

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

P. JAY TULLER,)
)
 Petitioner,)
)
 vs.) Case No. 00-0206
)
 DEPARTMENT OF HEALTH, HEARING)
 AID SPECIALISTS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice the Division of Administrative Hearings through its duly-designated Administrative Law Judge, Mary Clark, conducted a formal hearing in the above-styled case on June 21, 2000, by video conference between Orlando and Tallahassee, Florida.

For Petitioner: P. Jay Tuller, pro se
Advanced Hearing Centers of Florida
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For Respondent: Amy M. Jones, Esquire
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Office of the General Counsel
Bin A02
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STATEMENT OF THE ISSUES

Petitioner, P. Jay Tuller (Mr. Tuller), has challenged his score on the September 1999 Hearing Aid Specialist Examination.

The issue for resolution in this proceeding is whether he is entitled to relief in that challenge.

PRELIMINARY STATEMENT

After receiving the letter describing Mr. Tuller's challenge, the Department of Health (agency) forwarded the case to the Division of Administrative Hearings for conduct of an evidentiary hearing.

At the hearing Mr. Tuller testified in his own behalf and cross-examined the witnesses presented by the agency. Those agency witnesses were Lee H. Skinner, a psychometrician; and Jay Slavin, a hearing aid specialist. In addition to testimony, the agency submitted eight exhibits which were received in evidence as agency Exhibit Nos. 1-8. As required by Section 455.647, Florida Statutes, Exhibit Nos. 2-5 are sealed.

On June 30, 2000, the agency filed its Proposed Recommended Order. No transcript nor other post-hearing documents were filed.

Findings of Fact

1. In a self-described mid-life change of careers and after taking a 6-month training program, Mr. Tuller sat for the Florida Department of Health, Hearing Aid Specialist Examination on September 24 and 25, 1999.

2. A passing score of 75 was required for the written practical and written theory parts of the examination. On October 29, 1999, Mr. Tuller was sent his scores of 83 and 73.40,

respectively, on the two parts. His overall status was designated as "failed."

3. In his challenge Mr. Tuller contested the scoring of several questions on the examination. In addition, he asserted that the lighting in the examination room was poor and some of the diagrams in the examination booklet were blurred and illegible.

4. The written theory part of the examination requires a "best answer," not simply a "close answer" to a series of multiple-choice questions.

5. During the course of the hearing Mr. Tuller conceded that the agency's witnesses were correct as to the proper answer for three of the four questions he challenged. In the fourth question, number 146, the answer selected by the agency as correct was taken virtually verbatim from Rule 64B6-8001(3), Florida Administrative Code, defining the term "direct supervision." Mr. Tuller's answer was reasonably close but not the "best" answer. Even if he were right on this answer he would need two more correct answers, not just one, to pass the examination.

6. Mr. Tuller was not the only candidate who complained of poor lighting and poor quality of printing on the examination. Five of the 26 candidates for the September 1999, session wrote letters to the agency expressing their dissatisfaction. Four of those five did receive passing scores, however, and overall the

mean score on this examination was slightly higher than the mean score for the preceding examination in January 1999.

7. Mr. Tuller wears bifocal glasses and the blurred copies of the examination diagrams and the high ceiling lights in the room interfered with his being able to interpret the diagrams. He told the test monitors about the lighting problem, as did other candidates; he did not complain or make written comments on the examination booklet about the quality of the diagrams as the candidates were cautioned not to talk and he did not understand that he could make written comments.

8. Because this was the first written test he had taken since he was 19 years old, Mr. Tuller became nervous and frustrated after he had trouble seeing the diagrams.

9. The copies of questions submitted by the agency at the hearing include extremely small, blurred numbers on certain diagrams in the examination. These are not the exact copies viewed by the examination candidates but those copies were not available at the hearing. The copies submitted in evidence at the hearing are on special non-duplicating paper to assure their confidentiality.

10. Because of the several complaints of candidates regarding the lighting and poor copies, Lee Skinner, a psychometrician with the Department of Health, prepared a report for the Board of Hearing Aid Specialists. Mr. Skinner found that the lighting was "fair" and the printing quality of supplemental

sheets that had to be copied on a smaller machine was readable. At hearing Mr. Skinner candidly agreed that while the quality was "acceptable" the diagrams and graphs were hard to read.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

12. Mr. Tuller has the burden of proving by a preponderance of the evidence that his examination scoring was flawed and that the agency acted arbitrarily. See, Harac v. Dept. of Business and Professional Regulation, 484 So 2d. 1333, 1337 (Fla. 3rd DCA 1986); Espinoza v. Dept. of Business and Professional Regulation, 739 So. 2d 1250 (Fla. 3rd DCA 1999). Based on the evidence of record Mr. Tuller failed to meet that burden as to the correctness of his responses to the questions.

13. However, as to the conditions under which the examination was administered, Mr. Tuller proved by a preponderance of evidence that the lighting and print quality were poor and affected his performance.

14. Rule 64B-1.001(2)(d), Florida Administrative Code, provides that the original examination fee paid by the applicant shall be applied to a rescheduled examination when ". . . problems occur which are due to the Department's inaction or negligence." The appropriate remedy for Mr. Tuller is a free

retake of his examination rather than additional points on the examination already taken.

RECOMMENDATION

Based on the foregoing, it is hereby

Recommended: That the agency enter its final order denying Mr. Tuller's challenge to his examination grade on the September 1999 hearing aid specialist licensure examination but permitting him to retake the examination without further payment of a fee.

DONE AND ENTERED this 25th day of July, 2000, in Tallahassee, Leon County, Florida.

MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2000.

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 must be filed with the agency that will issue the Final Order in this case.