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

Utah Supreme Court

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FILED

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

In the Matter of the
Application for Admission
to the Utah State Bar of

DEBORAH LYNN TANNER

Petitioner.

No. 15703

BRIEF OF UTAH STATE BAR

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Application for Admission
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DEBORAH LYNN TANNER,
Petitioner.

No. 15703

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

The Utah State Bar Board of Commissioners declined to recommend admission to the Utah State Bar of petitioner, because of her failure to successfully pass the Bar Examination.

DISPOSITION BELOW

After review of petitioner's Bar Examination performance, the Board of Commissioners sustained their prior decision that petitioner be denied admission to the Utah State Bar at this time.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

The facts as stated in Petitioner's brief are essentially correct. One of the necessary criteria for passage of the Bar Examination is that an applicant receive scores of 60 or above on at least 12 of the 18 essay questions. Petitioner, having passed only 9 on those questions, was deemed to have failed to pass the Examination.

ARGUMENT

POINT I

THE REQUIREMENT THAT BAR APPLICANTS
PASS TWO/THIRDS OF THE BAR EXAMINATION'S
ESSAY QUESTIONS IS REASONABLE.

Petitioner argues that she should be admitted to the Bar because her weighted average for the entire examination was 60.75, above the minimum requirement of 60.00. While it is questionable that this score places petitioner "well above the 60.00 minimum passing score" (Brief at 3), it is used to advance the argument that it is unreasonable to also require passage of two-thirds of the essay questions in addition. Petitioner cites a recent decision of this Court for the proposition that the weighted average alone, should be criterion for examination passage. In re Guyon, (1977, unreported as far as the Bar can determine).

We dispute that the Guyon case stands for that proposition. The opinion was specifically limited to the particular facts arising from the July 1976 Bar Examination, and even then, produced a majority opinion of only two Justices, with two dissenting opinions, and one which partly dissented.

but concurred in the main opinion. Even the quotation included in Petitioner's brief includes the caveat that the decision results "under all circumstances upon the grading procedures of this July 1976 examination . . ." The last paragraph of the Guyon opinion clearly limits it to those particular facts:

In this opinion we have modified in this instance the formula adopted by the Bar Commissioners because, as heretofore stated, we believe it would be unreasonable not to do so. That is all this opinion stands for and is intended to stand for. (emphasis added)

The reasons for the requirement seem obvious - to demonstrate a broadly-based legal knowledge and expertise which will be utilized successfully and competently in future practice. Additionally, it serves to meet the purpose of Section 78-51-10 of UCA (1953), that requires each applicant to "have passed satisfactory examination upon the principles of common law, equity, criminal law and the statutes and practices of this state; . . ."

Despite the difficulties in administering and grading essay questions, it is nevertheless, an appropriate means of assessment and meets the test propounded by the United States Supreme Court in Schwabe v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1974), to wit:

A State can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. 353 U.S. at 238-239.

The two-thirds rule provides some assurance that the applicant has the necessary knowledge and skills in a range of legal subjects. The overall weighted average does not necessarily provide the same assurance, because sufficient extremely high scores could offset the low ones. The requirement has a rational and reasonable relationship to the evaluation of the applicant's competency and should therefore, be retained.

In the facts here, Petitioner needed to pass three more essay questions to meet the criteria. The disparity is sufficient to reasonably raise doubts as to competency. The following dialogue reflects this:

MR. SORENSON: In this particular case, Miss Tanner passed 9 out of 18.

MR. DABNEY: That's correct.

MR. SORENSON: So, on half of the essay questions the Examiners felt that she didn't come up to the lowest level of competency to practice in those fields.

MR. DABNEY: That's correct.

(Transcript, p. 18,
l. 4-11).

The Petitioner's average score on all of the essay questions did not rise to the minimal 60.00 level. The overall weighted average exceeded 60.00 only because of the relatively high score achieved on the Multistate portion of the Examination. It must be assumed, therefore, that the Petitioner lacks those sorts of skills and knowledge tested in the essay portion of the exam and not reflected in the Multistate portion. The indications are that Petitioner is not presently qualified for admission to the Bar.

POINT II

PETITIONER'S ANSWERS TO THE EXAMINATION
WERE PROPERLY GRADED.

Petitioner attempts, in her brief, to second guess the Examiners in evaluating both the essay questions and the answers provided by Petitioner. This grants scant appreciation for the process engaged in by the Examiners in the preparation of the examination questions and subsequent grading of answers. The Bar urges that, except where there is a clear showing of arbitrariness, this Court adopt the findings of the Examiners and the Bar Commissioners. To do otherwise would simply duplicate the efforts already expended and make a mockery of the authority delegated by this Court to the Commission.

Petitioner's criticisms of the questions, model answers and grading results are so generalized as to be meaningless. These criticisms included, among others, the following: an issue is not reasonable in light of the facts; one model answer is like a table of contents; one question is too broad; one is poorly worded; and one contains too many issues. In looking at Petitioner's answers, the brief states that one "seems adequate" and another is at least "passable." Also, Petitioner states that several questions must be defective because a relatively high percentage of applicants either failed or barely passed those particular questions. Then, the brief criticizes another question where only two applicants, including petitioner, failed. It seems that there is no way to win in such a contest. The question is improper according

to Petitioner, if it is too difficult or if it is too easy. The grading process utilized by the Examiners is arduous and is described by Commissioners Sorenson, one of the Hearing Officers, in the transcript of proceedings, as follows:

MR. SORENSON: In other words, there are teams of three readers. If the first reader determines that that paper does not meet the standard as compared against the model answer and how they read that, then it's reviewed by two other readers, as well. So, it takes three readers, in essence, to read that question to come up with that score.

In these cases where there are 59, those three readers do not feel that the applicant has passed with sufficient minimum qualifications in that area to receive a passing score. So, it isn't just a single person that makes that arbitrary ruling. It's three of them.

So, while we are all human, as you indicated, nevertheless, there is the thinking of three minds that have been reading these things to arrive at a passing score, not just one.

(Tr., p. 30, l. 23-25, p. 30, l. 1-14).

Petitioner seems to imply, at least by the number of criticisms, that essay exams are, per se, unfair or arbitrary. This argument has been raised in other jurisdictions and found wanting. In Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971), the court found that "Nor can it be said that an essay type examination is inherently unfair or that such a test has no rational connection with an applicant's fitness or capacity to

practice law." at 705. A similar conclusion was arrived at in an earlier California case:

The Court California Supreme Court has stated in effect that it will not engage in a regrading of examination papers - as no federal court is likely to do either. It said in Staly v. State Bar, 17 Cal.2d 119, 121, 109 P.2d 667, that "Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court." But it added that "if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition or coercion . . . , this court will be willing to listen to his complaint." Chaney v. State Bar of California, 386 F.2d 992 (9th Cir. 1967)

A recent United States Supreme Court decision found that dismissal from medical school for academic insufficiencies required less in terms of due process hearing rights, than dismissal for academic reasons. "The difference calls for far less stringent procedural requirements in the case of academic dismissal." Board of Curators of U. of Missouri v. Horowitz, 435 U.S. ____ (1978), 55 L.Ed2d 124, 133. In applying that standard herein, one would assume that the close perusal and careful methodology of the Bar Examiners and the second review by the Board of Commissioners has sufficiently provided Petitioner with requisite due process. This Court ought to refuse to completely reassess the grading of the Bar Examiners, as urged by Petitioner, in the absence of supportable allegations of fraud, coercion or unwarranted discrimination. There are no such allegations herein.

POINT III

THE UTAH STATE BAR ADEQUATELY COMPLIED
WITH PETITIONER'S DISCOVERY REQUESTS AND
PETITIONER SUFFERED NO PREJUDICE THEREFROM.

Petitioner claims to have been hampered in these proceedings by the failure or refusal of the Bar to provide certain documentation. There are three areas where discovery was denied. Each will be discussed briefly, below.

First, Petitioner requested information as to how and why the correlation between the multi-state and the essay portions was arrived at. This request was irrelevant because the weighting system whereby the weighted average is arrived at, resulted in an average in excess of 60.00 the minimum passing level, for the Petitioner. Therefore, she was not harmed by that formula. Also, it was explained during the course of the hearing that the formula was mandated by this Court, having original jurisdiction and authority over admission to practice law in the state of Utah. (Tr. p. 1. 13-19).

Second, Petitioner requested and was denied copies of passing answers for all applicants for the questions which she failed. This was denied by the Bar because of the burdensome nature of the request and because it was irrelevant. Petitioner was provided with copies of the questions, model answers and her answers. This was sufficient to provide the needed information. Furthermore, because Petitioner has an unqualified right to take the Bar Examination again, she is not entitled to the requested docu-

504 F.2d 474 (7th Cir. 1974), the petitioner had the right to take the bar examination again. He had requested that he be able to see his examination answers and compare them with both model answers and successful answers. The court disagreed and found that "Given the availability of these alternative procedures, the requested procedures were not constitutionally required." at 478. The court further stated as follows:

Furthermore, merely seeing his examination or comparing it with others would not allow plaintiff to expose errors or discern his abilities. These procedural rights would be virtually meaningless unless plaintiff also was able to confront the bar examiners and obtain from explanations of their grades. Several hundred applicants fail the Illinois Bar Examination annually. Requiring an explanation for each of these applicants would place an intolerable burden upon the bar examiners. It also would place at an unfair disadvantage those applicants who were taking the exam for the first time. 504 F.2d at 478.

Therefore, failure to provide copies of passing answers was not unreasonable nor prejudicial under the circumstances.

Lastly, Petitioner requested minutes of the Board of Commissioners and the Examiners Committee relating to the Bar Examination. Petitioner was informed that the Examiners kept no minutes and that the Commission minutes, while available, contained only conclusions, not reasoning. Again, the information requested was irrelevant.

CONCLUSION

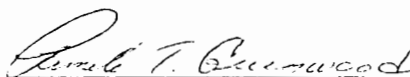
This Court has delegated to the Board of Commissioners the authority to test all bar applicants with a suitable examination and make recommendations to the Court as to admission to the Bar, based on the results of that examination and other factors. The Court ought to accord

the procedures and/or the results are grossly unreasonable, arbitrary or unfair. Such is not the case herein. The requirement that an applicant pass two-thirds of the essay questions of the Bar Examination is reasonable and rationally related to the ability to practice law. Furthermore, there has been no satisfactory evidence presented that the grading of Petitioner's examination was unfair or erroneous.

The Utah State Bar therefore urges that this Court adopt the Findings of the Commission and deny Petitioner's petition.

DATED this 9th day of June, 1978.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Respondent, Utah State Bar, were deposited in the mail, postage prepaid, to Virginius Dabney, Esq., McMillan & Browning, 1020 Kearns Building, Salt Lake City, Utah 84101, this 9th day of June, 1978.

