

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUCY ELLEN MOLLAN,)
)
 Petitioner,)
)
 vs.) Case No. 12-0135
)
 DEPARTMENT OF HEALTH, BOARD OF)
 MEDICINE, DIETETICS AND)
 NUTRITION PRACTICE COUNCIL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on May 29, 2012, via video teleconference with sites in Fort Myers and Tallahassee, Florida. The parties appeared before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Derek B. Brett, Esquire
The Tate Law Firm, PLLC
1301 West Colonial Drive
Orlando, Florida 32804

For Respondent: Lynette Norr, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for licensure by examination as a dietitian/nutritionist should be granted or

denied for the reasons stated in the Corrected Notice of Intent to Deny^{1/} (CNOI).

PRELIMINARY STATEMENT

On December 16, 2011, the Department of Health, Board of Medicine, Dietetics and Nutrition Practice Council (Council), notified Petitioner, Lucy Ellen Mollan (Ms. Mollan), that her application for licensure by examination was denied. The Council stated that her "Bachelor's degree in health and wellness - nutrition" was "not equivalent to a degree in human nutrition, food and nutrition, dietetics, or food management, because it lacks sufficient courses including medical nutrition therapy." Ms. Mollan timely submitted a "Petition for Formal Administrative Hearing (Premised Upon Respondent's "Corrected" Notice of Denial)" (Petition), wherein she requested:

that the hearing officer issue a recommended order finding that (1) she is entitled to the license in question; (2) the Respondent either exceeded its legal duties and/or erroneously denied the Petitioner the requested licensenot [sic] in compliance; (3) directing the Respondent to issue the license to the Petitioner; and (4) directing the Respondent to reimburse the Petitioner for her incurred, reasonable attorneys' fees and costs resulting from the instant proceedings.

On January 11, 2012, the Council referred the Petition to DOAH for the assignment of an Administrative Law Judge. Following one continuance, the hearing was held on May 29, 2012.

At the final hearing, the parties offered two joint exhibits, which were received into evidence. Ms. Mollan testified in her own behalf, and Petitioner's Exhibit 1 was received into evidence. The Council presented the testimony of Ms. Mollan, Ivy Shivers, and Jodee Dorsey, Ph.D. Respondent's Exhibits 1 through 5 were received into evidence. At the Council's request, and with no objection from Ms. Mollan, official recognition was taken of chapter 468, Part X (Dietetics and Nutrition Practice), Florida Statutes (2011),^{2/} and Florida Administrative Code Chapters 64B8-40 and 64B8-42.

The one-volume Transcript was filed with DOAH on June 18, 2012. The parties agreed to file their proposed recommended order (PRO) within ten days of the filing of the Transcript. Prior to the PRO filing day, Petitioner's Unopposed Motion for Enlargement of Time for Filing of Proposed Recommended Order (Motion) was filed. The Motion was granted, and both parties timely submitted their PROs. Each PRO has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Council, which serves under the supervision of the Board of Medicine, is the entity responsible for certifying persons for licensure by examination as a dietitian/nutritionist. § 468.509, Fla. Stat.; Fla. Admin. Code R. 64B8-40.003(1)(a).

2. The requirements for licensure by examination as a dietitian/nutritionist are found in section 468.509^{3/} and rule 64B8-42.002.^{4/}

3. Ivy Shivers has worked for the Department of Health for over 24 years in a variety of positions. Since 1997, she has worked in the Medical Quality Assurance (MQA) section. She is currently a regulatory supervisor consultant. Ms. Shivers supervises two MQA employees and has oversight of the administrative processes for the Council, including the application process, Council agenda preparation, licensure maintenance, continuing education activities, and related issues. Neither she nor the two MQA employees she supervises have any authority over any application other than to ensure that the Council has a complete application for its review, consideration, and determination. Ms. Mollan's application was handled in a routine fashion. Once the noted deficiencies were resolved, and Ms. Mollan's application was complete, it was submitted to the Council for its review and determination. Her testimony was credible.

4. Jodee Dorsey, Ph.D., has an extensive educational and professional background in dietetics and nutrition. Dr. Dorsey is a Florida-licensed dietitian/nutritionist, and she is also a registered dietitian. She served on the Council from 2004 through 2009. While on the Council, Dr. Dorsey performed those

duties as set forth in the statutes and rules governing the Council. Those duties included reviewing applicants (and applications) for licensure, reviewing requests for temporary permits, establishing fees, adopting rules as necessary,^{5/} and other responsibilities. Dr. Dorsey was accepted as an expert in dietetics and nutrition, including the educational requirements for licensure in Florida.

5. Several years ago, Ms. Mollan attended Florida Southern College^{6/} in Lakeland, Florida. Thereafter Ms. Mollan obtained an associate of arts (AA) degree from Valencia Community College, in Orlando, Florida.^{7/} Her AA was in general education and business courses. In 2008, Ms. Mollan transferred her AA (108 credits) to and enrolled in Kaplan University, Online (KU). Ms. Mollan enrolled in the KU program "XVI Advanced Start Bachelor of Science in Health and Wellness - Nutrition." The KU course catalog reflected that two of the prerequisite requirements for the program included anatomy and physiology I and II. Ms. Mollan did not complete either course at her undergraduate programs, nor did she complete either course while at KU.

6. Ms. Mollan chose KU based on its representation that, once she was finished, she "would have a bachelor's degree in Health and Wellness in their health science college and that's what" she was pursuing.

7. On January 26, 2010, Ms. Mollan earned a "Bachelor of Science" (Degree) from KU.

8. On August 31, 2011, the Council received Ms. Mollan's application for licensure by examination. Her initial application failed to contain all the required information. The Council staff requested the missing information from Ms. Mollan. Once the additional information was received, Ms. Mollan's completed application was placed on the Council agenda.

9. The KU course descriptions provided did not reflect a major course of study in human nutrition, food and nutrition, dietetics, or food management, or an equivalent major course of study.^{8/} The KU courses did not specify the requisite dietary or nutritional elements for courses to be deemed equivalent.

10. When asked about specific KU courses she had taken, Ms. Mollan's testimony was frequently couched in phrases of "I believe" it met the requirements, or it was "my understanding" that the courses were aimed specifically at becoming a dietician. Her persuasiveness was diminished greatly by the multiple uses of these equivocal terms. Further, based on her description of one specific course, HW 499 (Bachelors Capstone in Health and Wellness), Ms. Mollan confirmed that she did not make any progress towards any new nutritional or dietary educational goals or objectives in that particular class, but rather "they just took all of the stuff that we had done over the years and put it

all together in a neat little package and said this is everything that you've accomplished." Ms. Mollan's course description does not match the course description that was provided in the KU catalog.

11. KU measures its course credits in quarter hours. It was established that, although Ms. Mollan had 40 quarter hours of credit in her major program, not all of those courses met the "major course in human nutrition, food and nutrition, dietetics, or food management, or an equivalent major course study" requirement. Additionally, when converted to semester hours, she only had 26.67 semester hours of the requisite course of study. Thus, Ms. Mollan failed to obtain the requisite semester hours or equivalent major course of study hours.

12. At the October 28, 2011, general meeting, the Council was to make a "review of her [Ms. Mollan's] education and experience." Based on that review, the Council unanimously voted to deny the application for licensure by examination "on the basis the course of study was not deemed equivalent as specified in the Section 468.509, Florida Statutes."

13. The degree Ms. Mollan obtained from KU does not reflect a baccalaureate degree with a major course of study in human nutrition, food and nutrition, dietetics, or food management, or an equivalent major course of study.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

15. Ms. Mollan has applied to the Council for licensure by examination to practice as a dietitian/nutritionist. As the applicant for a new license by examination, Ms. Mollan has the burden of presenting evidence of her fitness for licensure.

Dep't of Banking & Fin. v. Osborne Stern, 670 So. 2d 932, 934 (Fla. 1996). If Ms. Mollan presented evidence supporting her fitness for licensure by examination, the burden of going forward with evidence would shift to the Council to show any violation of statutes or rules supporting denial. However, the ultimate burden of persuasion remains upon Ms. Mollan, the applicant. Id.

16. Section 468.509 sets out the requirements for licensure by examination as a dietitian/nutritionist and provides 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 . . . 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;^[9/1]

17. Rule 64B8-42.002(1)(a)1., in pertinent part, provides:

(1) Every applicant for certification by examination shall file the Application for Dietitian/Nutritionist Licensure, DOH Form DH-MQA 1161, ND APP, Rev. 10/2009, which can be accessed at www.doh.state.fl.us/mqa, and demonstrate to the Council that he meets one of the following:

(a)1. Has a baccalaureate or post baccalaureate degree with a major in human nutrition, food and nutrition, dietetics, food management or equivalent major as determined by the Council from a school or program accredited by the appropriate accrediting agency recognized by the Council on Post-secondary Accreditation or its successor and the United States Department of Education

18. Rule 64B8-42.002(2) provides:

(2) An equivalent major as mentioned in subparagraph 64B8-42.002(1)(a)1., F.A.C., shall be a course of study specially designed to prepare an individual to integrate and apply principles of nutrition under varying conditions of health, social, physical, psychological, and economic status to the appropriate care, nourishment and education of individuals or groups throughout the life cycle. Any major must include at least thirty semester hours covering human

nutrition, nutrition in health and disease, nutrition education and counseling, food science, nutrition in the community, and administration of food service or nutrition programs.

19. Based on the Findings of Fact above, Ms. Mollan failed to prove by a preponderance of the evidence that the KU degree contained a major course of study in human nutrition, food and nutrition, dietetics or food management, or an equivalent major course of study. Ms. Mollan failed to provide persuasive evidence that she met the statutorily-required education.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Medicine, Dietetics and Nutrition Practice Council, enter a final order denying Ms. Mollan's application for licensure by examination as a dietitian/nutritionist in Florida.

DONE AND ENTERED this 16th day of July, 2012, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2012.

ENDNOTES

^{1/} A Notice of Intent to Deny was issued on November 21, 2011, based on the October 28, 2011, meeting of the Council. There was an error in that document, and the CNOI was issued on December 16, 2011. This case proceeded to hearing on the CNOI.

^{2/} References to Florida Statutes are to Florida Statutes (2011), unless otherwise indicated.

^{3/} It is noted that section 468.509 has not been amended by the Florida Legislature since 1996.

^{4/} On January 26, 2010, this rule was amended solely as to the date of a revision to the "Application for Dietitian/Nutritionist Licensure, DOH Form DH-MQA 1161, ND APP, Rev. 10/2009 (~~12/2008~~)."

^{5/} According to rule 64B8-40.003(2), the Council proposes rules which relate to dietetics and nutrition, and "make[s] recommendations to the Board [of Medicine] as to the appropriate action to be taken."

^{6/} The Florida Southern College transcript reflects 5.00 credits earned in an elective 300 level course, 3.00 credits earned in an elective 100 level course, 5.00 credits earned in a humanities elective course, and 5.00 credits earned in a social science elective course.

^{7/} Ms. Mollan testified she "took courses" from Appalachian State University, but she did not provide any specific testimony about or transcripts of courses taken there.

^{8/} Dr. Dorsey testified that the KU degree does not contain a science-based curriculum including organic chemistry, biochemistry, or biology; however, those requirements are not explicitly set forth in section 468.509. Rule 64B8-42.002 alludes to a science-based curriculum.

^{9/} Ms. Mollan does not have a foreign degree; thus, that section of the statute is not applicable and will not be addressed.

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.