

1977

In the matter of the Application for Admission to the Utah State Bar of Deborah Lynn Tanner : Petitioner's Brief

Utah Supreme Court

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Recommended Citation

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

In the Matter of the)
Application for Admission)
to the Utah State Bar of) No. 15703
)
DEBORAH LYNN TANNER,)
)
Petitioner)

PETITIONER'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an application for admission to the Utah State Bar.

DISPOSITION IN LOWER COURT

Petitioner took the 1977 (summer) Bar Examination and, upon receiving notice from the Utah State Bar that she had failed, requested a review of that decision which was subsequently sustained by the Board of Bar Commissioners.

RELIEF SOUGHT ON APPEAL

Petitioner seeks an order from this Court granting her Petition for Admission to the Utah State Bar.

STATEMENT OF FACTS

In July, 1977, Petitioner took the Utah State Bar examination. Subsequently, she was informed that she allegedly had failed to pass the examination for the sole reason that she had received passing scores in only nine (rather than the minimum of 12) of the 18 essay questions. She received two scores of 59. Petitioner's average was 60.75, sufficient for a passing score, which was above at least one successful applicant.

On or about October 7, 1977, Petitioner timely filed her Petition for Review with the Board of Commissioners. From October 13, 1977 until the hearing by the Review Board, limited discovery was permitted by the Utah State Bar.

On January 6, 1978, a hearing was begun but one of the three members of the Review Board was disqualified because of his prior participation in the bar examination process. A second hearing was scheduled for and heard on January 12, 1978.

On February 3, 1978 the Board of Bar Commissioners denied Petitioner's claim.

On March 2, 1978, Petitioner timely filed a Notice of Appeal with this Court requesting that her Petition for Admission to the Utah State Bar be granted.

ARGUMENT

POINT I.

THE PETITION SHOULD BE GRANTED BECAUSE HER WEIGHTED AVERAGE OF 60.75 FOR THE ENTIRE EXAMINATION WAS ABOVE THE HISTORICAL MINIMUM OF 60.00, AND ABOVE AT LEAST ONE SUCCESSFUL APPLICANT WHO TOOK THE SAME EXAMINATION.

Petitioner received a Multi-State Converted Score of 62.82 and an essay average score of 59.72 for a weighted average for the entire examination of 60.75, well above the 60.00 minimum passing score historically required for passing the bar examination. Interestingly enough, this score exceeds the weighted average (60.74) of at least one successful applicant and is very close to the weighted average of at least three other successful applicants, namely, 60.77, 60.81 and 60.96.

Historically, a minimum of 60.00 has always been required for successful passage of the Utah State Bar Examination. The combining of the scores of the multi state examination and the essay examination include all of the safe guards necessary to insure that competency in the profession is maintained. That Petitioner's score exceeds the 60.00 historical minimum score should be sufficient.

In addition, because Petitioner's weighted average exceeds the weighted average of the successful applicant

who passed the examination with the lowest weighted average, the Petition should be granted along the same line of reasoning this Court used In Re Guyon, _____ P.2d _____ (Utah, 1977) in granting the petitions for admission of five applicants who took the 1976 examination there, the Court stated:

It is our opinion that it would be unreasonable under all of the circumstances attendant upon the grading procedures of this July 1976 examination not to allow all student applicants to be admitted to the Utah State Bar who received an overall passing score equal to or above the combined score of the student applicant that received the lowest passing score of all one hundred and forty-five applicants who passed this July 1976 examination.

Petitioner submits that this analysis is the proper standard for review which should be made applicable here.

The only argument the Board of Commissioners urges - eventhough its findings are short on this point - is that Petitioner should not be admitted to practice because she did not satisfactorily pass 12 out of the 18 essay questions. Petitioner submits that the additional requirement that an applicant receive a passing score of 60.00 on at least 12 of the 18 essay questions is inconsistent with the primary, basic requirement of requiring a minimum weighted average of 60.00 on the entire examination. Because all of the scores of the multi state examination and the essay examinations are computed in the weighted average, the additional 12/18 requirement is unnecessary, duplicitious and arbitrary and capricious, and effectively raises the

requirement for passage to 66.67%, a result which this Court certainly never contemplated. To argue that the 12/18 requirement insures general proficiency is without merit, particularly since in the past applicants have been admitted who have passed 11, 10, 9 and 8 of the essay questions.

The results of this particular bar examination demonstrate the frivolity of this procedure. First, one applicant who failed and five applicants who passed the examination had passing scores on the exact minimum of 12 of the 18 essay questions; second, three applicants who failed the examination had average essay scores of 60.28, 60.56 and 61.06; and third, four applicants who failed the examination had weighted averages which exceeded the minimum required of 60.00, namely, 60.32, 60.75, 61.89 and 62.84.

In conclusion, the 12/18 requirement bears no rational relationship to the primary basic requirement of receiving a minimum weighted average of 60.00 on the entire examination, and, therefore, is capricious and arbitrary. Because Petitioner's average of 60.75 exceeds the minimum weighted average of 60.00 and is, further, above the weighted average of at least one successful applicant, her petition should be granted.

POINT II.

THE PETITION SHOULD BE GRANTED BECAUSE SOME OF THE MODEL ANSWERS CONTAIN ERRONEOUS STATEMENTS OF LAW, INCORRECT TOPICAL LISTING OF ISSUES AND POOR LEGAL ANALYSIS, ALL OF WHICH RESULTED IN GROSSLY UNFAIR ANALYSIS AND SCORING OF PETITIONER'S EXAMINATION WHICH WOULD NOT HAVE OCCURRED HAD THE EXAMINATION BEEN PROPERLY PREPARED AND ADMINISTERED.

Utah Code Annotated §78-51-10 (1953) provides that

applicants for admission must pass a "satisfactory examination". To the extent that the 1977 (summer) examination contained poorly structured and reviewed essay questions, the examination violated the requirements of this provision. In any event essay questions are at best an imperfect tool for determining competency. The prior state examination for which the petitioner received a score of 62.82 is a much more broad-based and professionally administered examination, and should be given more weight.

Petitioner submits that there are at least six essay examination questions which are defective and, had they been fairly and evenly administered, petitioner would have successfully passed the bar examination. Each of those questions is examined below.

No. 34 - Civil Procedure - Score 55

This particular question contains four errors in law and legal analysis.

First, the motion to dismiss for insufficiency of process although a possibility -- cannot be said to be reasonably based upon the given statement of facts. To list this as a potential motion is error without more definitive facts upon which such a motion could be premised. Petitioner did not discuss this as a possible motion and was correct in failing to do so.

Second, the suggestion that a motion for change of venue be made if two other motions failed, or, alternatively, could be asserted in an answer, is an incorrect statement of the law in Utah. In Rudd v. Crown International, 488 P.2d. 298

(Utah, 1971), this court made it very clear that a motion for a change of venue must be made at the first appearance. The model answer's legal analysis of the venue problem is in direct conflict with the law of this state. Again, Petitioner did not commit these errors outlined in the model answer.

Third, the statement in the model answer that statutes of limitation are, technically speaking, matters of defense rather than matters commonly raised by motions is an incorrect statement of the law. The Utah Rules of Civil Procedure are flexible enough to allow either method to be utilized.

Fourth, the question asked the same question in two different ways which, because petitioner did not complete the second part, gives the impression that 50% of the question was not fully answered. The first part asked what motions could be filed and the second requested an outline of a responsive pleading to the complaint (which might, also, be a motion anyway). The second question was, therefore, duplicitous and superfluous; petitioner should not have been penalized for failing to complete the second part of the question.

In addition, it is interesting to note that on this particular question, there were 29 failing scores and 36 scores of 60.00, for a total of approximately 40% scores which were either failing or borderline. This percentage indicates further the poor structure of the question.

No. 62 - Administrative Law - Score 59

This particular question contains one glaring error - the model answer resembles a table of contents of a textbook

as distinguished from a reasonable breakdown of precise, definitive legal issues. It is virtually impossible for an examiner to evaluate an answer with such a cursory topical outline. Close scrutiny of the eight issues listed in the model answer also discloses that six of them are not even issues, but are rather propositional topics of law applicable to administrative hearings generally. With these monumental mistakes, Petitioner's score based upon four typewritten pages should certainly be raised to give her a passing score on this question.

In addition, it is interesting to note that on this particular question, there were 18 failing scores, 31 scores of 60.00 and 14 scores of 61.00, all of which indicates that approximately 40% either failed or had borderline scores on this question. This percentage is further evidence of the unsatisfactory nature of the model answer.

No. 12 - Evidence - Score 59

The model answer for this particular question indicates that it is a very complex, technical essay question; it is unquestionably too broad to be a good question. That there were 18 failing scores, 31 scores of 60.00 and 14 scores of 61.00 for a total of failing/borderline responses of 40% for this question also certainly augments petitioner's petition. Her answer does not deserve a score one point shy of passing.

No. 11- Agency- Score 54 [or 55]

Petitioner's answer to this question appears to be a pretty good answer. That there were 15 failing scores and 23

scores of 60.00 for a total of approximately 25% which were either failing or borderline scores is further evidence that it, too, was poorly worded and included too many issues.

No. 45 - Ethics - Score 55

Petitioner was one of only two applicants who failed this question and her score was the lowest; there were 142 scores of 70.00 or higher. Petitioner's answer appears to discuss most of the issues involved and it is difficult to understand how her three type-written pages are inadequate.

No. 23 - Civil Procedure - Score 55

Petitioner's answer to this technical question appears passable. In addition, that there were 22 failing scores, 52 scores of 60.00 and 27 scores of 61.00 or 62.00, for a total of approximately 60% which resulted in either failures or borderline passing, also calls for reevaluation of the Petitioner's answer.

These six questions should all be reevaluated by this Court. These six essay questions are inadequate legally and factually to support the position of the Board of Bar Commissioners.

POINT III

THE PETITION SHOULD IN THE ALTERNATIVE BE REMANDED TO THE BOARD OF COMMISSIONERS WITH DIRECTIONS FOR IT TO PRODUCE CERTAIN RELEVANT AND ESSENTIAL DOCUMENTATION AND TO PREPARE MORE ADEQUATE FINDINGS REGARDING THIS PETITION, PARTICULARLY AS THEY RELATE TO THE SIX ESSAY QUESTIONS ATTACKED BY PETITIONER.

After timely filing her Petition for Review with the Utah State Bar, Petitioner requested in writing on October 13, 1977 and December 6, 1977 certain relevant and essential documentation regarding her Petition. Petitioner submits that the Committee of Bar Examiners and Bar Counsel's failure to make the requested information available to Petitioner should be construed against the Committee's decision that Petitioner failed the bar examination, and that this Petition should be remanded with instructions to turn over and release that information to Petitioner.

Specifically, Petitioner requested the following information and documentation:

(a) A description of how the multi-state and essay examination scores were correlated on the results of the last several years.

(b) The essay examination answers of all applicants for each of the nine bar examination essay questions Petitioner allegedly failed.

(c) The minutes, memorandums, responses and similar documents of both the Board of Commissioners of the Utah State Bar and the ad hoc Bar Examination Commission regarding the weighing to be given the multi-state and essay examinations. None of these documents has been supplied to Petitioner to assist her in preparing her appeal.

Petitioner submits that all of the requested information is relevant to her Petition and the failure to provide that information should be construed against the Board of Commissioners.

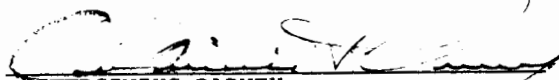
decision that Petitioner failed the bar examination, and in the alternative, should result in an Order of this Court that the documentation be provided forthwith to Petitioner on remand.

In addition, the findings prepared by the Board of Commissioners do not in any sense of the word comport with the degree of detail and specificity required in a Court of law. To not require that body to specifically detail what its findings are on all of the issues raised at the hearing level makes it difficult for this Court to afford any significance at all to the Board's judgment. The Board of Bar Commissioners should be required on remand to delineate more specifically what its position is on each issue raised.

CONCLUSION

In conclusion, Petitioner has demonstrated that she has the degree of competency to practice law in the State of Utah by obtaining a 60.75 weighted average for the entire examination, which exceeds the weighted average of at least one successful applicant. Petitioner prays that her Petition for Admission to the Utah State Bar be granted.

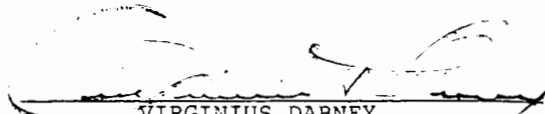
RESPECTFULLY SUBMITTED,



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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of Petitioner's Brief to Pamela T. Greenwood, Utah State Bar, 425 East First South, Salt Lake City, Utah this 2nd day of May, 1978.



VIRGINIUS DABNEY