

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RUTH PREVOR, PH.D.,

Petitioner,

vs.

Case No. 13-3520

DEPARTMENT OF HEALTH, BOARD OF
PSYCHOLOGY,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing on December 11, 2013, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Rachel W. Clark, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, Ruth Prevor, Ph.D. ("Dr. Prevor"), should be granted a variance or waiver from Florida Administrative Code Rule 64B19-11.0035.

PRELIMINARY STATEMENT

On March 22, 2013, Dr. Prevor filed a petition with the Department of Health, Board of Psychology, requesting a variance or waiver from rule 64B19-11.0035 ("petition"). On August 14, 2013, the Department of Health, Board of Psychology ("Board"), entered an Order denying the petition.

Dr. Prevor timely requested an administrative hearing to challenge the Board's denial of her petition. Subsequently, the Board referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing.

On September 16, 2013, an Initial Order was sent to the parties requesting that they provide the undersigned with mutually acceptable dates and a suggested geographic location for the final hearing. The parties did not timely respond to the Initial Order. Accordingly, on September 24, 2013, the undersigned entered an Order setting the final hearing for December 11, 2013, in Miami, Florida.

On September 24, 2013, the Board filed an agreed Motion to Change Venue to Tallahassee, Florida. On September 25, 2013, the undersigned entered an Order granting the Board's motion, and the final hearing was scheduled for December 11, 2013, in Tallahassee, Florida.

At the hearing, Dr. Prevor testified on her own behalf and offered composite Exhibits 1 through 3, all of which were received into evidence. The Board presented no additional witnesses or exhibits.

The final hearing Transcript was filed on December 31, 2013. At the hearing, the undersigned granted the Board's unopposed request that the parties' proposed recommended orders be due 15 days from the date the Transcript was filed. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Dr. Prevor graduated with a Ph.D. in psychology in 1988 from Carlos Albizu University (formerly known as Caribbean Center for Advanced Studies) in Puerto Rico.^{1/}

2. At the time Dr. Prevor was enrolled and graduated from Carlos Albizu University, the psychology doctoral program was not accredited by the American Psychological Association ("APA"). The psychology doctoral program was not accredited by the APA until 1994, approximately six years after Dr. Prevor's graduation.

3. Dr. Prevor received a license to practice psychology in Puerto Rico in 1985. For over 25 years after becoming licensed in Puerto Rico, Dr. Prevor practiced psychology in Puerto Rico.

4. Approximately two years ago, Dr. Prevor moved to the United States, intending to obtain licensure as a psychologist in Florida, and practice psychology in Florida.

5. The Board is the state agency charged with the duty of licensing psychologists in the state of Florida, pursuant to chapter 490, Florida Statutes.

6. A person may apply to the Board to be licensed as a psychologist through various methods, including: a) licensure by examination; b) licensure by endorsement; and c) licensure by diplomate status. The Board considers each application for licensure on an individual basis.

7. On March 20, 2012, Dr. Prevor submitted an application to the Board for licensure as a psychologist by endorsement, only. At no time has Dr. Prevor applied to be licensed by examination or diplomate status. Dr. Prevor applied for licensure by endorsement through two endorsement methods: endorsement by licensure in another state, and endorsement of 20 years' experience.

8. In her application for licensure by endorsement, Dr. Prevor was specifically asked: "Did you graduate from a doctoral program which was accredited by the American Psychological Association (APA) at the time you were enrolled and subsequently graduated?" Following the question were two boxes marked "YES," and "NO." Dr. Prevor checked the box marked "NO,"

acknowledging that she had not graduated from a doctoral program which was accredited by the APA at the time she was enrolled and graduated.

9. Dr. Prevor's application for licensure by endorsement was initially reviewed by the Board's staff. Subsequently, Dr. Prevor was notified that her application would be considered at the Board's Credentials Committee meeting on July 20, 2012.

10. Prior to the July 20, 2012, meeting, Dr. Prevor was aware that the Board was concerned about her application. Importantly, the Board was concerned that Dr. Prevor's doctoral program did not meet the minimum educational requirements set forth by statute because her doctoral program was not accredited by the APA at the time she was enrolled and graduated.

11. In an effort to address this concern, Dr. Prevor solicited a "comparability study" from Jose Pons, Ph.D., Professor and Director of an APA accredited Psy.D. program at Ponce School of Medicine and Health Science in Puerto Rico. On June 21, 2012, Dr. Pons submitted a letter to the Board on behalf of Dr. Prevor, purporting to demonstrate that the doctoral program Dr. Prevor was enrolled in and graduated from in 1988 was "comparable" or "substantially equivalent" to an APA accredited program.

12. The Board refused to accept the "comparability study," and instead, offered to allow Dr. Prevor to withdraw her

application for licensure by endorsement. Dr. Prevor refused the Board's offer.

13. Instead, Dr. Prevor requested that her application for licensure by endorsement be held by the Board in abeyance pending the outcome of this proceeding. The Board agreed to this request and, as of the date of the final hearing, no formal decision had been made by the Board on Dr. Prevor's application for licensure by endorsement.

14. Dr. Prevor's primary contention is that the Board should have accepted the "comparability study" submitted by Dr. Pons. According to Dr. Prevor, the Board accepted "comparability studies" from other applicants prior to an October 2011 amendment to rule 64B19-11.0035, which took language allowing for "comparability studies" "out of the rule." According to Dr. Prevor, the underlying purpose of section 490.006, Florida Statutes, which governs licensure by endorsement, would be met by requiring the Board to accept her "comparability study," and the Board's application of the current rule to her circumstances would violate principles of fairness or impose a substantial hardship. Therefore, Dr. Prevor asserts she is entitled to a variance from the current rule 64B19-11.0035.

15. In denying the petition, the Board relied on sections 490.006 and 490.003, Florida Statutes, which contain the minimum educational requirements for licensure by endorsement. These

statutes are clear in requiring that a doctoral degree be awarded from an accredited institution and from an accredited program at the time of enrollment and graduation. Section 490.006 provides as follows:

490.006 Licensure by endorsement.-

(1) The department shall license a person as a psychologist or school psychologist who, upon applying to the department and remitting the appropriate fee, demonstrates to the department or, in the case of psychologists, to the board that the applicant:

* * *

(a) Holds a valid license or certificate in another state to practice psychology or school psychology, as applicable, provided that, when the applicant secured such license or certificate, the requirements were substantially equivalent to or more stringent than those set forth in this chapter at that time; and, if no Florida law existed at that time, then the requirements in the other state must have been substantially equivalent to or more stringent than those set forth in this chapter at the present time;

(b) Is a diplomate in good standing with the American Board of Professional Psychology, Inc.; or

(c) Possesses a doctoral degree in psychology as described in s. 490.003 and has at least 20 years of experience as a licensed psychologist in any jurisdiction or territory of the United States within 25 years preceding the date of application.

16. Section 490.003(3)(b), provides, in pertinent part, as follows:

(b) Effective July 1, 1999, "doctoral-level psychological education" and "doctoral degree in psychology" mean a Psy.D., an Ed.D. in psychology, or a Ph.D. in psychology from:

1. An educational institution which, at the time the applicant was enrolled and graduated, had institutional accreditation from an agency recognized and approved by the United States Department of Education or was recognized as a member in good standing with the Association of Universities and Colleges of Canada; and

2. A psychology program within that educational institution which, at the time the applicant was enrolled and graduated, had programmatic accreditation from an agency recognized and approved by the United States Department of Education.

17. In Dr. Prevor's Proposed Recommended Order, she concedes that the definition of "doctoral degree in psychology" in section 490.003(3)(b), applies equally to all provisions of section 490.006.

18. The evidence presented at the final hearing established that Dr. Prevor does not possess the minimum statutory qualifications to be licensed in Florida by endorsement pursuant to section 490.006, because at the time she was enrolled and graduated with her Ph.D. in 1988, the doctoral program was not accredited by the APA.

19. Dr. Prevor failed to prove that she is entitled to a variance or waiver from rule 64B19-11.0035, because she did not establish that the purpose of the underlying statute, section 490.006, would be met were she to be granted a variance or waiver from the rule, and that the Board's application of the current rule to her circumstances would violate the principles of fairness or impose a substantial hardship.

20. The purpose of the underlying statute governing licensure by endorsement, section 490.006, would not be met if Dr. Prevor were to be granted a variance or waiver from the rule, because Dr. Prevor does not meet the minimum educational requirements of the statute to be licensed as a psychologist by endorsement.

21. The undersigned rejects Dr. Prevor's contention that the underlying purpose of the statute would be achieved by the Board's acceptance of the "comparability study."

22. The statute is clear in requiring that a doctoral degree be awarded from an accredited institution and from an accredited program at the time of enrollment and graduation. Nothing in sections 490.006 or 490.003 allow for the Board to accept a "comparability study" in lieu of an applicant's satisfaction of the statutory minimum educational requirements.

23. Allowing the Board to accept the "comparability study" would run afoul of the statutory requirement that the applicant

must have been enrolled and graduated from a doctoral program which, at the time, was accredited by the APA. No statutory provision exists allowing for a doctoral degree to meet the educational requirements through a "comparability study" or accreditation of the program at a later time.

24. The undersigned also rejects Dr. Prevor's contention that the application of the current rule to her circumstances would violate principles of fairness or impose a substantial hardship. Dr. Prevor cannot obtain a variance or waiver from the rule because she cannot meet the minimum educational requirements established by statute. In other words, Dr. Prevor cannot overcome her failure to satisfy the minimum statutory educational requirements by seeking a variance or waiver from a rule.

25. Be that as it may, the rule, in its current and prior versions, applies to licensure by examination, not licensure by endorsement. No sufficient factual basis was provided by Dr. Prevor for a variance or waiver from a rule governing licensure by examination, which on its face, does not apply to an application for licensure by endorsement.^{2/}

26. The undersigned rejects Dr. Prevor's contention that because the Board may have accepted "comparability studies" under the old rule prior to October 2011 for other persons, (and particularly one person who received his doctoral degree in psychology in 1988 from Carlos Albizu University), that

Dr. Prevor is therefore entitled to a variance from the current rule. This argument fails for two fundamental reasons.

27. First, the rule, in its prior or current versions, does not create an exception to the statutory requirement that the doctoral program must have been APA accredited at the time of enrollment and graduation. Thus, if the Board accepted "comparability studies" under the old rule, it did so in violation of the statute.

28. Secondly, Dr. Prevor did not provide persuasive evidence that the other persons are similarly situated to her. Many of the other persons had licenses from other states (not a territory such as Puerto Rico), and submitted their applications under different methods of licensure. Furthermore, if any "comparability studies" were accepted by the Board, they were accepted prior to the effective date of the October 2011 amendment to the rule. Dr. Prevor's argument is premised on an old rule, which is no longer in effect.^{3/}

29. Finally, Dr. Prevor failed to prove that the application of the current rule to her circumstances would violate principles of fairness or impose a substantial hardship, because she may have the option of pursuing alternative pathways to licensure as a psychologist in Florida.^{4/}

CONCLUSIONS OF LAW

30. DOAH has jurisdiction of the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

31. Section 120.542(2), provides as follows:

120.542 Variance 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.

32. As the party seeking the variance or waiver, Dr. Prevor has the burden of establishing entitlement to the relief sought by a preponderance of the evidence. Dept. of Banking and Fin., Div. of Sec. and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

33. The Board lacks the authority to grant a variance or waiver from its governing statutes. § 120.542(1), Fla. Stat.

34. As detailed in the findings of fact contained herein, Dr. Prevor does not possess the minimum statutory qualifications to be licensed in Florida by endorsement pursuant to section 490.006, because at the time she was enrolled and graduated with her Ph.D. in 1988, the doctoral program was not accredited by the APA. The Board has no authority under the provisions of section

120.542, Florida Statutes, to grant a variance or waiver to the educational requirements imposed by statute.

35. The purpose of the underlying statute, section 490.006, would not be met if Dr. Prevor were to be granted a variance or waiver from the rule, because Dr. Prevor does not meet the minimum educational requirements of the statute to be licensed as a psychologist by endorsement.

36. For these same reasons, the Board's application of the current rule to her circumstances would not violate principles of fairness or impose a substantial hardship. Furthermore, the rule, in its current and prior versions, applies to licensure by examination, not licensure by endorsement. Finally, Dr. Prevor may have the option of pursuing alternative pathways to licensure as a psychologist in Florida.

37. It is therefore concluded that because the Board cannot waive statutory requirements, and Dr. Prevor failed to establish that the purpose of the underlying statute, section 490.006, would be met were she to be granted a variance or waiver from the rule, and that the Board's application of the current rule to her circumstances would violate the principles of fairness or would impose a substantial hardship, she is not entitled to a variance or waiver from rule 64B19-11.0035.^{5/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order dismissing the Petition for Variance From or Waiver of Rule 64B19-11.0035, Florida Administrative Code.

DONE AND ENTERED this 28th day of January, 2014, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of January, 2014.

ENDNOTES

^{1/} Puerto Rico is not a state within the United States. Puerto Rico is a territory of the United States.

^{2/} The current rule which is the subject of this proceeding was amended in October 2011, and provides as follows:

**64B19-11.0035 Licensure by Examination:
Proof Satisfactory to the Board for the
Purpose of Determining Eligibility for
Examination.**

(1) The following proof is satisfactory to the Board for the purpose of showing that the

applicant has received a Ph.D. in Psychology, a Psy.D., or an Ed.D in Psychology from an institution of higher learning recognized and approved by the U.S. States Department of Education or recognized as a member in good standing with the Association of Universities and Colleges of Canada: a true copy of the applicant's transcript confirming same and sent directly to the Board from an institution of higher learning accredited by a regional accrediting agency recognized and approved by the U.S. Department of Education or the Association of Universities and Colleges of Canada.

(2) The following proof is satisfactory to the Board for the purpose of showing that the applicant's degree obtained in the United States or Canada was obtained from a psychology program accredited by a programmatic accrediting agency recognized and approved by the U.S. Department of Education: a true copy of the applicant's transcript confirming same from a doctoral psychology program accredited by an accrediting agency recognized and approved by the United States Department of Education.

(3) The following proof is satisfactory to the Board for the purpose of showing that the applicant's degree obtained outside of the United States or Canada was equivalent to a Ph.D. in psychology, a Psy.D., or an Ed.D. in psychology and was obtained from a program equivalent to a program accredited by a programmatic accrediting agency recognized and approved by the U.S. Department of Education: an original, signed letter on official letterhead confirming same and sent directly to the Board from the director of a doctoral psychology program accredited by the accrediting agency recognized and approved by the United States Department of Education. The letter shall enumerate the exact documents that were reviewed in determining comparability or augmentation. The Board shall also require the validation of degree

and internship equivalence performed by a credentials' evaluation service acceptable to the Board.

The previous version of rule 64B19-11.0035, "Licensure by Examination: Proof Satisfactory to the Board for the Purpose of Determining Eligibility for Examination," stated in pertinent part:

(4) The following proof is satisfactory to the Board for the purpose of showing that the applicant's degree obtained in the United States or Canada was obtained from a program comparable to a program accredited by a programmatic accrediting agency recognized and approved by the U.S. Department of Education: an original, signed letter on official letterhead confirming same and sent directly to the Board from the director of a doctoral psychology program accredited by the accrediting agency recognized and approved by the United States Department of Education, provided that the director has not had a relationship with the previously unaccredited institution from which the applicant received a degree that might appear to create a conflict of interest. The letter shall enumerate the exact documents that were reviewed in determining comparability. This letter also shall verify and describe how the applicant's program met all of the criteria set forth in subsection (5).

^{3/} Dr. Prevor's application is governed by the law in effect at the time of the decision. Lavernia v. Dep't of Prof. Reg., 616 So. 2d 53 (Fla. 1st DCA 1993).

^{4/} The undersigned has not reached any issue of whether Dr. Prevor may, in fact, be entitled to licensure by other means as that issue is not presently before the undersigned.

^{5/} Dr. Prevor's contention that she should be "grandfathered" into licensure by endorsement status is without merit. In Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992), a case relied on by Dr. Prevor, the Eleventh Circuit rejected the plaintiffs' argument for grandfathering status, recognizing that grandfathering has been allowed by some courts only where a state seeks to regulate a "profession for the *first time*." Id. at

1580. (emphasis in original). The court recognized that the regulation of psychology in Florida was not new, stating: "The history of licensing and educational requirements in Florida distinguishes this case from those in which a state has regulated a profession for the first time." Id. Notably, among the cases distinguished by the Abramson court were Berger v. Board of Psychologist Examiners, 521 F.2d 1056 (D.C. Cir. 1975), and Taylor v. Hayes, 264 N.E. 2d 814 (Ill. Ct. App. 1970), both of which are also relied on by Dr. Prevor. Finally, Dr. Prevor's reliance on James Newberry, Jr. v. Board of Orthotists and Prosthetists, Case No. 98-1186RE (Fla. DOAH May 28, 1998), is also misplaced. Newberry involved a challenge to an emergency rule, and a statute providing for a grandfathering period of approval of eight years during which time the petitioner was practicing in the field of orthotics in Florida.

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.