

1987

In Re Lindsay Shane McCarthy, Petition for Admission to the Utah State Bar : Brief of Petitioner

Utah Supreme Court

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Gregory N. Barrick; Van Cott, Bagley, Cornwall and McCarthy; Counsel for Petitioner.

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BRIEF

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DOCKET NO. 870442

IN THE SUPREME COURT OF THE STATE OF UTAH

In Re LINDSAY SHANE McCARTHY.
Petition for Admission
to the Utah State Bar

Case No. 870442
(Priority No. 5)

OPENING BRIEF OF PETITIONER LINDSAY SHANE McCARTHY

APPEAL OF ORDER OF THE
BOARD OF COMMISSIONERS OF THE
UTAH STATE BAR
DENYING ADMISSION TO THE BAR

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FILED

DEC 15 1987

Clerk, Supreme Court, Utah

In Re LINDSAY SHANE McCARTHY.
Petition for Admission
to the Utah State Bar

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JURISDICTION AND PROCEEDINGS BELOW

This is an Appeal from the determination of the Grievance Petition Committee (the "Committee"), as approved by an order of the Board of Commissioners (the "Commission"), of the Utah State Bar, denying Petitioner LINDSAY SHANE McCARTHY'S Application for Admission to the Bar after having passed the essay portion of the Utah Bar Exam and having missed a passing score on the Multistate Bar Exam ("MBE") by two (2) points. This Court has jurisdiction to review and pass upon the Order of the Commission in this matter. See, e.g. In re Thorne, 635 P.2d 22 (Utah 1981); Rule of Review of Bar Examination and Appeal, approved by the Supreme Court, January 26, 1977.

STATEMENT OF THE ISSUE

Whether the Committee's Finding that it was "unpersuaded that the Petitioner has demonstrated . . . that relief should be granted to prevent manifest injustice," is supportable in light of uncontroverted medical evidence that Petitioner has a visual impairment which affected his performance on the MBE, the fact that if Petitioner would have been given additional time, or had his condition not existed, he likely would have correctly answered sufficient questions to have passed the MBE, and the fact that the Commission has in the past granted admission to applicants whose positions are indistinguishable from Petitioner's situation.

STATEMENT OF THE CASE

Petitioner LINDSAY SHANE McCARTHY sat for the July 1987 Bar Exam administered by the Utah State Bar. In order to pass the examination, an applicant must pass twelve (12) of the eighteen (18) questions on the essay portion of the Exam and receive a scaled score of at least 125 on the Multistate Bar Exam. Petitioner received a passing score on fourteen (14) of the eighteen (18) essay questions presented in the Exam. Record at page 7. Petitioner also received a score of 123 on the MBE. Id. Because Petitioner received a scaled score of 123 on the MBE, he was deemed to have failed the July 1987 Bar Examination. Record at pages 1-3.

Petitioner timely sought review of the results of the MBE portion of his Bar Exam, and a hearing was held before the Grievance Petition Committee on or about October 16, 1987. Record at page 1. At the hearing, Petitioner presented uncontroverted medical evidence from two (2) eye doctors indicating that Petitioner has a visual impairment which, because of the time constraints imposed on the MBE portion of the exam, caused him to perform at less than his full capacity on the MBE. Record at pages 4-6. If Petitioner would have had additional time in which to answer the MBE portion of the exam to compensate for his visual impairment, or had the condition not existed, he undoubtedly would have passed the one or two

more questions necessary for him to receive a scaled score of 125 on the MBE, a score sufficient to pass the Exam.

Despite the fact that the Commission has granted admission to persons whose situations are legally indistinguishable from that of the Petitioner (see Exhibits "A" and "B" hereto), the Commission denied Petitioner's request for admission to the Bar. Record at page 3. An Appeal was timely taken to this Court for review of the Commission's denial of Petitioner's petition for admission.

SUMMARY OF ARGUMENT

Uncontroverted medical evidence at the hearing demonstrated that Petitioner has a visual impairment which caused him to be on an unequal footing with other applicants, and that he would have passed the MBE portion of the Bar Examination had the condition not existed or if he would have had additional time to compensate for this impairment. On prior occasions, the Commission has admitted applicants who, like Petitioner, passed the essay portion of the Exam but had MBE results slightly below the required level for passing the Exam, where such applicants demonstrated that they had some impairment or distraction and that if they would have had additional time to compensate for the impairment or distraction, or had the impairment or distraction not existed,

they would have passed the Exam. However, the Commission, for no apparent reason, has determined not to grant similar relief to Petitioner in this case. Such a decision is unfair, unreasonable, and arbitrary with respect to Petitioner.

ARGUMENT

Petitioner's position in this case is simple and straight forward. As previously indicated, other applicants to the Bar have been admitted on MBE scores similar to Petitioner's score when the facts demonstrated that there was some circumstance which caused the applicant to be on an uneven footing with the other Bar applicants, and that if the applicants would have had additional time to compensate for this disadvantage, or had the disadvantage not existed, they likely would have passed the MBE. Yet Petitioner was not granted similar treatment in this case.

Here Petitioner presented uncontroverted evidence to the Commission to the effect that on the MBE portion of the Bar Exam Petitioner's performance suffered because he has a visual impairment which affects his ability to read rapidly, particularly for extended periods of time and during periods of stress. Dr. Orson W. White is an eye physician and surgeon located in Salt Lake City, Utah. Dr. White has been Petitioner's eye doctor from Petitioner's youth. As indicated

in Dr. White's letter to the Commission of October 20, 1987, Petitioner was born "right esotropia (cross eye)." Record at page 6. Petitioner was first treated for this condition at age five. Petitioner had muscle surgery to correct the condition at age six. However the surgery was only partially successful and Petitioner's condition continues to result in some double and even triple vision in the affected eye. Petitioner "still has a tendency for the right eye to cross . . . [and] [w]hen he is tired or stressed he frequently has a double vision with the right eye and some tripling when the two eyes are unable to work together." Id.

Dr. Stanley C. Sollie, a physician in Tacoma, Washington (where Petitioner attended law school), who most recently was responsible for Petitioner's treatment, confirmed Petitioner's visual impairment, determining that Petitioner has a "low grade myopia," and a "condition called esotropia." Record at page 4. According to Dr. Sollie, when Petitioner reads under periods of stress the images seen in each eye do not coordinate with each other, and instead these images are "nearly superimposed" over each other. Under normal circumstances Petitioner has, in general, learned to suppress the image in the affected eye, thereby allowing him to see a relatively clear image. However, he is unable to do this under periods of stress and, as indicated by Dr. Sollie, as a result

"diplopia," or "double vision" ensues. Record at pages 4 and 5. As a result of his professional examination of Petitioner, Dr. Sollie indicated that:

Based on my examination of this individual, I would concur with his contention that a visual problem exists which would contribute to his difficulty with rapid reading, especially under periods of stress.

Record at page 4.

As a result of his visual impairment, Petitioner was unable to "read the MBE questions of the Exam "as fast as he would under normal circumstances." Record at page 5. Therefore, he was unable to read and analyze each MBE question within the required time, forcing him to guess on many of the questions at the end of each of the two test sessions. Petitioner's situation is legally indistinguishable from the case of an applicant in the 1986 Bar Exam who was granted admission despite the fact that he slightly missed passing the MBE. Attached hereto as Exhibit "A," and incorporated herein by reference, is a Determination and Recommendation of the Grievance Petition Committee, adopted by the Commission, admitting to the Bar an applicant who, like Petitioner herein, passed the essay portion of the Exam but failed the MBE because he received a scaled score of 123 (the same score received by Petitioner), just two points below the scaled score of 125 that was necessary to pass the exam. In that case the applicant

appealed his failure of the MBE on the basis that English was his second language, with Tongan being his primary language, and that he was forced to guess on approximately 20 questions on the MBE because of the extra time it took to assimilate the questions in English. Based upon these facts, the Committee in that case found that:

1. The applicant had established that because of the time constraints imposed on him during the MBE portion of the Exam and his need to assimilate the questions in English, that if he had been given additional time, or had the language barrier not existed, that he would have correctly answered one or two additional questions which would have established his scaled score at a passing level.

2. That in light of the above, the applicant had established and carried the burden of proving that he should be admitted to the Bar to prevent manifest injustice. The Grievance Committee then recommended that the Petitioner be admitted to practice law in the State of Utah.

Similarly, in a second case in 1986 (a copy of the Findings of Fact and Recommendation of which is attached hereto as Exhibit "B," and incorporated herein by reference) an individual who received a scaled score of 124 on the MBE was granted admission to the Utah State Bar based upon his assertion that there was excessive noise near his seat and that without the distractions created by this noise he would have

passed at least one additional question and thereby passed the Exam. Both of these examples were brought to the attention of the Committee in the instant case.

Despite the above, in the Findings of Fact and Recommendation in the instant case, the Grievance Committee states only that it is "unpersuaded" that Petitioner herein should be admitted to the Bar. The decision is entirely void of any explanation for this bare conclusory statement. The medical evidence in the record in this case is even more authoritative and documented evidence than the assertions of the applicants in the two cases referred to in Exhibits "A" and "B" above. Yet the applicants in those cases were granted admission to the Bar and Petitioner was not. Petitioner contends that this action is unfair, unreasonable, and arbitrary, and that this Court's Order admitting him to the Bar is necessary in order to prevent manifest injustice.

CONCLUSION

For the reasons stated above, Petitioner prays that this Court order that Petitioner be admitted to the Utah State Bar.

DATED this 15th day of December, 1987.

Respectively Submitted

By Gregory N. Barrick
Gregory N. Barrick, of Van Cott,
Bagley, Cornwall & McCarthy
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing Opening Brief of Petitioner to be mailed, postage prepaid, this 15th day of December, 1987, to the following:

Stephen F. Hutchinson
Executive Director
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Jo Carol Nasset-Sale
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Salt Lake City, Utah 84111

Paul Stapley

9091B
121587

EXHIBIT "A"

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

Hearing Panel:
Hans Q. Chamberlain, Chairman
Stewart M. Hanson, Jr.
Reed L. Martineau

IN RE:)	
)	
)	DETERMINATION AND
)	RECOMMENDATION
Petitioner.)	
)	

The petition for review filed by _____ came on for hearing before the Committee on Grievance Petitions, pursuant to notice, on October 21, 1986, at 9:00 o'clock a.m. The petitioner appeared before the Committee. _____ Esq. appeared and testified on behalf of the petitioner. Also in attendance was Julee G. Smilley, Admissions Administrator.

1. Petitioner claims that his failure to pass the Utah State Bar Examination resulted from arbitrary or capricious conduct on the part of the Committee of Bar Examiners.

2. Specifically, petitioner alleges that he successfully passed the essay portion of the exam, but failed the MBE because he received a scaled score of 123, which was just 2 points below the scaled score of 125 that was necessary to pass the exam. Petitioner further claimed that English is his second language,

with Tongan being his primary language, and that he was forced to guess at approximately 20 questions on the MBE because of the extra time it took to assimilate the questions in English.

3. Both petitioner and ~~_____~~ Esq., stated that there are approximately 12,000 Tongans living in the Salt Lake Valley who find it difficult to seek legal counsel, that Salt Lake has no fellow Tongan to serve them in the legal community and that because of the language barrier, the Tongan community is deprived of access to legal service.

Based upon the foregoing, the Committee makes the following findings:

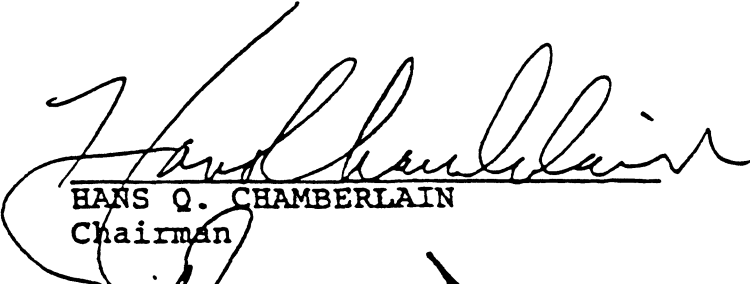
1. Petitioner established that because of the time constraints imposed on the petitioner during the multi-state portion of the bar exam and his need to assimilate the questions in English, that had additional time been given, or had the language barrier not existed, that he would have correctly answered one or two additional questions which would have established his scaled score at a passing level.

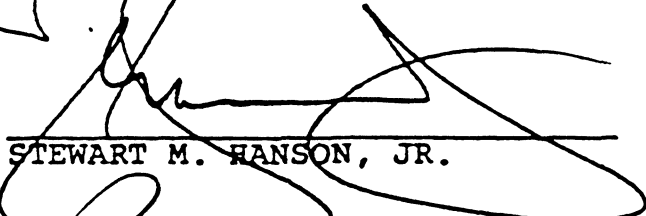
2. That petitioner has established and carried the burden of proof that he should be admitted to the Bar to prevent manifest injustice.

Based upon the foregoing, it is the decision and recommendation of the Committee that the petition be granted, and

that petitioner be admitted to practice law in the State of Utah.

DATED this _____ day of October, 1986.


HANS Q. CHAMBERLAIN
Chairman


STEWART M. HANSON, JR.


REED L. MARTINEAU

EXHIBIT "B"

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

Hearing Committee: Gordon J. Low, Chairman
Kent M. Kasting
B. L. Dart

---oooOooo---

IN RE: :
: FINDINGS OF FACT
: AND RECOMMENDATION
Petitioner. :

---oooOooo---

The Petition of _____ came before the
Hearing Committee for Hearing on the 28th day of May, 1986. The
Petitioner was present in person and represented by counsel,

Also in attendance were Julee Smiley of the Utah
State Bar Association staff in charge of Bar admissions and
and _____ as expert witnesses. Evidence
was received by the Committee, and the matter having been
submitted, and the Committee being fully advised makes the
following:

FINDINGS OF FACT

1. Petitioner sat for the February 1986 Bar
Examination and passed 13 of the 18 essay questions which gave
him a passing score on the essay portion of the test. Petitioner
scored 124 on the Multi-state Bar Examination (MBE), and since a
score of 125 is required to pass, failed the MBE portion of the

Bar Examination. By reason of this failure, Petitioner was denied admission to the Utah State Bar.

2. Petitioner contends that his failing score on the MBE portion of the Examination was caused by the distraction of noise during the examination process. In support of his petition, Petitioner alleged that for both the morning and afternoon sessions, he was assigned a seat for the Examination which was next to the doors and hallway linking the examination room to the banquet serving and set-up areas of the hotel where the test was conducted.

Petitioner alleges that during the morning session, there were several incidents of noise from the employees of the hotel moving food trays and chairs, conversing and talking on a telephone which was located in close proximity to the doors.

Petitioner asserts that on several occasions he raised his hand to get the assistance of the proctor, and on one or two occasions, the proctor did go into the adjacent area to bring the noise level down. Petitioner asserts that on several occasions the proctor did not see him and because Petitioner was pressed for time, he did not attempt further to get the proctor's attention.

Prior to the commencement of the afternoon session, Petitioner requested that his seat be moved away from the distraction caused by proximity to the noisy area, but this

request was denied. Petitioner testified that in the afternoon session there were further disruptions, one of which was quite major requiring the proctor to again quiet the hotel employees. Petitioner represented that because of the distractions, he was unable to complete the MBE portion of the test and left between one and four of the questions completely unanswered. It is petitioner's contention that but for the distraction, he would have scored at least one point higher and thereby have passed the MBE portion of the test.

3.

was called as an expert witness

this job oversees all activities and personnel of the Center which is involved in testing roughly 18,000 individual and group administered tests yearly. She testified on behalf of Petitioner stating that if undue disruption would not occur to the other persons taking the test, a person who requests a move of seat because of noise should have that request granted if other seating is available.

5. Julee Smiley, currently in charge of Utah State Bar Admissions, testified that Petitioner had complained during the morning of noise from the adjacent service area, but is not aware of more than one complaint having been made to the proctor of noise. It is her recall that the room generally was quiet and a good room for the taking of tests. She did state that Petitioner did request that his seat be moved and that this request was denied because of the desire to keep the seating chart intact so that she knew which applicant at each seat. This was done because it is necessary to hand out to the applicants their test under the same number in the afternoon session following the morning session.

Julee Smiley acknowledged that other seats were available to which the Petitioner could have been moved and that the move could have been made with little disruption since Bar applicants were free to get up and leave the room during the testing and many did so without disrupting the other test takers.

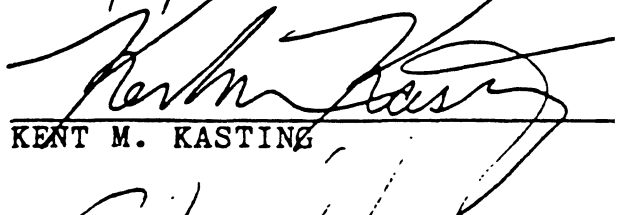
6. The Hearing Committee having carefully considered the petition, arguments and evidence is persuaded that Petitioner having requested an opportunity to change his seat because of distractions of noise should have had his request granted. The Committee is further persuaded that had Petitioner been allowed to change his seat, he would have probably scored sufficiently higher on the examination to have achieved a passing score.

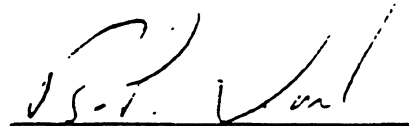
Because of these facts, it is the opinion of the Committee that relief should be granted to prevent manifest injustice.

The recommendation to the Board of Commissioners of the Utah State Bar is that based upon the foregoing, the petition of _____ be approved and he be allowed admission to the Utah State Bar.

DATED this 5th day of June, 1986.


GORDON J. LOV


KENT M. KASTING


B. L. DART