

BEFORE THE BOARD OF NURSING
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-08-0212-NUR REGARDING:

THE APPLICATION FOR LICENSURE) Case No. 381-2008
OF MARIE DORVIL-LOUIS,)
Nursing Applicant for Licensing.)
)
)

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

I. INTRODUCTION

Marie Dorvil-Louis appeals from the Montana Board of Nursing's denial of her request to be licensed as a licensed practical nurse. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on November 20, 2007. Mike McCabe, agency legal counsel, represented the Department of Labor and Industry Business Standards Division. Dorvil-Louis represented herself. Dorvil-Louis, her husband - Bierre Louis, Marilyn Kelly-Clark, and BON director Barb Swehla all testified under oath. The parties stipulated to the admission of Louis's Exhibits A through U and BSD's Exhibits 1 through 20. The parties graciously agreed to provide the hearing examiner with post-hearing briefs, the last one of which was received on January 18, 2008, at which time the record was closed. Based on the evidence and argument adduced at hearing, the hearing examiner makes the following findings of fact, conclusions of law, and recommended order.

II. FINDINGS OF FACT

1. Louis obtained her education for licensed practical nursing through Wilmot's Academy which is located in the country of Jamaica. She attended Wilmot's Academy between July 2000 and July 2001.

2. On August 19, 2004, Louis applied to the Montana Board of Nursing (BON) for a license to become a licensed practical nurse. She applied to obtain her license by examination. In addition to taking the state required examination, Louis was required to provide a passing test score for the Test of English as a Foreign Language (TOEFL) and to provide transcripts from Wilmot's Academy. A passing score on the exam is 197.

3. Louis took the TOEFL test on October 4, 2004 and reported her score to BON. She received a score of 163.

4. On October 5, 2004, Jennifer Billman, BON licensing clerk, sent a letter to Louis advising her that BON had received Louis's TOEFL score but had not yet received the transcripts from the Wilmot Academy. Billman's letter further advised Louis to register to take the state required examination, the NCLEX examination.

5. The NCLEX examination is designed to test the applicant's knowledge of various facets of practical nursing. The examination does not test the applicant's clinical skills. Adequate knowledge of licensed practical nursing and adequate clinical skills are essential to ensuring the health, safety and welfare of patients that an LPN will come in contact with during his or her work. For this reason, BON requires that the applicant not only obtain a passing grade on the NCLEX but also attend and graduate from an educational program that is equivalent to the educational programs offered in the United States.

6. On October 8, 2004, BON received Louis's transcripts from Wilmot's Academy.

7. On October 12, 2004, Billman advised Louis that BON had received her transcript from Wilmot's Academy and that her transcript was complete. Exhibit 10. Billman further advised Louis to take the NCLEX examination. *Id.*

8. Louis registered for and took the NCLEX on January 20, 2005. She obtained a passing score and reported this to BON.

9. On January 20, 2005, Billman issued Louis an LPN license in Montana. Exhibit 12. At the time of the issuance of the license, Louis did not have a passing TOEFL score nor had the BON determined whether Wilmot's Academy's LPN program was equal to programs in the United States.

10. Billman issued the license in error. In addition to the problems noted in paragraph 9, above, the application had not been submitted to the full Board for its review and approval prior to the issuance of the license. BON's practice with respect to applicants who had obtained their education outside of the United States was to obtain Board approval before issuing the license. In those cases where an applicant obtained an education at a recognized program located in the United States (and where no other unusual circumstances were present), BON permitted licensing clerks to issue licenses without full Board approval.

11. Louis utilized her Montana license to obtain an endorsement license in the State of New Jersey where she lives.

12. On May 25, 2005, BON's legal counsel wrote Louis a letter informing her that her license had been issued in error because she did not have a passing TOEFL score and because BON had not verified that her education was the equivalent of an education obtained at an LPN program in the United States. Exhibit 13. The letter advised Louis that BON would treat her case as a pending application. The letter further advised Louis to retake the TOEFL and obtain a passing score. The letter further required her to obtain credentialing from the Council of Graduate Foreign Nursing Schools (CGFNS) to show that the program she had attended at

Wilmot's Academy was in fact the equivalent of an education program taught in the United States.

13. Louis acquiesced in this request and set about obtaining the CGFNS credentialing and retaking the TOEFL. By October 2005, Louis had obtained and reported a passing score (by sending a facsimile of the test result) on the TOEFL examination. Exhibit 14.

14. On October 28, 2005, BON application specialist Becky McTaggart by letter acknowledged receipt of Louis's facsimile of the TOEFL score. Exhibit 15. McTaggart advised Louis that she had to have an original score card provided directly from TOEFL to BON. McTaggart also told Louis that BON had not yet received the CGFNS verification. Finally, McTaggart advised Louis that her application had expired and that she would need to resubmit a new application with an additional \$100.00 fee.

15. To comply with McTaggart's letter, Louis submitted a new application to BON on November 4, 2005. Exhibit 16. McTaggart acknowledged the new application in a letter dated November 9, 2005. McTaggart also noted that Louis's application still needed the CGFNS credentialing as well as a copy of her social security card.

16. BON received the CGFNS results in April 2007. Those results demonstrate that Louis's education at the Wilmot Academy was not equivalent to programs in the United States. Exhibit 19.

17. Because of the fact that Louis's educational program was not the equivalent of a program in the United States, BON denied Louis's application for licensure.

18. Louis diligently pursued her license throughout this entire process. As demonstrated by her several letters to BON, she repeatedly contacted BON about the status of her application.

III. CONCLUSIONS OF LAW

1. When BON proposes to deny a practical nurse's license, an applicant may request a hearing on the denial (Mont. Code Ann. § 37-1-131(2)), but has the burden of proving that the agency's denial of the license was improper. *See, e.g., Montana Environmental Information Center and Environmental Defense v. Montana Dept. Of Environmental Quality*, 2005 MT 96, ¶16, 326 Mont. 502, ¶16, 112 P.3d 964, ¶16 (holding that under the Montana Administrative Procedures Act, the party asserting that an agency determination is in error has the burden of going forward with evidence and the burden of persuading the fact finder that the agency's determination was in error). In this case, Dorvil-Louis seeks to have the denial of her application for licensure overturned. As such, she bears the burden of proof to demonstrate that the Board's denial of her license was erroneous either in fact or law.

2. A professional licensing board may grant or deny a license. Mont. Code Ann. § 37-1-307(1)(e). Mont. Code Ann. § 37-8-204(1)(c) authorizes BON to review qualifications of applicants for licensure.

3. Licensing requirements in Montana exist primarily to ensure that the public health, safety and welfare are protected. Indeed, in order to safeguard life and health, it is incumbent upon a person seeking a practical nurse's license to submit evidence that the person is qualified to practice in conformity with requirements imposed by BON. Mont. Code Ann. § 37-8-101(1).

4. Montana Code Annotated § 37-8-415 requires an applicant for practical nurse licensure to submit written proof that the applicant is a graduate of an approved practical nursing education program that is authorized to prepare persons for licensure as a practical nurse. Mont. Code Ann. § 37-8-415. The "education program" referred to in the statute is defined as any BON approved school that prepares graduates for practical nursing licensure under the statute. Mont. Code Ann. § 37-8-102(5).

5. At the time the applicant filed the application for the licensure at appeal in this case (her 2005 license application), the applicable BON rules required that foreign educated applicants for practical nursing licensure provide a CGNFS credentials evaluation service report (CGNFS CES) "verifying the applicant's nursing education credentials and comparing the applicant's nursing education with the U.S. nursing education standards." Admin. R. Mont. 24.159.1029(2)(c). The Board may deny licensure based on the CGNFS CES report if the Board deems denial to be warranted based upon the report. *Id.*

6. There is no real dispute in this case that the GCNFS CES report on the applicant's practical nursing school in Jamiaca shows that the applicant's education at the Wilmot Academy was not the equivalent of a practical nursing education obtained in the United States. On this basis alone, BON properly denied Dorvil-Louis's 2005 application.

7. Likewise, it is plain that Dorvil-Louis did not pass the TOEFL exam for purposes of her 2004 application. That basis alone provided the BON with an appropriate basis for denying her 2004 license application.

8. Dorvil-Louis's understandable frustration with the long and tortuous process of her license application has compelled her to argue that she should be granted a license even though her English proficiency was not adequate at the time of her 2004 application and her education as reflected in her 2005 application clearly does not meet the equivalency requirements spelled out in the administrative rules. She contends that BON caused unreasonable delay in her application and this resulted in a change in licensing requirements that rendered her education inadequate for licensing in Montana. Applicant's closing brief, page 2. In essence, she is arguing that the department should be estopped from denying her a license by its conduct. While the hearing examiner does not condone the sloppy processing of the license in this case, the department cannot be estopped from denying the license in this matter because the fact remains that both the 2004 application and the 2005 application plainly show that the applicant was not qualified for licensure under the applicable rules.

The State of Montana holds the police power to regulate the health and welfare of its citizens. *Wiser v. State of Montana*, 2006 MT 20, ¶24, 331 Mont. 28, ¶24, 129 P.3d 133, ¶24. While a person does have the right to pursue employment, "one does not have the right to

practice his or her profession free of state regulation promulgated to protect the public's welfare." *Id.* The applicant does not suggest that the administrative rules which resulted in the rejection of the applicant's license in this case, namely, the failure to obtain a passing TOEFL score and the lack of equivalency for the 2004 examination and the lack of equivalency discovered during the 2005 application, are not reasonably related to protecting the health, safety and welfare of the public whom practical nurses care for in their profession.¹ In this case, there is no evidence to suggest that the denial of the license either in the 2004 application or the 2005 application was related to any concern other than the deficiencies in the TOEFL score and the lack of equivalency in the applicant's studies.

Likewise, even if this tribunal had some type of equitable powers like those possessed by judicial courts, the erroneous issuance of the license in 2004 could not be deemed to equitably estop BON from denying the license in this case. Equitable estoppel can be applied to prevent a party from benefitting from its own misconduct where the elements of equitable estoppel exist. *City of Whitefish v. Troy Town Pump*, 2001 MT 58, 304 Mont. 346, 21 P.3d 1026. There are six elements of equitable estoppel and all six elements must be found to exist before the doctrine can be applied. The elements are (1) conduct, acts, language or silence amounting to a representation or concealment of a material **fact**; (2) the facts must be known to the party to be estopped at the time of that party's conduct; (3) the truth must be unknown to the other party at the time the representation was acted upon; (4) the representation must be made with the intent or expectation that it will be acted upon by the other party; (5) the representation must be relied upon by the other party; and (6) the other party must in fact rely on the representation so as to change its position for the worse. *Id.* (emphasis added).

In *Town Pump*, a store owner argued that the City of Whitefish should be estopped from withdrawing a building permit the city had issued in error to the store owner for the addition of an awning that served as both an awning and a store sign. The city had erroneously concluded that the addition was simply an awning when in fact it served both as an awning and a store sign. The sign did not comport with city regulations regarding signage. *Id.* In finding that equitable estoppel did not apply, the court noted that the store owner's argument failed because the city's conduct was a misrepresentation of law, not one of fact. 2001 MT 58, ¶19, 304 Mont. 346, ¶19, 21 P.3d 1026, ¶19. As the court noted, "the original approval of Town Pump's building plan was based on an incorrect conclusion that Town Pump's proposed fascia did not constitute a sign under Whitefish's ordinances—it was a misrepresentation of law, not a misrepresentation of fact." *Id.*

Like the issuance of the permit in *Town Pump*, the erroneous issuance of the license in this case amounted to a misrepresentation of law, not fact. The licensing clerk here, acting

¹While Dorvil-Louis has not questioned that these regulations are reasonably related to protecting the public health, safety and welfare, the hearing examiner would have rejected any such argument in any event. The requirement that a licensed practical nurse be able to communicate proficiently in English about matters pertaining to health, particularly where those matters relate to life and death, is self evident. Likewise, the requirement that a foreign school's curriculum and graduation requirements be the equivalent of a U.S. school is also reasonably related to protecting the health of the public. As the testimony at hearing revealed, applicants for licensed practical nursing are not tested on clinical skills. Rather, BON relies on the fact of graduation from a U.S. school or graduation from the equivalent of a U.S. program in order to ensure that this critical component of licensed practical nursing is met by the applicant.

outside the scope of her authority, erroneously concluded that Dorvil-Louis had presented adequate proof of compliance with BON rules applicable to such applications when in fact she had not. Specifically, Dorvil-Louis had not presented a passing TOEFL score, a requisite to the issuance of a practical nurse's license at the time of her 2004 application. Thus, equitable estoppel could not be applied against BON under the facts of this case and there is no basis for finding that the denial of Dorvil-Louis's practical nursing license is erroneous either in fact or law.

9. Finally, Dorvil-Louis has asked in the alternative that this tribunal "direct BON to compensate me for my loss, or provide me a reasonably obtainable remedial program." Applicant's brief, page 4. This tribunal has only those powers conferred by statute or by administrative rule. *Auto Parts of Bozeman v. Uninsured Employers' Fund*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 **quoting** *City of Polson v. Public Service Com'n* (1970), 155 Mont. 464, 473 P.2d 508, 511, *Gwynn v. Town of Eureka* (1978), 178 Mont. 191, 582 P.2d 1262, 1263. There is no statute or rule that would permit this tribunal to award damages against the department and, accordingly, Dorvil-Louis's request in this regard must be denied.

IV. RECOMMENDED ORDER

For the foregoing reasons, the Board should affirm the denial of Dorvil-Louis's license.

DATED this 3rd day of March, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.