

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILLIP JAMES HURSH,)
)
 Petitioner,)
)
 vs.) Case No. 05-2859RX
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 FLORIDA BOARD OF PROFESSIONAL)
 ENGINEERS,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to the agreement of the parties, no formal hearing was held in this case. Rather, the parties submitted the case for decision on the stipulated facts set forth in the Petitioner's Unilateral Proposed Pre-hearing Statement.

APPEARANCES

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For Respondent: Lee Ann Gustafson, Esquire
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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rules 61G15-21.009(1)(b) and (3) and 61G15-20.0015(3) are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On August 9, 2005, Phillip James Hursh filed his Petition for Administrative Determination of Validity of Existing Rules. Mr. Hursh challenges Florida Administrative Code Rules 61G15-21.009(1)(b) and (3) and 61G15-20.0015(3) on the grounds that they enlarge, modify, or contravene the specific provisions of Section 471.015(3)(b), Florida Statutes, which renders the rules invalid pursuant to Section 120.52(8)(c), Florida Statutes. A formal hearing was scheduled for September 9, 2005; however, on September 7, 2005, the parties requested, during a telephone conference, that the hearing be cancelled and the parties be allowed to submit the case on stipulated facts.

The parties filed their proposed final orders on September 28, 2005, and the Petitioner filed Petitioner's Response to Proposed Final Order on October 21, 2005. The parties' proposals have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the stipulated facts submitted by the parties and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Business and Professional Regulation, Board of Professional Engineers ("Board") is the state agency responsible for the licensure and regulation of professional engineers in Florida. §§ 471.007, 471.008, 471.013, and 471.031, Fla. Stat. (2005).¹

2. Mr. Hursh is an individual who applied for licensure by endorsement with the Board to be licensed as a professional engineer. Mr. Hursh is licensed in another state, so he applied for licensure by endorsement pursuant to Section 471.015(3)(b), Florida Statutes.

3. Mr. Hursh failed to pass the required Principles and Practice Examination, provided by the National Council of Examiners for Engineers and Surveyors ("NCEES") five times since October 1, 1992, in an effort to become licensed as an engineer in Florida. In April 2004, Mr. Hursh passed the NCEES examination in Delaware, met Delaware's other licensing criteria, and, on July 14, 2004, was issued a license to practice engineering by the State of Delaware.

4. In August 2004, Mr. Hursh filed his application for licensure by endorsement with the State of Florida and

subsequently provided all supporting documentation as requested by the Board, including a Verification of Licensure from the Delaware Association of Professional Engineers. Mr. Hursh did not provide a copy of the Delaware licensing requirements.

5. On January 19, 2005, the Application Committee of the Board denied Mr. Hursh's application, citing as the reason "5 time failure - need 12 hrs. of courses prior to endorsement." Delaware's licensing criteria was never reviewed by the Board to determine if the Delaware licensing criteria was substantially the same as Florida's licensing criteria.

6. On February 10, 2005, the Board filed a Notice of Denial of Mr. Hursh's application for licensure by endorsement, citing as the basis for the denial that Mr. Hursh had failed the examination five times and needed to meet the additional college credit requirements of Section 471.013, Florida Statutes, and Florida Administrative Code Rule 61G15.21.007.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.56(1) and (3) and 120.569, Florida Statutes.

8. The Petitioner challenges the validity of Florida Administrative Code Rules 61G15-21.009(1)(b), 61G15-20.0015(3)

and 61G15-21.009(3), pursuant to Section 120.52(8), Florida Statutes, which provides in pertinent part:

8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; . . .

* * *

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory

language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

See also § 120.536(1), Florida Statutes.

9. In interpreting the provisions in the final paragraph of Section 120.52(8) and in Section 120.56(1), which was amended for the last time in 1999, the First District Court of Appeal held in Southwest Florida Water Management District v. Save the Manatee Club, Inc., et al., 773 So. 2d 594, 599 (Fla. 1st DCA 2000):

The new law gives the agencies authority to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language that is more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable statute. There would be no need for interpretation if all details were contained in the statute itself.

It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not.

10. For purposes of this challenge to existing rules, Mr. Hursh has the burden of proving by a preponderance of the evidence that the rules are invalid. § 120.56(3)(a), Fla. Stat. Validity of Florida Administrative Code Rule 61G15-21.009(1)(b)

11. Mr. Hursh asserts that the second sentence of Florida Administrative Code Rule 61G15-21.009(1)(b) is an invalid exercise of delegated legislative authority on the grounds that the Board has exceeded its rulemaking authority; that this provision of the rule enlarges, modifies, or contravenes the provisions of Section 471.015(3), Florida Statutes; and that this provision of the rule is arbitrary and capricious. See § 120.52(8)(b), (c), and (e), Fla. Stat.

12. Florida Administrative Code Rule 61G15-21.009(1)(b), provides in pertinent part:

(1) An applicant shall be qualified for licensure by endorsement if:

* * *

(b) The applicant holds a valid license to practice engineering issued by another state or territory of the United States, provided that the criteria for issuing the license was substantially the same as the licensure criteria which existed in Florida at the time the license was issued. If, at the time the applicant was licensed by the other jurisdiction, the applicant's qualifications would have rendered him or her eligible for licensure in Florida, the applicant is qualified for licensure by endorsement.

(Emphasis added.) The Board cited Section 471.008, Florida Statutes, as the specific authority for Rule 61G15-21.009, and Section 471.015(3), Florida Statutes, as the law implemented by the rule.

13. Section 471.008, Florida Statutes, confers general rulemaking authority on the Board: "The board has authority to adopt rules pursuant to ss. 120.56(1) and 120.54 to implement provisions of this chapter or chapter 455 conferring duties upon it."

14. The specific law implemented by Florida Administrative Code Rule 61G15-21.009, Section 471.015(3), Florida Statutes, governs licensure by endorsement and provides:

(3) The board shall certify as qualified for a license by endorsement an applicant who:

a) Qualifies to take the fundamentals examination and the principles and practice examination as set forth in s. 471.013, has passed a United States national, regional, state, or territorial licensing examination that is substantially equivalent to the fundamentals examination and principles and practice examination required by s. 471.013, and has satisfied the experience requirements set forth in s. 471.013; or

(b) Holds a valid license to practice engineering issued by another state or territory of the United States, if the criteria for issuance of the license were substantially the same as the licensure criteria that existed in this state at the time the license was issued.

15. Mr. Hursh applied for licensure by endorsement pursuant to Section 471.015(3)(b), Florida Statutes, based on his having been licensed as a professional engineer in Delaware in 2004.

16. Based on the findings of fact herein, Mr. Hursh has failed to prove by a preponderance of the evidence that the second sentence of Florida Administrative Code Rule 61G15-21.009(1)(b) is an invalid exercise of delegated legislative authority as defined in Section 120.52(8), Florida Statutes. The provision in the rule that applicants licensed in another jurisdiction who meet the licensure criteria in Florida at the time they were licensed qualify for licensure by endorsement does not on its face, impose an additional restriction on licensure by endorsement.² Indeed, it would appear to provide an additional basis for licensure by endorsement when an applicant is licensed in a state in which the licensure criteria were not "substantially similar" to those in Florida at the time the applicant was licensed.³

Validity of Florida Administrative Code Rule 61G15-21.0015(3) and Florida Administrative Code Rule 61G15-21.009(3).

17. Florida Administrative Code Rule 61G15-20.0015(3), which governs applications for licensure by endorsement, provides in pertinent part: "An applicant for licensure by endorsement who has taken either the fundamentals or the

principles and practice examinations more than five (5) times after October 1, 1992 must document compliance with subsection 61G15-21.007(2), F.A.C., as a condition of eligibility for licensure by endorsement." The Board cited Sections 471.008, 471.013, and 471.015, Florida Statutes, as the specific authority for Rule 61G15-20.0015 and cited Sections 471.013 and 471.015, Florida Statutes, as the law implemented by the rule.

18. Florida Administrative Code Rule 61G15-21.009(3), which governs licensure by endorsement, provides in pertinent part: "An applicant for licensure by endorsement who has taken either the fundamentals or the principles and practice examinations more than five (5) times after October 1, 1992 must document compliance with subsection 61G15-21.007(2), F.A.C., as a condition of eligibility for licensure by endorsement." The Board cited Section 471.008, Florida Statutes, as the specific authority for Rule 61G15-20.0015 and cited Section 471.015(3), Florida Statutes, as the law implemented by the rule.

19. As noted above, Section 471.015(3), Florida Statutes, governs licensure by endorsement and states that an applicant is qualified for licensure by endorsement if he or she is licensed in another jurisdiction in which the licensing criteria was substantially the same as that in Florida at the time the license was issued. Section 471.013(1), Florida Statutes, sets forth the prerequisites which must be met before an applicant is

entitled to take the examination that must be passed in order for an applicant to qualify for licensure as professional engineer in Florida. Section 471.013(1), Florida Statutes, provides in pertinent part:

(e) Every applicant who is qualified to take the fundamentals examination or the principles and practice examination shall be allowed to take either examination three times, notwithstanding the number of times either examination has been previously failed. If an applicant fails either examination three times, the board shall require the applicant to complete additional college-level education courses as a condition of future eligibility to take that examination. . . .^[4]

20. Florida Administrative Code Rule 61G15-21.007, which is incorporated into Florida Administrative Code Rule 61G15-21.0015(3) and Florida Administrative Code Rule 61G15-21.009(3), implements Section 471.013(1)(e), Florida Statutes, and provides:

If an applicant fails three times to pass the examination, the applicant must take additional courses in order to reapply for examination. The applicant must submit to the Board of Professional Engineers transcripts for the enrollment and completion of twelve (12) college credit hours of college level courses in the applicant's area of deficiency. For applicants to take Part I of the engineer examination, such additional courses shall be undergraduate college courses in higher mathematics, basic sciences or engineering as described in paragraphs 61G15-20.007(2)(a), (b) and (d), F.A.C. For applicants to take Part II of the engineer

examination, such additional courses shall be upper level or higher courses in engineering, as defined in paragraph 61G15-20.007(2)(d), F.A.C.^[5]

21. Based on the findings of fact herein, Mr. Hursh has failed to prove by a preponderance of the evidence that Florida Administrative Code Rule 61G15-21.009(3) is an invalid exercise of delegated legislative authority as defined in Section 120.52(8), Florida Statutes. Section 471.015(3)(b), Florida Statutes, permits licensure by endorsement only if the licensure criteria of another jurisdiction was substantially the same as the criteria in Florida at the time the license was issued. As noted by both the Board and Mr. Hursh, "substantially similar" or "substantially equivalent" has been defined in the context of comparing licensing examinations to mean "that which is equal in essential and material elements." See Eason v. Department of Business & Professional Regulation, 732 So. 2d 1136, 1137 (Fla. 5th DCA 1999). This definition can appropriately be applied to the term "substantially the same," as used in reference to licensing criteria in Section 471.015(3)(b), Florida Statutes.

22. The Board may certify for licensure as a professional engineer a person who has, among other things, passed a two-part examination. See § 471.015(1), Fla. Stat. Pursuant to Section 471.013(1)(a), Florida Statutes, an applicant is not

entitled to take the examination unless he or she has an educational background specified in that section and is of good moral character. Likewise, pursuant to Section 471.013(1)(e), Florida Statutes, an applicant who has taken and failed to pass the examination three times is not entitled to take the examination unless he or she obtains additional college credit in the area of deficiency. Therefore, additional college credit is a "licensure criteria" for those persons who have failed the examination three times, or, in Mr. Hursh's case, five times.

23. Florida Administrative Code Rule 61G15-21.0015(3) and Florida Administrative Code Rule 61G15-21.009(3), do not impose an additional licensure criteria on those seeking licensure by endorsement even though the requirement that an applicant for licensure by endorsement obtain the additional college credit is identified in both rules as a "condition of eligibility for licensure by endorsement." Rather, those rules merely make it explicit that the licensing criteria of another jurisdiction will not be considered "substantially the same" as the licensing criteria in Florida if the criteria permit licensure of persons who have failed the examination three or more times without requiring that the person obtain additional college credit. Indeed, were it not for Florida Administrative Code Rule 61G15-21.0015(3) and Florida Administrative Code Rule 61G15-21.009(3), the Board could reject the application for licensure by

endorsement of applicants from states who do not require additional college credit, without more. These rules, however, allow the Board to qualify these applicants for licensure by endorsement if they provide proof that they have obtained the additional college credit specified in Florida Administrative Code Rule 61G15-21.007.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Phillip James Hursh's Petition for Administrative Determination of Validity of Existing Rules be dismissed.

DONE AND ORDERED this 5th day of January, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2006.

ENDNOTES

^{1/} All references to the Florida Statutes herein are to the 2005 edition unless otherwise indicated.

^{2/} The argument included in Mr. Hursh's Response to Proposed Final Order that the second sentence of Florida Administrative Code Rule 61G15-21.009(1)(b) commingles the alternative means of qualifying for licensure by endorsement set forth in Section 471.015(3), Florida Statutes, overlooks the distinction between Section 471.015(3)(b), Florida Statutes, which requires that an applicant currently meets certain licensing criteria, and the rule provision, which requires that an applicant meet the licensing criteria in Florida at the time the applicant was licensed in the other jurisdiction.

^{3/} In his Proposed Final Order, Mr. Hursh complains that the Board required him "to submit evidence that he met all of Florida's licensing requirements, instead of making a determination as to whether the Florida and Delaware licensure criteria were substantially the same." This constitutes a challenge to the way in which the Board applied Florida Administrative Code Rule 61G15-21.009(1)(b) to Mr. Hursh, rather than a challenge to the rule's validity pursuant to Section 120.52(8), Florida Statutes.

^{4/} Section 471.013(1)(e), Florida Statutes, was amended in 2004 to reduce from five to three the number of times an applicant could fail to pass the examination. This change is irrelevant to the present case.

^{5/} At the time relevant to this proceeding, the rule applied to persons who had failed the examination five times. The rule was amended effective February 10, 2005, to correspond with the amendment to Section 471.013(1)(e), Florida Statutes, in 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.