

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GARY ROSEN,

Petitioner,

vs.

Case No. 14-5089

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on December 17, 2014, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Gary Rosen, pro se  
2881 West Lake Vista Circle  
Davie, Florida 33328

For Respondent: Thomas Hugh Campbell, Esquire  
Brittany B. Griffith, Esquire  
Department of Business and  
Professional Regulation  
Northwood Centre  
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application for certification of its proprietary testing instruments, which are designed to measure minimum competency in mold assessment

and remediation, as "national examinations" acceptable for use in the state's mold-related services licensing program should be denied for failure to provide a sufficient factual basis for Respondent to make a finding as to whether Petitioner satisfies the requirements for recognition as a national or multi-state professional association.

PRELIMINARY STATEMENT

By a letter dated September 24, 2014, Respondent Department of Business and Professional Regulation notified Petitioner Gary Rosen that it intended to deny his organization's application for certification of the National Association of Environmentally Responsible Mold Contractors' testing instruments as "national examinations" acceptable for use in the state's mold-related services licensing program. As grounds for this intended action, the Department stated that the information provided in the Examination Evaluation Questionnaire, Part A, which Dr. Rosen had filled out and submitted, failed in the Department's eyes to support a "finding that [the applicant] is a national or multi-state professional organization."

Dr. Rosen timely requested a formal administrative hearing. On October 27, 2014, the Department referred the matter to the Division of Administrative Hearings, where the case was assigned to an administrative law judge.

The final hearing took place as scheduled on December 17, 2014, with both parties present. Dr. Rosen testified on his organization's behalf and offered no exhibits. The Department presented the testimony of its employee Alex Bosque, who works in the Department's Bureau of Education and Testing. In addition, Respondent's Exhibits 1 through 4 were received in evidence without objection.

The final hearing transcript was filed on January 22, 2015. Each party timely submitted a Proposed Recommended Order on or before February 2, 2015, in accordance with the schedule established at the conclusion of the hearing.<sup>1/</sup>

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes, and all references to rules are to the versions in effect as of the date hereof.

#### FINDINGS OF FACT

1. Petitioner Gary Rosen ("Rosen") is the president of a Florida corporation named Certified Mold Free Corp. ("CMF"), which in turn controls a wholly owned, unincorporated subsidiary or division known as the National Association of Environmentally Responsible Mold Contractors ("NAERMC"). CMF has developed two examinations for NAERMC—the Florida Mold Assessor Licensing Exam and the Florida Mold Remediator Licensing Exam—which, Rosen asserts, reliably measure a person's ability to practice, respectively, as a mold assessor and mold remediator. Rosen

wants Respondent Department of Business and Professional Regulation (the "Department" or "DBPR") to certify each of these instruments as a "national examination" so that a passing score on either test would satisfy a requirement for licensure under Florida's mold-related services licensing program, which operates under chapter 468, part XVI, Florida Statutes.

2. To be eligible for certification as a national examination, a test must have been developed by or for a "national or multi-state professional association"— "organization" for short. See Fla. Admin. Code R. 61-11.015(1). An organization that wants DBPR to certify its test as a national examination must submit, *seriatim*, the separate parts of a two-stage application, namely Form DBPR-BET 001, titled "Examination Evaluation Questionnaire, Part A," and Form DBPR-BET 002, titled "Examination Evaluation Questionnaire, Part B."<sup>2/</sup> On April 29, 2014, Rosen submitted Part A of the application to the Department, on behalf of NAERMC.

3. By letter dated June 2, 2014, the Department notified Rosen that NAERMC's application was incomplete, and it requested additional information pursuant to section 120.60(1), Florida Statutes. Among other things, the Department asked NAERMC to give a better answer to Question No. 13 by "provid[ing] a list of individual members in the association, by State, who have been licensed or certified through a NAERMC examination."<sup>3/</sup>

4. Rosen promptly submitted a revised version of NAERMC's application, which contained the following response to Question No. 13:

13 Include a list of the **number** of individual members in the association, by State, who have been licensed or certified through this examination.

California 87 (One of the State of California Technical Training Schools has been using our mold training and certification program for many years.)  
Florida 78 (Based on 2014 Mold CE training)  
Georgia 1  
Maryland 1  
Massachusetts 1  
Michigan 3  
New Hampshire 1  
New Jersey 5  
New York 6  
North Carolina 2  
Ohio 2  
Pennsylvania 6  
South Carolina 1  
Texas 2  
Virginia 2

There is no dispute about the truthfulness of NAERMC's response, and no question concerning its completeness has been raised. It is determined, as a matter of ultimate fact, that NAERMC fully answered Question No. 13, supplying the Department with all of the information about NAERMC's membership that the Department had requested via Form DBPR-BET 001.

5. By letter dated September 24, 2014, the Department informed Rosen that it intended to deny NAERMC's application based on the following:

As a threshold issue, prior to evaluating your examination to determine if it meets the standards for licensure examinations, the Department is required to assess whether your organization meets the criteria of a national or multi-state professional association, board, or society. As mandated by Rule 61-11.015(1), of the Florida Administrative Code, "[t]he organization must be generally recognized by practitioners across the nation in the form of representatives from the State Boards or shall have membership representing a substantial number of the nation's or states' practitioners who have been licensed through the national examination."

The Department is unable to find from the facts submitted in your revised application a basis for determining that the National Association of Environmentally Responsible Mold Contractors (NAERMC) meets the above requirements to be certified as a national or multi-state professional organization. The insufficient factual basis for a finding that NAERMC is a national or multi-state professional organization is a dispositive issue that precludes the Department from approving your application.

(Emphasis added.)

6. At hearing, Rosen asserted that NAERMC has "membership representing a substantial number of the nation's or states' practitioners who have been licensed [or certified] through [NAERMC's] national examination," which if true would be sufficient to satisfy the "membership requirement" of rule 61-11.015(1)(a). At the same time, he disclaimed reliance upon the alternative means of meeting this rule's standards, which entails a demonstration—namely, of the organization's

widespread recognition "in the form of representatives from the State Boards"—that NAERMC evidently is unable to make.

Accordingly, no further findings regarding, or conclusions about, the "recognition standard" are necessary.

7. The only question on the application by which DBPR asked NAERMC for information relevant to a determination of whether NAERMC meets the membership requirement is Question No. 13, which, as found above, NAERMC answered fully and honestly. Apart from this single question, DBPR never requested any additional information from NAERMC bearing directly on the membership requirement.

8. Question No. 13, it should now be noted, subtly loosens the membership requirement as stated in rule 61-11.015(1)(a) by requesting the applicant to identify the number of its members who have been "licensed *or certified*" through the organization's examination rather than just those who have been "*licensed*" through the examination. DBPR uses the term "certified" in this context to refer to practitioners who have received a certificate from the applicant through passage of the organization's examination.<sup>4/</sup> This is significant because the only state besides Florida that presently issues licenses to providers of mold-related services is Texas. For ease of reference, the undersigned will use the term "certified practitioner" as shorthand for an individual who has been

licensed or certified through an applicant-organization's examination.

9. In response to Question No. 13, NAERMC told the Department that it has 198 members who are certified practitioners, and that these members are distributed among 14 states. The Department did not find, based on this information, that NAERMC is *not* a national or multi-state professional association; rather, it determined that NAERMC's answer to Question No. 13 afforded an "insufficient factual basis for a finding that NAERMC" meets the membership requirement. The Department is technically correct in this regard, but the fault is plainly not NAERMC's; the problem is that Question No. 13, which NAERMC completely answered, fails to request all of the information necessary to determine whether *any* organization (not just NAERMC) meets the membership requirement. Simply put, a complete answer to Question No. 13 will *never* afford a sufficient factual basis for a finding that the applicant's membership comprises, or fails to comprise, a substantial number of the nation's or states' certified practitioners (unless the applicant happens to answer "0").

10. The membership requirement compels an evaluation of the relationship between several sets. The first, "set A," is the applicant's entire membership; that is, all of the applicant's members are elements of A. The second, "set B," is



composed of all certified practitioners. The intersection of sets A and B—i.e., the set of all objects that are elements of both A and B—can be called "set C." Set C, in other words, comprises all individual members of the organization who are certified practitioners.

11. Whether set C contains a "substantial number" of the elements of set B cannot be determined without knowing how many elements set B has; it is impossible to quantify a ratio with just one number. Here, Question No. 13 asks only for the number of objects in set C, which is the numerator in the relevant fraction. It does not request the denominator, i.e., the number of objects in set B, which is necessary for a decision regarding how much of B is represented in C. Question No. 13 is, therefore, facially defective.

12. Turning to the specific facts of this case, no one could determine, based upon the information that DBPR requested in the application, whether the 198 members of NAERMC who are certified practitioners represent a substantial number of all of the nation's or states' certified practitioners.

13. At hearing, Rosen testified credibly that everyone who takes and passes one of NAERMC's examinations is automatically a member of NAERMC. In reviewing NAERMC's application, the evidence shows, DBPR decided that there is no "ongoing relationship" between NAERMC and its members and therefore that

the organization, in effect, has no bona fide members. The Department, however, never asked NAERMC whether it has an "ongoing relationship" with its members; rule 61-11.015(1)(a) does not explicitly require an "ongoing relationship" between an organization and its members; and the Department did not, in its letter of September 24, 2014, state this alleged deficiency with particularity as a basis for the intended denial of NAERMC's request for certification. In addition, DBPR failed to produce any persuasive evidence in support of its assertion that NAERMC's members do not enjoy an "ongoing relationship" with NAERMC. Rosen's persuasive testimony is credited, and it is found that NAERMC's membership includes all individuals who are certified practitioners.

14. With this additional information, which the Department had not requested anytime during the application process, a finding can be made that NAERMC's membership does, in fact, comprise a substantial number of the country's certified practitioners; indeed, NAERMC's membership represents *all* of the states' practitioners who have been licensed or certified through NAERMC's examinations. Put differently, recalling the discussion above, sets C and B contain the same elements; the ratio is 1:1. By any measure, a subset containing 100 percent of a group represents a "substantial number" of that group.

15. It is determined as a matter of ultimate fact that NAERMC satisfies the membership requirement of rule 61-11.015(1)(a), contrary to the grounds for denial that DBPR set forth in the letter dated September 24, 2014.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

17. As the applicant for certification of its national examinations,<sup>5/</sup> NAERMC has the ultimate burden of persuasion and must prove, by a preponderance of the evidence, that NAERMC and its examinations meet all applicable statutory and rule requirements. § 120.57(1)(j), Fla. Stat.; see Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

18. The licensing agency has burdens of its own. Section 120.60(3) provides as follows:

(3) Each applicant shall be given written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has made a written request for notice of agency action. Each notice must inform the recipient of the basis for the agency decision . . . .

(Emphasis added.) Thus, it is "the Department's burden to provide specific reasons for the denial and to produce competent, substantial evidence to support those reasons." N.W. v. Dep't of Child. & Fam. Servs., 981 So. 2d 599, 601 (Fla. 3d DCA 2008).

19. Section 120.60(1) further provides that "[a]n agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within" 30 days after receiving its application "of any apparent errors or omissions and request[ed]" additional information as permitted by law.

20. Section 455.217(1)(a), Florida Statutes, requires DBPR to ensure that professional licensure examinations adequately and reliably measure potential licensees' abilities to practice the various professions that the Department regulates. So-called "national examinations" may be approved for this purpose. § 455.217(1)(d), Fla. Stat. Before a national examination can be used as a tool for ascertaining fitness for licensure, however, DBPR must certify that the test satisfies the requirements of national examinations and generally accepted testing standards. Id.

21. The Department has adopted Florida Administrative Code Rule 61-11.015, titled "Definition of a National Examination," which establishes the criteria an examination must meet to be

considered a "national examination." The rule provides in pertinent part as follows:

(1) A national examination is an examination developed by or for a national or multi-state professional association, board, council, or society (hereinafter referred to as organization) and administered for the purpose of assessing entry level standards of practice necessary to protect the health, safety, and welfare of the public from incompetent practice and meets the following standards:

(a) The organization must be generally recognized by practitioners across the nation in the form of representatives from the State Boards or shall have membership representing a substantial number of the nation's or states' practitioners who have been licensed through the national examination.

(Emphasis added.)

22. In this case, the Department gave NAERMC notice of its intent to deny certification based upon NAERMC's purported failure to provide a sufficient "factual basis for a finding that NAERMC is a national or multi-state professional association" meeting the requirements of rule 61-11.015(1)(a). NAERMC, however, had provided all of the information that the Department had requested. As explained above, the insufficiency of the information NAERMC had provided was due, not to any error or omission on NAERMC's part, but to the Department's faulty application, whose Question No. 13 fails to request necessary facts, i.e., the number of certified practitioners (including

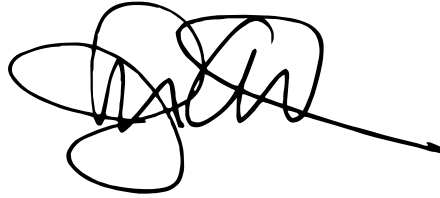
those who are *not* NAERMC members) in each of the states where any are located. DBPR never asked NAERMC to provide this information, and thus the agency is prohibited under section 120.60(1)(a) from denying NAERMC's application for failure to supply such information.

23. As it happened, NAERMC came forward with the necessary facts at hearing, establishing that, more likely than not, a substantial number of the nation's or states' practitioners who have been licensed or certified through NAERMC's examinations are members of NAERMC. Thus, NAERMC proved that it meets the requirements of rule 61-11.015(1)(a), contrary to the particular reasons for denial set forth in the Department's notice of intended action dated September 24, 2014.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order approving NAERMC's Examination Evaluation Questionnaire, Part A, and directing that NAERMC be sent Part B of the application.

DONE AND ENTERED this 10th day of February, 2015, in  
Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of February, 2015.

ENDNOTES

<sup>1/</sup> Shortly after the final hearing, Dr. Rosen filed documents that had not been offered or admitted as evidence, together with a letter containing assertions or arguments based at least in part on such materials. The Department moved to strike this submission from the file and urged the undersigned to give no consideration to any sources of information outside of the evidentiary record. The undersigned declines to strike Dr. Rosen's submission from the file. Following section 120.57(1)(j), Florida Statutes, however, the undersigned has not considered or relied upon anything but the evidence of record in making the findings of fact in this case, all of which are amply supported by competent, substantial evidence.

<sup>2/</sup> DBPR has adopted the forms as rules, by incorporative reference in rule 61-11.015(3).

<sup>3/</sup> Understood in context, DBPR's request sought a list of the states in which NAERMC claims to have members, together with the *number* of such members per enumerated state, as opposed to the

members' *names*, which would not be relevant to the merits of NAERMC's application.

<sup>4/</sup> In its Proposed Recommended Order, the Department argues that because no one has obtained a state license through passage of NAERMC's examinations (which is an undisputed fact), NAERMC cannot satisfy the membership requirement. The undersigned rejects this argument as contrary to the plain language of Question No. 13, which the Department has adopted as a rule, see Fla. Admin. Code R. 61-11.015(3), and the Department's application of rule 61-11.015(1)(a) in practice. Mr. Bosque's testimony on behalf of DBPR, taken as a whole—and despite some equivocation—supports the finding in the text about DBPR's understanding and application of the term "certified," which is not synonymous with "licensed" for this purpose.

<sup>5/</sup> The certification Petitioner seeks in this proceeding is a license under section 120.52(10), Florida Statutes.

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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.