

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NAVIN SINGH,)
)
Petitioner,)
)
vs.) Case No. 01-0374
)
DEPARTMENT OF HEALTH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on May 2 and 3, 2001, in West Palm Beach, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Navin Singh, O.D., pro se
103 Knights Court
Royal Palm Beach, Florida 33411

For Respondent: Cherry A. Shaw, Esquire
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner is entitled to a passing grade on the clinical portion of the August 2000 optometry licensure examination.

PRELIMINARY STATEMENT

In August 2000, the Petitioner took the optometry licensure examination. In an examination grade report dated September 13, 2000, the Department of Health ("Department") notified the Petitioner that he had failed the clinical portion of the licensure examination. The minimum passing score for the clinical portion of the subject examination is 75.00. The Petitioner scored 70.50. Accordingly, the Petitioner failed to obtain a passing score on the clinical portion of the subject examination.

The Petitioner submitted a timely request for a hearing to challenge the grades awarded to him for his performance of several of the procedures he was required to perform during the course of the clinical portion of the examination. In due course, the proceeding was referred to the Division of Administrative Hearings, and the case was scheduled for final hearing at a time convenient to the Petitioner's out-of-state expert witness.

At the final hearing the Petitioner testified on his own behalf and also presented the testimony of an expert witness, Steven Katz, M.D., who is an assistant professor of ophthalmology teaching courses in neuro-ophthalmology and optical disease. The Petitioner also offered seven exhibits. All of the Petitioner's exhibits were received in evidence. The Respondent presented

the testimony of two expert witnesses: Lee Skinner, M.A., an expert in psychometrics, and Gary D. McDonald, O.D., an expert in optometry. The Respondent also offered a total of 16 exhibits, all of which were received in evidence.¹

At the conclusion of the hearing, the parties were allowed ten days from the filing of the transcript within which to file their proposed recommended orders. The transcript was filed on June 21, 2001. Thereafter, both parties filed Proposed Recommended Orders. The parties' proposals have been carefully considered during the preparation of this Recommended Order.²

FINDINGS OF FACT

1. The Petitioner took the optometry licensure examination in August of 2000. He received passing scores on three of the four parts of the licensure examination. He received a failing score on the clinical portion of the examination. The Petitioner's score on the clinical portion of the subject examination was 70.50. The minimum passing score is 75.00.

2. The Petitioner contested the scores awarded to him for his performance of procedures itemized on the examination as 2A, 7B, 10A, 22A, 33C, 9A, 18B, and 14B.³ During the course of the hearing, two of the challenged items were resolved without the need for evidence. The Petitioner withdrew his challenge to item 10A. The Respondent stipulated that the Petitioner's performance on item 2A had been incorrectly graded, and agreed

that 1.5 points should be added to the Petitioner's grade on the subject examination.

3. On five of the items challenged by the Petitioner, one of the examiners gave the Petitioner credit for successful completion of the procedure and the other examiner did not.⁴ With regard to these five items, the Petitioner's primary contention is that, if one examiner gave him credit, he should also have received credit from the other examiner. However, given the nature of the manner in which the clinical examination is conducted, different scores by examiners evaluating a candidate's performance are not unusual, and, standing alone, different scores are not indicative of any irregularity in the manner in which the examination was conducted.

4. On the clinical portion of the optometry licensure examination, each candidate is evaluated by two examiners, each of whom grades the candidate's performance of a procedure independently of the other examiner. Further, the examiners are not permitted to confer with each other regarding a candidate's scores.

5. Specific written grading standards have been prepared for each of the procedures candidates are required to perform as part of the clinical portion of the subject examination. These written grading standards are provided to all examiners prior to each examination so that the examiners can review the standards

and be prepared to apply them in a fair and even-handed manner. Before serving as an examiner, each proposed examiner goes through a training session. During the training session, each proposed examiner practices scoring the performance of various optometry procedures. Following the practice sessions, the work of each examiner is evaluated to determine whether the examiner is correctly applying the grading standards. If a potential examiner is unable to demonstrate the ability to apply the grading standards, then that examiner is assigned to other duties and is not assigned to grade candidates on the licensure exam.

6. The examiners assigned to grade the Petitioner on the clinical portion of the subject examination all successfully completed the training process and were determined to be acceptable by the Department. The examiners assigned to grade the Petitioner on the clinical portion of the subject examination were all experienced examiners and a statistical analysis of their scoring of all candidates on the subject examination demonstrates that they reliably applied the grading standards.

7. With regard to the procedure required by item 14B, the Petitioner asserts that his ability to demonstrate the required procedure was impaired by the fact that the patient was photophobic. The greater weight of the evidence is otherwise.

While the subject examination was in progress, two optometrists examined the patient and determined that the patient was not photophobic.

8. There is no competent substantial evidence of any misconduct by any of the examiners who graded the Petitioner's performance during the subject examination. Similarly, there is no competent substantial evidence that the Department acted arbitrarily or capriciously, or that it abused its discretion. There is no competent substantial evidence that the scoring of the Petitioner's examination performance was flawed, other than the additional 1.5 points that the Department agreed should be given for item 2A.

CONCLUSIONS OF LAW

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

10. The Department is authorized to administer licensure examinations for optometrists. Section 455.574, Florida Statutes. Any person desiring to practice optometry in Florida is required to pass the licensure examination developed by the Department to test an applicant's competency as an optometrist. Section 463.006, Florida Statutes.

11. The Petitioner has the burden to establish by a preponderance of the evidence that his examination scoring was

flawed and that the Department acted arbitrarily or capriciously or with an abuse of discretion. See Harac v. Department of Business and Professional Regulation, 484 So. 2d 1333, 1337 (Fla. 3rd DCA 1986).

12. The Petitioner has failed to establish that his failure to demonstrate the procedure required by item 14B was caused by the patient's photophobia. Accordingly, the Petitioner is not entitled to any additional points for item 14B.

13. The Petitioner also asserts that, based on the disagreement of the examiners in their scoring of his performance on items 7B, 22A, 33C, 9A, and 18B, he should be awarded additional points on the examination. This argument also fails for lack of proof. In a similar case, an administrative law judge noted that "the two examiners did not observe Petitioner perform these procedures at the same time. Moreover, even if they had observed Petitioner simultaneously and disagreed as to whether Petitioner has shown minimal competency in performing these procedure, their difference of opinion on the matter would not, in and of itself, provide a basis upon which to conclude that the Petitioner's test results were flawed." See Star v. Department of Business and Professional Regulation, DOAH Case No. 90-2423.⁵ In addition, Rule 64B-1.006(2), Florida Administrative Code, allows for

subjective evaluation and disagreement of examiners on a candidate's performance on a practical examination. The rule states, "no less than two examiners shall independently evaluate the performance of each candidate and the independent grades of the examiners shall be averaged to produce the final score for each candidate." The rules do not provide for the "dismissal" of the opinion of an examiner who gives no credit when another examiner gives credit, as the Petitioner appears to request. Accordingly, the Petitioner is not entitled to any additional points for items 7B, 22A, 33C, 9A, and 18B.

14. It is conceded by the Department that the Petitioner is entitled to have 1.5 raw points added to his score. These additional points are not sufficient to raise the Petitioner's grade to a passing grade.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be issued concluding that the Petitioner is not entitled to a passing grade on the clinical section of the optometry licensure examination and dismissing the petition in this case.

DONE AND ENTERED this 13th day of September, 2001, in
Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2001.

ENDNOTES

- 1/ Several of the exhibits offered by the Respondent are confidential documents within the meaning of Section 456.014, Florida Statutes.
- 2/ The findings and conclusions proposed by the Respondent are, to a large extent, consistent with the conclusions reached by the Administrative Law Judge. Portions of the Respondent's proposed findings and conclusions have been incorporated into this Recommended Order.
- 3/ At the hearing the Petitioner also sought, for the first time, to litigate the scores awarded to him for his performance of the procedures itemized as 26A and 28A. The Respondent objected to the Petitioner's tardy attempts to litigate items 26A and 28A. In this regard the Respondent argued that it would be prejudiced because the Petitioner had not provided any prior notice of his intent to litigate items 26A and 28A. The Respondent's objections were sustained, and the Petitioner was precluded from presenting any evidence as to items 26A and 28A.
- 4/ The five procedures on which one examiner scored the Petitioner as successful and on which the other examiner scored him as unsuccessful were 7B, 22A, 33C, 9A, and 18B.

5/ To similar effect, see Jayeshkumar Vallabhbhai Patel, O.D. v. Department of Health, DOAH Case No. 00-5023 (Recommended Order issued February 23, 2001; Sandra D. Farhady v. Department of Health, Board of Optometry, DOAH Case No. 99-5120 (Recommended Order issued April 13, 2000); and Susan J. Summerton-Madison v. Department of Health, Board of Optometry, DOAH Case No. 97-5865 (Recommended Order issued May 22, 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.