondent nor DOAH has authority to construe Rule 64B17-3.001(3) as imposing a requirement not found in a statute. Hughes, 710 So. 2d at 685; Johnson, 709 So. 2d at 624; Willette, 700 So. 2d at 401; DeMario, 648 So. 2d at 213-214; Duda & Sons, 608 So. 2d at 884; Wingfield, 581 So. 2d at 197; Booker Creek, 534 So. 2d at 423; Capeletti Brothers, 499 So. 2d at 857. The requirements in Rule 64B17-3.001(3) must be construed in a manner that is consistent with the statutory authority in Section 486.031(3)(b).

25. Even if it were determined that Petitioner is not entitled to licensure pursuant to Section 486.031(3)(b), Petitioner is entitled to licensure pursuant to Sections 486.031(3)(c) and 486.081. Section 486.031(3)(c) expressly authorizes licensure without examination if Petitioner satisfies the requirements of Section 486.081.

26. Section 486.081 provides, in relevant part:

(1) The board may cause a license to be issued through the department without examination to any applicant who presents evidence satisfactory to the board of having passed the American Registry Examination prior to 1971 or an examination in physical therapy before a similar lawfully authorized examining board of another state, the District of Columbia, a territory, or a foreign country, if the standards for licensure in physical therapy in such other state, district, territory, or foreign

country are determined by the board to be as high as those of this state, as established by rules adopted pursuant to this chapter
. . . . (emphasis supplied)

27. Rule 64B17-3.003 provides in relevant part:

. . . The standard for determining whether the standards of another state . . . are as high as the standards in Florida shall be whether the written examination taken for licensure in such other jurisdiction was an examination prepared under the auspices of the Profession Examination Services.
(emphasis supplied)

28. Neither Respondent nor DOAH can deviate from the terms of Rule 64B17-3.003. An agency's deviation from a valid existing rule is invalid and unenforceable. Section 120.68(7)(e)(2); Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977).

29. Respondent argues that Rule 64B17-3.003 requires an applicant to satisfy the educational requirements in Rule 64B17-3.001(3) and therefore incorporates by reference the requirement in the latter rule for Petitioner to satisfy the requirement in Section 486.031(3)(a) to obtain a bachelor's degree in a course of study approved by CAPTE. For reasons stated in paragraphs 42-43, Respondent's argument suffers the same legal fallacy as that in Rule 64B17-3.001(3)(a). Rule 64B17-3.003 cannot, by reference

to Rule 64B17-3.001(3)(a), impose a requirement not found in the statute. See Section 120.52(8)(c) and cases cited in paragraph 42.

30. Respondent's legal argument that its position is supported by reading Sections 486.031 and 486.081 in pari materia is not persuasive. Sections 486.031(3)(a)-(c) are separate disjunctive provisions that prescribe alternative requirements for licensure. Section 486.031(3)(a) prescribes licensure requirements for graduates of universities in the United States. Section 486.031(3)(b) prescribes licensure requirements for graduates of universities outside the United States. Section 486.031(3)(c) and 486.081 prescribe licensure requirements for any applicant, such as Petitioner, who has passed a PES examination other than the PES examination given in Florida. Any other statutory construction of Sections 486.031 and 486.081 would be unreasonable and reduce the separate subsections to nullities or redundancies. The legislature does not intend its enactments to be redundant or a nullity. See, e.g., North Miami General Hospital v. Central National Life Insurance Company, 419 So. 2d 800, 802 (Fla. 3d DCA 1982); City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422, 423 (Fla. 4th DCA 1972) (courts should avoid interpretation that renders legislatively created provision ineffective or purposeless).

31. Respondent argues that its interpretation of Sections 486.031 and 486.081 is entitled to great weight because the Board is the state agency responsible for administering those statutes. The rule that gives great weight to an administrative

construction of a statute by the agency responsible for its administration is limited to matters infused with agency expertise.

32. The matter at issue in this proceeding is not infused with agency expertise. It requires no technical expertise in physical therapy. The Board's construction of Sections 486.031 and 486.081 requires only legal skills that do not enjoy the presumption of validity applicable to matters of agency expertise. Zopf v. Singletary, 686 So. 2d 680 (Fla. 1st DCA 1997), reh. denied; SAVE the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193, 1202 (Fla. 1st DCA 1993).

33. Even if the Board's contention were infused with agency expertise, the contention is clearly erroneous. The Board's interpretation conflicts with the plain language of Sections 486.031 and 486.081. An agency's construction that conflicts with the unambiguous language of a statute is clearly erroneous. Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So. 2d 34, 36 (Fla. 1994); Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Arbor Health Care Company v. State, Agency for Health Care Administration, 654 So. 2d 1020, 1021 (Fla. 1st DCA 1995); Wingfield, 581 So. 2d at 197. The statute controls any conflict.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order granting Petitioner's request for a license in Florida as a physical therapist pursuant to Sections 486.031(3)(b), 486.031(3)(c), and 486.081.

DONE AND ENTERED this 13th day of April, 2000, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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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.