

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TERRY BUCKLEY, )  
)  
Petitioner, )  
)  
vs. ) Case No. 07-3370  
)  
BOARD OF PHYSICAL THERAPY )  
PRACTICE, )  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On October 11, 2007, a formal administrative hearing in this case was held by video teleconference between Tallahassee and Fort Myers, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick E. Geraghty, Esquire  
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For Respondent: Reginald D. Dixon, Esquire  
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STATEMENT OF THE ISSUE

The issue in the case is whether Terry Buckely (Petitioner) should be granted a variance or waiver pursuant to Section 120.542, Florida Statutes (2007), from the provisions of

Florida Administrative Code Rule 64B17-3.003 which limits the number of times a candidate for licensure as a physical therapist can take a national examination. The cited rule implements Section 486.051, Florida Statutes (2007).

PRELIMINARY STATEMENT

The Petitioner is an applicant for licensure as a physical therapist by endorsement. On February 16, 2007, the Petitioner filed a petition for variance from, or waiver of, Florida Administrative Code Rule 64B17-3.003, seeking to have the Board of Physical Therapy (Respondent) grant a waiver or variance from the prohibition against licensure of an applicant who failed to pass the national examination in five attempts.

On April 24, 2007, the Respondent denied the Petitioner's request to receive a waiver or variance from the restrictions set forth at Florida Administrative Code Rule 64B17-3.003.

By Petition for Hearing dated May 21, 2007, the Petitioner disputed the Respondent's decision and requested a formal hearing. The Respondent forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner testified on his own behalf and had one exhibit admitted into evidence. The Respondent presented the testimony of one witness and had two exhibits admitted into evidence. The Petitioner was granted leave to

file deposition transcripts of five additional witnesses, which were filed on November 6, 2007.

A Transcript of the hearing was filed on October 26, 2007. Both parties filed Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an applicant for licensure by endorsement as a physical therapist.

2. The Petitioner graduated in 1994 with a Bachelor's of Science degree from Youngstown State University in Youngstown, Ohio, with a 3.7 grade point average (GPA) on a 4.0 scale.

3. After receiving the bachelor's degree, the Petitioner attended Edison Community College in Fort Myers, Florida, and completed several courses including two in chemistry and two in physics with a GPA of 3.2 on a 4.0 scale.

4. The Petitioner next graduated in 2003 with a master's degree in physical therapy from Florida Gulf Coast University in Fort Myers, Florida, with a GPA of 3.3 on a 4.0 scale.

5. The Petitioner completed his college education without the provision of any special services or accommodations related to any disability or disorder.

6. After receiving the master's degree, the Petitioner sought licensure in Florida as a physical therapist and was approved to sit for the national examination.

7. In August 2003, December 2003, April 2004, and July 2004, the Petitioner took the national examination in Florida and failed on each of the four attempts.

8. The Petitioner subsequently obtained the services of Dr. Stephen P. Schengber, a licensed psychologist and clinical neuropsychologist, whose neuropsychological evaluation was admitted into evidence without objection. Dr. Schengber apparently administered a battery of tests to the Petitioner and, in relevant part, rendered a written report which included the following summary and recommendation:

Overall, the current test results are consistent with a mild visual attentional disorder, as well as a severe disorder of reading comprehension. There were also some scattered areas of neuropsychological dysfunction, but the results were quite consistent with the two main areas of dysfunction. In addition, the test results were consistent with a mild dysthymic condition.

Due to the patient's history, as well as the current results of the neuropsychological evaluation, it is my professional and clinical opinion that Mr. Buckley should be entitled to special accommodations in the administration of his licensure exam to become a licensed physical therapist. These accommodations should include the opportunity to retake the past four failures on the licensure examination, as well as the provision of extra time to complete the exam.

9. Apparently based on Dr. Schengber's recommendation, the Petitioner took the June 2005 national examination in Florida

and was provided with time and a half to complete the exam, but failed on his fifth attempt.

10. The Petitioner subsequently applied to take the national examination in Michigan, which did not impose any limitation on the number of times an applicant could sit for the examination. The Petitioner took the October 2005 examination in Michigan and was provided with time and a half to complete the exam, but failed on this sixth attempt.

11. After failing to pass the national exam in Michigan, the Petitioner applied to take the national examination in Colorado, which also imposed no limitation on the number of times an applicant could sit for the examination. The Petitioner took the May 2006 examination in Colorado and was provided with time and a half to complete the exam, but failed on this seventh attempt.

12. In August 2006, the Petitioner sat for the national exam in Colorado, was provided with time and a half to complete the exam, and passed the test on the eighth attempt.

13. After passing the examination, the Petitioner obtained licensure in Colorado, but has never practiced physical therapy in Colorado; and, shortly after becoming licensed in Colorado, the Petitioner applied for Florida licensure by endorsement.

14. At the hearing, the Respondent presented the testimony of Zohre Bahraymi, Ph.D., accepted as an expert in examination development and testing.

15. Dr. Bahraymi testified that the first score received on an examination is an accurate reflection of an applicant's entry level knowledge of the material being tested, but that "since they might have had a bad day and something happens and they did get a lower score . . . it is fair to let them retake the test once or twice." Dr. Bahraymi stated that the more often a person takes an examination, the higher a score should be as an applicant's exposure to the content of the test increased.

16. Dr. Bahraymi also testified that a person with a disability would be able to receive an accommodation, including additional time, and that she would anticipate scores to increase in the event that a person with previous exposure to the content of the test also received additional time to complete the examination.

17. The Petitioner's test scores increased on each but the fourth attempt at the examination.

18. No evidence was offered contrary to Dr. Bahraymi's testimony, and it is credited.

## CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

20. As the applicant for the variance or waiver, the Petitioner has the burden of establishing entitlement to the relief sought by a preponderance of the evidence. Dept. of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). In this case, the burden has not been met.

21. Section 120.542, Florida Statutes (2007), provides in relevant part as follows:

120.542 Variances and waivers.--

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and

with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

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(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition.

A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter. (Emphasis supplied)

22. Section 120.52, Florida Statutes (2007), provides the following relevant definitions:

(18) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

(19) "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5). (Emphasis supplied)

23. The limitation on the number of times an applicant for licensure in Florida can sit for examination is established at Section 486.051, Florida Statutes (2007), which provides as follows:

The examinations of an applicant for licensing as a physical therapist shall be in accordance with rules adopted by the board, to test the applicant's qualifications and shall include the taking of a test by the applicant. If an applicant fails to pass the examination in three attempts, the applicant shall not be eligible for reexamination unless she or he completes additional educational or training requirements prescribed by the board. An applicant who has completed the additional educational or training requirements prescribed by the board may take the examination on two more occasions. If the applicant has failed to pass the examination after five attempts, she or he is no longer eligible to take the examination. (Emphasis supplied)

24. The Respondent has no authority under the provisions of Section 120.542, Florida Statutes (2007), to grant a waiver or variance to requirements imposed by statute, even if the request for waiver or variance was otherwise warranted.

25. Section 486.081, Florida Statutes (2007), provides in relevant part as follows:

486.081 Physical therapist; issuance of license without examination to person passing examination of another authorized examining board; fee.--

(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. Any person who holds a license pursuant to this section may use the words "physical therapist" or "physiotherapist," or the letters "P.T.," in connection with her or his name or place of business to denote her or his licensure hereunder. (Emphasis supplied)

26. Florida Administrative Code Rule 64B17-3002 identifies the specifically-endorsed licensure examination and provides as follows:

(1) The licensure examination shall be the National Physical Therapy Examination (NPTE) for Physical Therapists developed by the Federation of State Boards of Physical Therapy. An applicant for licensure by examination must have obtained a passing score on the NPTE examination within the five (5) years immediately prior to the filing of the application.

(2) Applicants must obtain a passing score on the National Physical Therapy Examination for Physical Therapists developed by the

Federation of State Boards of Physical Therapy.

(3) An applicant must reapply in order to retake the examination. If an applicant wishes to take the examination for the fourth time, the applicant must submit to the Board for approval satisfactory evidence of having successfully completed the following since the last taking of the examination: successful completion of a course of study or internship designed to prepare the applicant for the physical therapy examination. An applicant who has completed these additional requirements may take the examination on two more occasions. (Emphasis supplied)

27. Florida Administrative Code Rule 64B17-3.003 (the rule to which the variance or waiver is being sought) addresses the issue of licensure by endorsement and provides as follows:

64B17-3.003 Licensure by Endorsement.  
An applicant demonstrating that he or she meets the requirements of Rule 64B17-3.001, F.A.C., may be licensed to practice physical therapy by endorsement by presenting evidence satisfactory to the Board that the applicant has active licensure in another jurisdiction and has passed an examination before a similar, lawful, authorized examining board in physical therapy in such other jurisdiction if their standards for licensure are as high as those maintained in Florida. The standard for determining whether the standards of another jurisdiction are as high as the standards in Florida shall be whether the written examination taken for licensure in such other jurisdiction by applicants meeting Florida's minimum educational qualifications was through the national physical therapy examination provider certified by the Department. An applicant who has failed to pass the National Physical Therapy

Examination for Physical Therapists by or on the fifth attempt, regardless of the jurisdiction through which the examination was taken, is precluded from licensure.  
(Emphasis supplied)

28. In this case, the evidence fails to establish that the standards for licensure in Michigan and Colorado are as high as those adopted in Florida. Although the same examination is utilized in all three states, Florida limits the number of times an applicant can sit for the examination to five.

29. The evidence establishes that an applicant's initial test score is an accurate reflection of entry level knowledge and that a second attempt is warranted to address situations where a test-taker had a "bad day." An applicant's test score is expected to increase as familiarity with test content expands. Permitting an applicant an unlimited number of attempts to pass an examination would likely result in increased passage rates and fails to establish that the standards in states permitting unlimited examination attempts are as high as those adopted in Florida. Accordingly the Florida Legislature has by statute limited the number of attempts an applicant has to pass the examination, and the Respondent has extended that limitation by rule to applicants seeking licensure by endorsement.

30. The Petitioner has specifically not challenged the validity of Florida Administrative Code Rule 64B17-3.003;

accordingly, the rule is presumed to be valid, and this Order does not address whether the rule is an invalid exercise of delegated legislative authority. Clemons v. State Risk Management Trust Fund, 870 So. 2d 881, 884 (Fla. 1st DCA 2004) (Benton, J., concurring opinion).

31. As stated at Section 120.542, Florida Statutes (2007), "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness."

32. The evidence fails to establish that the purpose of the underlying statute has been achieved by other means. The purpose of the testing requirement is presumably to require an applicant for licensure in Florida to demonstrate a basis of academic knowledge prior to licensure. The Petitioner offered the deposition testimony of five persons for whom, or with whom, he is employed, which suggest that at least in their opinions, the Petitioner is capable of acceptably providing physical therapy services to patients to the extent that the deponents have observed the Petitioner. The deposition testimony is insufficient to establish that the Petitioner has the entry level of academic knowledge which would be included on the national examination. The licensing statute does not require a

demonstration of proficiency at various types of physical therapy.

33. Finally, the Petitioner has asserted that the Florida limitation of the number of attempts to pass the exam violates federal disability law. This assertion is outside the jurisdiction of this forum and has not been addressed herein.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent enter a final order denying the Petitioner's request for variance from, or waiver of, the provisions of Florida Administrative Code Rule 64B17-3.003.

DONE AND ENTERED this 16th day of January, 2008, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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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.