

BEFORE THE BOARD OF PSYCHOLOGISTS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0247-PSY REGARDING:

THE APPLICATION FOR LICENSURE) Case No. 1766-2007
OF ALAN OSTBY, PSYCHOLOGIST)
LICENSE BY EXAMINATION PENDING.)
)
)

**PROPOSED FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

I. INTRODUCTION

Alan Ostby requested a hearing in response to the Montana Board of Psychologists' Notice of Proposed Action to deny his application to sit for the psychologist's licensing examination. Hearing Examiner David A. Scrimm held a contested case hearing in this matter on October 9 and 10, 2007. Ostby was represented by Peter A. Stanley, attorney at law. Art Gorov, agency legal counsel, represented the Board of Psychologists. Ostby, Dr. Allen Bishop, Dr. Therese Ettell, and Dr. David Schuldberg all testified under oath. Over the untimely objection of the Board's counsel, Dr. Bishop appeared by telephone.¹

Exhibits A and 1 through 24 were admitted into evidence at hearing. Exhibit 24 is now excluded from the record as documents used to refresh recollections are not normally included as evidence.² The parties were allowed to submit post-hearing briefs, the last of which was filed on November 29, 2007. The record in this matter was deemed submitted for decision on that date. Based on the testimonial and documentary evidence adduced in this case, the hearing examiner makes the following findings of fact, conclusions of law, and recommended order.

II. SUMMARY JUDGMENT

¹ The hearing examiner issued an order on August 22, 2007 by which Board counsel was to file any objections no later than September 21, 2007 to either Dr. Bishop testifying via telephone or to the Board being required to produce a Bates stamped copy of its files in this matter. Board counsel failed to provide the documents requested and by his own admission overlooked the time period for filing any objection to Dr. Bishop's testimony by telephone.

² Exhibit 24 is a handwritten document which details the courses Ostby contends shows he met the course work requirements for biological bases, cognitive-affective disorders, social bases, and individual differences. All courses identified in Exhibit 24 are part of other exhibits.

Prior to hearing, the Board sought summary judgment on the question of whether the Board properly denied Dr. Ostby's application for licensure in Montana. The Board denied Dr. Ostby's application for licensure under Admin. R. Mont. 24.189.604 which sets minimum standards for psychology programs, and Admin. R. Mont. 24.189.301(2), which defines one-year's residency required by Admin. R. Mont. 24.189.604(1)(i). Having reviewed the complaint, the facts, and having considered the written arguments of the parties, it is appropriate to deny summary judgment in this case.

Summary judgment is an appropriate method of dispute resolution in administrative licensing proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042.

The Montana Supreme Court has previously held that:

A party cannot create a disputed issue of material fact by putting his own interpretations and conclusions on an otherwise clear set of facts. We conclude Koepplin's conclusory and interpretive statements of material fact do not rise to the level of genuine issues of material fact required to defeat Zortman's motion for summary judgment on Koepplin's claim for wrongful discharge. *Koepplin v. Zortman Mining*, (1994) 267 Mont. 53, 61, 881 P.2d 1306, 1311 (citing *Sprunk v. First Bank Sys.* (1992), 252 Mont. 463, 466-67, 830 P.2d 103, 105.)

The facts of this case do not amount to "an otherwise clear set of facts" upon which summary judgment can be granted. Counsel for the Board asserts that based on Ostby's submissions he has not met the one-year residency requirement. Board counsel further references PGI course catalogs to show that Ostby's curricula did not include a one-year residency. However, it appears from those documents that residency is a required part of those courses. The Board also denied Ostby's application because it found that the curriculum did not encompass three academic years of full-time graduate study with a minimum of one-year's residency at PGI. Ostby's transcripts and other submissions indicate that he was enrolled full-time for three academic years. Clearly there is a material disputed fact regarding this requirement. As such, there is a factual dispute that precludes the granting of summary judgment in this matter.

III. TESTIMONY OF DR. ALLEN BISHOP AND ISSUES AT HEARING

Counsel for the Board not only objected to Dr. Bishop testifying by telephone, but also objected to the testimony on relevancy grounds, arguing that Bishop's testimony was additional information that was not considered by the Board when it denied Ostby's application to sit for the psychologist's exam and therefore was not relevant.

The Board has authority to grant or deny a license and hold hearings. Mont. Code Ann. § 37-1-307(1)(a). Board hearings are governed by the Administrative Procedures Act, the Montana Rules of Civil Procedure and the Montana Rules of Evidence. Mont. Code Ann. § 37-1-310. The Montana Administrative Procedures Act requires that "[o]ppportunity shall be afforded all parties to respond and present evidence and argument on *all issues involved.*" Mont. Code Ann. § 2-4-612(1) (emphasis added).

In *Johansen v. DNRC*, the Montana Supreme Court held "pursuant to MAPA, an administrative agency must afford all parties a trial-type hearing in a contested case." 1998 MT 51 ¶20, 288 Mont. 39 ¶20, 955 P.2d 653 ¶20 (Mont. 1998). It further held that the statutory requirement of a trial-type hearing does not apply to every situation where a person's interest is adversely affected by agency action. *Id.* Rather, such a hearing is required only in "contested cases." *Id.* MAPA defines contested case as:

A proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing and *licensing*. Mont. Code Ann. § 2-4-102(4) (emphasis added).

Thus, the Board's denial of Ostby's license entitled him to a trial-type hearing where a determination of his legal rights or privileges could be determined. While Montana law does not specifically identify limitations, if any, that may govern contested case proceedings, other jurisdictions in the Ninth Circuit have held that:

When a statute authorizes an officer, board or tribunal to grant or refuse licenses to conduct businesses, "after a hearing," as it does in section 1300.4a of the Agricultural Code, it contemplates a fair and impartial hearing of the application therefor with an opportunity for the petitioner to present competent evidence upon that application. *Albert Albek, Inc. v. Brock*, 75 Cal. App. 2d 173, 176 170 P.2d 508, 509 (Cal. App. 1946) (citing *Carroll v. California Horse Racing Board*, 16 Cal.2d 164 [105 P.2d 110]; *Martin v. Board of Supervisors*, 135 Cal.App. 96, 100 [26 P.2d 843]; *Irvine v. State Board of Equalization*, 40 Cal.App.2d 280 [104 P.2d 847]; 33 C.J. [***6] § 138, p. 548.)

The California court went on to state that:

In the *Martin* case, *supra*, in which a writ of mandate was issued directing the Board of Supervisors of Lake County to grant a hearing to the petitioner for a liquor license, it was said that while such hearings before licensing tribunals are not required to be conducted with all the formality of a court, nevertheless, “This informality . . . does not justify the denial of a hearing, or the refusal to permit a fair presentation of the petitioner’s claim, or the arbitrary denial of a license,” without a hearing. *Id.* (emphasis added).

In an Arizona case the court held:

On the other hand, when we consider a *de novo* review without statutory limitations of any kind, that is, a classic *de novo* reconsideration, the proceeding loses most of its character as a review, and is heard the same as though it were an original proceeding upon evidence introduced in the reviewing court, and with the reviewing court making an entirely independent determination unfettered by presumptions created by the decision of the administrative agency.

Herzberg v. State, 513 P.2d 966, 969 (Ariz. Ct. App. 1973).

In *Dupont v. Idaho State Bd. of Land Comm’rs*, the petitioner argued that the only issue at the contested case hearing should have been whether the Department’s decision to issue the permit was supported by law. 134 Idaho 618, 622 (Idaho 2000) 7 P.3d 1095. The Idaho Supreme Court held that:

By its very nature, a contested case hearing on the revocation of Dupont’s permit would involve the presentation of evidence by all parties and a recommendation from the presiding officer as to whether or not the permit should be revoked, based upon that evidence. See I.C. § 67-5242, -5243. The Board then reviews the recommendation and, based on the evidence from the hearing, makes an independent determination as to whether the permit was issued in violation of the applicable laws. See I.C. § 67-5244. *Dupont v. Idaho State Bd. of Land Comm’rs*, 134 Idaho 618, 622, 7 P.3d 1095, 1099 (Idaho 2000).

Similarly, in Montana a licensing board issues its proposed order denying a license and offers an opportunity for a contested case hearing. If the applicant requests such a hearing, a hearing examiner is appointed who holds a full evidentiary hearing on all the issues involved, not just a review of the board’s decision, makes findings of fact, conclusions of law and issues a recommended order. The board may then accept the recommended decision or modify or reject the conclusions of law, but may only reject or modify the findings of fact if the board reviews the entire record and states with particularity that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3).

In an Oregon case, the Court held that absent statutory limitations on the type of evidence that could be presented at a contested case hearing:

An APA contested hearing is one where individual legal rights are determined only after an agency hearing and the parties are entitled to appear and be heard. ORS 183.310(2)(a)(A). At a contested case hearing the parties have the right to admit evidence 'of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs.' ORS 183.450(1). It is at the contested case hearing that the record is created. The record consists [of] the pleadings, the evidence at the hearing, and the agency's decision. ORS 183.415(11). Implicit in the APA is that a contested case hearing is a de novo, full due process and quasi judicial hearing because review by the Court of Appeals is for substantial evidence or errors of law. ORS 183.482(8)(a) and (c). (Footnotes omitted.)

O'Neil v. National Union Fire, 152 Ore. App. 497, 502, 954 P.2d 847, 850 (Or. Ct. App. 1998).

The Oregon Court held that because of statutory limitations on the specific proceedings that "at the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law." "No new medical evidence or issues shall be admitted." *Id.* No such limitations are found in Montana law governing contested case hearings.

Thus under Montana law and the precedent from other states interpreting similar administrative procedure acts and contested case requirements, Bishop's testimony should be allowed and will not be stricken from the record. Bishop's testimony is relevant to the issue of Ostby's qualifications for licensure as a psychologist in Montana.

Counsel for the Board further objected to Bishop's testimony alleging he was not notified of the content of Bishop's testimony prior to hearing. Counsel overlooks the fact that notice of Bishop's testimony was included in Ostby's Response to Summary Judgment filed on August 6, 2007, two months before the hearing in this matter. Moreover, counsel for the Board had notice of Bishop's likely testimony which he gained through interrogatories he propounded on the applicant. Specifically, in response to Interrogatory #1, Ostby responded that Bishop would likely testify regarding the residency program at PGI, the coursework and practicums. Board counsel had timely and sufficient notice of the content of Bishop's testimony at hearing and his claim of lack of notice is not well taken.

IV. FINDINGS OF FACT

1. On or about December 20, 2006, Ostby submitted a signed and certified application for psychologist licensure by examination to the Montana Board of Psychologists (Board). Ostby submitted additional material at the request of the Board.

2. On April 27, 2007, the Board denied Ostby's application because his doctoral degree was obtained from a psychology program that allegedly did not meet the following minimum standards criteria:

- a. a minimum of three academic years of full-time graduate study;
- b. a minimum of one year's residency at the educational institution granting the doctoral degree;
- c. core program must demonstrate competence in the four substantive content areas of: biological bases of behavior; cognitive-affective bases of behavior; social bases of behavior; and individual differences; and
- d. the program must include three terms (2 semesters) of coordinated practicum that is distinct from the pre-doctoral internship.

3. It is undisputed that Ostby's application met all other criteria for licensure except those identified in Finding of Fact #2.

4. Ostby is 52 years of age and of good moral character.

5. On or about September 18, 2004, Ostby obtained a doctor of philosophy in clinical psychology from Pacifica Graduate Institute (PGI), 249 Lambert Rd, Carpinteria, CA 93013. PGI is accredited by the accrediting commission for senior colleges and universities of the Western Association of Schools and Colleges.

6. Ostby applied for licensure pursuant to the provisions of Mont. Code Ann. § 37-17-302(3)(c).

7. Ostby's psychology graduate program included a minimum of three academic years of full-time graduate study.

8. Ostby's psychology graduate program included a minimum of one-year's residency at the educational institution. Ostby attended classes in-person on campus and earned more than 27 quarter hours on a full-time basis. His classes included student-to-faculty and student-to-student contact and involved personal group courses. His classes were taught 100% of the time by full-time or adjunct PGI faculty. His educational meetings were documented by the institution. Ostby had considerable meetings with faculty that related substantially to the psychology program and course content.

9. Ostby's doctoral degree program included a core program through which students demonstrate competence in the four substantive content areas of biological bases of behavior, cognitive-affective bases of behavior, social bases of behavior, and individual differences. Ostby's transcript clearly documents GPI's assessment that he successfully completed CP 721 Cultural Foundations of Depth Psychology II (A); CP 735 Biological Bases of Behavior (A); CP870 Principles of Pharmacotherapy I (A); CP 871 Principles of Pharmacotherapy II (P); CP 872

Principles of Pharmacotherapy III (P); and CP900 Clinical Practicum I (A), all of which fulfilled the biological bases requirement. Exhibit 2.

Ostby's transcript clearly documents GPI's assessment that he successfully completed CP 835 Cognitive-Behavioral Psychotherapy (A)³; CP 711 Psychoanalytic-based Psychotherapy I (A); CP 712 Psychoanalytic-based Psychotherapy II (A); CP 999 Cognitive-Behavioral Applications (A), all of which fulfilled the cognitive-affective bases of behavior requirement. Exhibit 2.

Ostby's transcript clearly documents GPI's assessment that he successfully completed CP 715 Group Process I (P); CP 722 Cultural Foundations of Depth Psychology III (A); CP 822 Myth, Literature and Religious Studies III (IA); CP 845 Cross-cultural Psychotherapy (A); CP 921 Depth Psychology and Contemporary Culture II (IA); CP 922 Depth Psychology and Contemporary Culture III (A); and CP 923 Depth Psychology and Contemporary Culture IV (A), all of which fulfilled the social bases of behavior requirement. Exhibit 2.

Ostby's transcript clearly documents GPI's assessment that he successfully completed CP 730 Psychopathology I (A); CP 731 Advanced Psychopathology II (IA); CP 810 Jungian-Based Psychotherapy I (A); CP811A Jungian-Based Psychotherapy II (A); and CP 830 Developmental Psychology (IA), all of which fulfilled the individual differences requirement. Exhibit 2.

10. Ostby's doctoral degree program included at least three terms of coordinated practicum separate and distinct from the pre-doctoral internship. Ostby's transcript documents GPI's assessment that he successfully completed CP 900 Clinical Practicum I (A); CP 910 Clinical Practicum II (A); CP 750 Practicum (P); and CP 760 Practicum in Psychotherapy Process II (P), all of which fulfilled the practicum requirement. Ostby's transcript shows that he had a separate internship – CP 950 Personal Psychotherapy during which time he accumulated 1950 hours.

11. Ostby completed three years (12 quarters) of full-time graduate study.

³ Letter in parentheses after course title indicates Ostby's grade for the course; A = Honor grade to distinguish exceptional work at the graduate level; IA = Incomplete grade that was later completed as an A; P = Passing work in a Pass/Fail course.

V. CONCLUSIONS OF LAW⁴

1. Ostby seeks licensure as a psychologist in Montana. As such, he bears the burden of proof to demonstrate that he is qualified for the license. *See generally*, 2 Am. Jur. 2d Administrative Law §251.

2. A professional licensing board may grant or deny a license. Mont. Code Ann. § 37-1-307(1)(e). The Board may license as a psychologist a person who “has received a doctoral degree in psychology from an accredited college or university and has completed a course of studies that meets minimum standards specified in rules by the Board.” Mont. Code Ann. § 37-17-302(3)(c).

3. Admin. R. Mont. 24.189.604(1) provides in pertinent part that a doctoral degree qualifies under Mont. Code Ann. § 37-17-302(3)(c) if it is obtained from a psychology program which meets the following criteria:

...

(h) The program must include supervised practicum, internship, field or laboratory training appropriate to the practice of psychology.

(i) The curriculum shall encompass a minimum of three academic years of full-time graduate study with a minimum of one year’s residency at the educational institution granting the doctoral degree. In addition to instruction in scientific and professional ethics and standards, research design and methodology, statistics and psychometrics, the core program shall require each student to demonstrate competence in each of the following substantive content areas. This typically will be met by including a minimum of three or more graduate semester hours (five or more graduate quarter hours) in each of these four substantive content areas:

(i) Biological bases of behavior: physiological psychology, comparative psychology, neuropsychology, sensation and perception, psychopharmacology.

(ii) Cognitive-affective bases of behavior: learning, thinking, motivation, emotion.

(iii) Social bases of behavior: social psychology, group processes, organizational and systems theory.

(iv) Individual differences: personality theory, human development, abnormal psychology.

* * *

4. One year’s academic residency means 18 semester hours or 27 quarter hours earned on a full-time or part-time basis at the educational institution granting the doctoral degree. (a) The residency must be accumulated in not less than nine months and no more than 18 months and must include student-to-faculty contact involving face-to-face (personal) group courses. Such educational meetings must: (i) include both faculty-to-student and student-to-student

⁴ Statements of fact in the conclusions of laws are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

interaction; (ii) be conducted by the psychology faculty of the institution at least 90 percent of the time; (iii) be fully documented by the institution; and (iv) relate substantially to the program and course content. (b) An internship requirement cannot be used to fulfill the academic year requirement of the residency. (c) The institution must clearly document its assessment and evaluation of the applicant's performance. Admin. R. Mont. 24.189.301(2).

5. Ostby's psychology program meets the minimum standards established by the Board. Mont. Code Ann. § 37-17-302(3)(c). Admin. R. Mont. 24.189.604.

VI. RECOMMENDED ORDER

Based upon the foregoing, the hearing examiner recommends that, pending the outcome of his examination, the Board grant Dr. Alan Ostby's application for licensure as a psychologist.

DATED this 4th day of August, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Examiner