

By: Rachel B.
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

2009 MAR 18 A 10:40
DIVISION OF
ADMINISTRATIVE
HEARINGS
FILED

LARISA ALONSO,
Petitioner,

vs.

DOAH Case No. 08-2241

BOARD OF MEDICINE,
DIETITIAN/NUTRITION COUNCIL,

Respondent.

_____)

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on February 6, 2009 in Tampa, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by Allen R. Grossman, Respondent was represented by Allison M. Dudley, Esquire.

Upon review of the Recommended Order, the argument of the parties and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULING ON EXCEPTIONS

The Board reviewed and considered the Exceptions to the Recommended Order and ruled as follows:

The Board hereby grants Petitioner's exception that Washington state statute is substantially equivalent to or more stringent than Florida.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.
2. The conclusions of law set forth in the Recommended Order are approved and adopted as modified by the exceptions and incorporated herein by reference.
3. The excepted and substituted conclusion of law is as or more reasonable than the rejected conclusion of law.

DISPOSITION

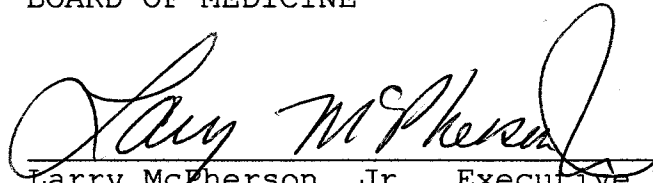
Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be REJECTED.

WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that licensure is granted by endorsement in that Ms. Alonso's education and experience meets qualification for licensure by endorsement.

DONE AND ORDERED this 13 day of MARCH, 2009.

BOARD OF MEDICINE

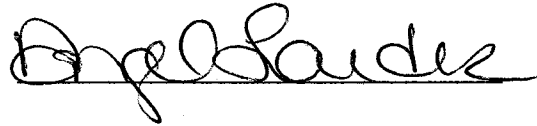

Larry McPherson, Jr., Executive Director
For Fred Bearison, M.D., Chair

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 ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND 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 THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Allen R. Grossman, 1408 N. Piedmont Way, Tallahassee, Florida 32308; to Patricia M. Hart, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Allison Dudley, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-0750 this 17 day of March, 2009.



Deputy Agency Clerk

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARISA ALONSO,)

Petitioner,)

vs.)

Case No. 08-2241)

BOARD OF MEDICINE,)
DIETITIAN/NUTRITION COUNCIL,)

Respondent.)

PETITIONER'S EXCEPTION

Comes now Petitioner, by and through her undersigned Counsel, and files this exception to the Conclusion of Law contained in paragraph 14 of the Recommended Order. As grounds for such exception, Petitioner avers:

1. Section 468.513(4), F.S., provides that an applicant is qualified for licensure by endorsement if the applicant "[h]olds a valid license to practice dietetics or nutrition issued by another state, district, or territory of the United States, if the criteria for issuance of such license are determined by the board to be substantially equivalent to or more stringent than those of this state." (e.s.)

2. The Administrative Law Judge concluded that the licensure criteria in the State of Washington was not "substantially equivalent" to the Florida criteria because "a person in Washington State can be certified as a nutritionist without meeting the requirements for certification as a dietitian if the person has an advanced academic degree."

3. The term "substantially equivalent" in the context of a licensure examination has been held to mean "that which is equal in essential and material elements." Espinoza v. Dept. of Professional Regulation, 739 So. 2d 1250, 1251 (Fla. 3rd DCA 1999).

4. The licensure criteria in Florida for a dietician requires a minimum of a baccalaureate degree. Washington State's licensure criteria provides an avenue for licensure as a nutritionist if the applicant has the qualifications for licensure as a dietitian, or has a master's degree in nutrition.

5. Petitioner has a master's degree in nutrition and immunology from the University of Texas. This is a higher level credential than that required for licensure in Florida or Washington State.

6. Florida does not have a separate licensure as a nutritionist. The Administrative Law Judge correctly concluded that the Washington State criteria for licensure as a dietician was substantially equivalent. However, because Washington State also has an alternative criteria for licensure that is more stringent, since it requires an advanced degree, the ALJ erroneously concluded that the licensure criteria was not substantially the same. The Washington State criteria is more stringent than the comparable Florida criteria, and thus Petitioner is indeed eligible for licensure by endorsement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand delivered to Sam Powers, Agency Clerk, Department of Health, and that copies were e-mailed to Larry

McPherson, Executive Director, Board of Medicine and Edward Tellechea, Board
Counsel, this 5 day of January, 2009.



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On behalf of Petitioner

FILED
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CLERK *Rachel Brooks*
DATE *1-21-09*

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARISA ALONSO,

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DOAH CASE NO. 08-2241

BOARD OF MEDICINE,
DIETITIAN/NUTRITION COUNCIL

Respondent.

**RESPONDENT'S RESPONSE TO
PETITIONER'S EXCEPTION TO THE RECOMMENDED ORDER**

COMES NOW Respondent, Board of Medicine, Dietitian/Nutrition Council, and submits its Response to Petitioner's Exception to the Recommended Order Issued by the Administrative Law Judge (ALJ), and in support thereof, states as follows:

Preliminary Statement

Section 120.57(1), Florida Statutes, clarifies the reviewing authority of a Board under the Administrative Procedure Act. Under the law, the Board may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has

substantive jurisdiction. The Board of Medicine is vested by the laws of Florida with the authority to interpret and apply such laws, regulations and policies as are applicable to programs within the Board's regulatory sphere.

If the Board wishes to reject or modify a finding of fact, Section 120.57(1)(l), Florida Statutes, requires that the agency make a determination from a review of the entire record and state with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceeding on which the findings were based did not comply with essential requirements of law. Findings of fact may only be overturned by the Board if they are not supported by competent, substantial evidence in the record.

In regard to the conclusions of law, the Board may reject or modify the conclusions of law to reflect a more reasonable interpretation of the applicable laws and rules. However, the Board must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule *and* make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Further, rejection or

modification of conclusions of law may not form the basis for rejection or modification of findings of fact. See §120.57(1)(l), Fla. Stat. (2008).

Petitioner's Exception

1. Petitioner takes exception to the ALJ's conclusion in Paragraph 14 that the requirement for licensure as a "certified nutritionist" in the state of Washington is not substantially equivalent to the requirement for licensure in the state of Florida. Petitioner argues that the requirements for licensure in the state of Washington are more stringent than the requirements for licensure in Florida because a person could become licensed as a "certified nutritionist" in Washington by providing evidence of a postbaccalaureate degree in certain enumerated areas.

2. The Board is limited in its review to the record presented at the hearing. Petitioner failed to present any evidence at the hearing that would support the argument that the licensure requirements in Washington are more stringent than the licensure requirements in Florida. Because there are no facts in evidence to support Petitioner's assertion, this exception should be denied.

3. Section 468.509, Florida Statutes (2007) was reviewed by the ALJ in making her determination. Section 469.509, F.S. describes the

requirements for licensure as dietician/nutritionist in Florida and states in pertinent part:

(1) Any person desiring to be licensed as a dietitian/nutritionist shall apply to the agency to take the licensure examination.

(2) The agency shall examine any applicant who the board certifies has completed the application form and remitted the application and examination fees specified in s. 468.508 and who:

(a)1. Possesses a baccalaureate or postbaccalaureate degree with a major course of study in human nutrition, food and nutrition, dietetics, or food management, or an equivalent major course of study, from a school or program accredited, at the time of the applicant's graduation, by the appropriate accrediting agency recognized by the Commission on Recognition of Postsecondary Accreditation and the United States Department of Education; and

2. Has completed a preprofessional experience component of not less than 900 hours or has education or experience determined to be equivalent by the board; . . .

(3) The board shall waive the examination requirement for an applicant who presents evidence satisfactory to the board that the applicant is a registered dietitian.

(4) The agency shall license as a dietitian/nutritionist any applicant who has remitted the initial licensure fee and has passed the examination in accordance with this section.

4. Under Section 468.509, Florida Statutes (2007), all applicants for a dietitian/nutritionist license, regardless of whether they have a baccalaureate degree or post-baccalaureate degree, must take both a

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licensure examination and complete nine hundred hours of preprofessional experience. However, in the state of Washington, an applicant may become licensed as a "certified nutritionist" by obtaining either a master's degree or doctorate degree in certain enumerated areas. An applicant for a "certified nutritionist" license in Washington could avoid the preprofessional experience and examination requirements by holding either a master's degree or doctorate degree; whereas in Florida, that would not be possible. Therefore, the licensure requirements for a "certified nutritionist" in the state of Washington are not substantially equivalent or *more stringent* than the licensure requirements for a dietitian/nutritionist in the state of Florida. In actuality, the requirements in Florida are more stringent than those in Washington because the state of Florida requires more of an applicant than mere satisfaction of the educational requirement.

5. Although the ALJ labeled the finding in Paragraph 14 as a conclusion of law, that conclusion is arguably a finding of fact which should not be overturned absent a showing that the finding was not based on competent, substantial evidence. The courts have held that "the mere fact that what is essentially a factual determination is labeled a conclusion of

law, whether labeled by the hearing officer or the agency, does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law." Pillsbury v. State, Dept. of Health and Rehabilitative Services, 744 So.2d 1040, 1042 (Fla. 2d DCA 1999); Kinney v. Department of State, Div. of Licensing, 501 So.2d 129 (Fla. 5th DCA 1987).

In reaching the conclusion in Paragraph 14, the ALJ weighed the evidence and compared the requirements for licensure as a dietician/nutritionist in the state of Florida with the requirements for licensure as a "certified nutritionist" in the state of Washington. The ALJ's conclusion that that the licensure requirement in the state of Washington is not substantially equivalent to the licensure requirement in Florida was based on competent, substantial evidence and should not be overturned, absent a showing otherwise.

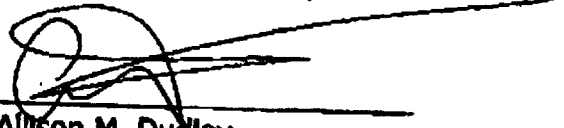
6. If the conclusion in Paragraph 14 of the Recommended Order is considered a conclusion of law, the standard of review is different. The standard of review as to the ALJ's conclusion of law is whether the ALJ's conclusion is a reasonable interpretation of the applicable laws and rules. Because Florida would require an applicant with a postbaccalaureate

degree to also pass an examination and complete nine hundred hours of preprofessional experience prior to licensure, it is a reasonable conclusion that the requirements in Florida are not substantially equivalent to those in the state of Washington, which only requires a master's or doctoral degree for licensure as a "certified nutritionist".

The Recommended Order demonstrates that the ALJ considered the totality of the evidence in reaching her conclusions and there is not a more reasonable interpretation of the applicable laws and rules. The standardized examination and nine hundred hours of preprofessional experience are important and essential to ensure that those licensed dietitians/nutritionists in the state of Florida meet minimum standards for competency prior to licensure. Therefore, Petitioner's exception should be denied.

WHEREFORE, Respondent respectfully requests that the Board deny Petitioner's exception and that the Recommended Order be adopted in its entirety.

Respectfully submitted,

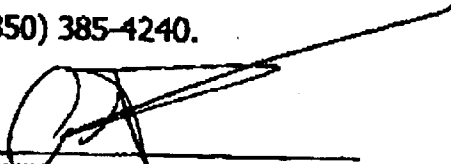

Allison M. Dudley
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TOTAL P. 08

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Counsel for Dietitian/Nutrition Council

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Respondent's Response to Petitioner's Exception to the Recommended Order has been furnished by facsimile this 15th day of January 2009, to the Board of Medicine; the Dietitian/Nutrition Council; Petitioner's counsel, Edwin A. Bayó at Metzger, Grossman, Furlow and Bayó, 1408 N. Piedmont Way, Tallahassee, Florida 32308, (850) 385-4240.



Allison M. Dudley