

1990

In the matter of the application of Juanita Fussell for
licensure as a Psychologist in the State of Utah:
Juanita J. Fussell v. Department of Commerce,
Division of Occupational and Professional
Licensing : Reply Brief

Utah Court of Appeals

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900291-CA

IN THE MATTER OF THE
APPLICATION OF JUANITA FUSSELL
FOR LICENSURE AS A PSYCHOLOGIST
IN THE STATE OF UTAH:

JUANITA J. FUSSELL,

Petitioner,

vs

DEPARTMENT OF COMMERCE,
DIVISION OF OCCUPATIONAL
AND PROFESSIONAL LICENSING.

Respondent.

Case No. 900291-CA

REPLY BRIEF OF PETITIONER JUANITA J. FUSSELL

* * * * *

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FILED

FEB 4 1991

Mary T Noonan
Clerk of the Court

UTAH COURT OF APPEALS

IN THE MATTER OF THE	:	
APPLICATION OF JUANITA FUSSELL	:	
FOR LICENSURE AS A PSYCHOLOGIST	:	
IN THE STATE OF UTAH:	:	
	:	
JUANITA J. FUSSELL,	:	
	:	
Petitioner,	:	
	:	
vs	:	Case No. 900291-CA
	:	
DEPARTMENT OF COMMERCE,	:	
DIVISION OF OCCUPATIONAL	:	
AND PROFESSIONAL LICENSING,	:	
	:	
Respondent.	:	
	:	

REPLY BRIEF OF PETITIONER JUANITA J. FUSSELL

* * * * *

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POINT I.

J. J. FUSSELL IS QUALIFIED TO PRACTICE AND TO
BE LICENSED TO PRACTICE PSYCHOLOGY ON THE
DOCTORAL LEVEL.

The Agency has conceded in its Brief that J. J. Fussell is qualified to practice psychology at the doctoral level. (Agency's Brief, page 23.) The Agency recognizes as undisputed that Dr. Fussell is practicing psychology on the doctoral level in Utah as a staff psychologist at Weber State College. (Id.) Then without support in the record or any other foundation, the Agency asserts that there is a difference between practicing psychology on the doctoral level and practicing independently as a licensed psychologist. The Agency implies that one practicing psychology on the doctoral level teaches, while a licensed psychologist independently practices psychology. This argument is without merit and is contrary to the evidence of record.

The undisputed evidence indicates that Petitioner is not teaching at Weber State College, but is practicing psychology as a staff psychologist.¹ Her duties are essentially the same as they would be in a private practice setting as an independent, professional, licensed psychologist in the State of Utah. The Agency admits that Petitioner is qualified to continue in her current employment. (Agency's Brief at p. 24). But the Agency never explains why, if Petitioner is qualified to practice as a

¹Dr. Southwick's explanation of Dr. Fussell's duties as a staff psychologist indicates that she has performed some teaching in the department of psychology at Weber State College, but only on an informal basis. (Transcript p. 76).

staff psychologist, she is not qualified to be licensed as a psychologist. In this regard, the State's argument is a non sequitur.

The undisputed evidence of record demonstrates that J. J. Fussell is qualified to be licensed to practice as an independent psychologist on the doctoral level. Of the three witnesses presented by the Agency, only one had personal experience evaluating Dr. Fussell's performance. That person, Dr. Addie Fuhrman, acknowledged as "good" her own experience with Dr. Fussell, which occurred in the counseling psychology internship program at the University of Utah. (R. 107-108.) The witnesses who testified on behalf of the applicant were unqualifiedly positive about her qualifications. For example, Dr. Richard Southwick testified:

"She's been an outstanding psychologist in the [Weber State] Counseling Center. . . . She is seen by her former clients as being valuable, as providing superb service, in being outstanding and meeting their needs. We have done co-therapy together on occasion, and that gives me an opportunity to see how she functions in that context. She makes presentations periodically in our in-service meetings, which gives you some indication as to how she organizes, how she diagnoses, how she carries out her responsibilities. Those, too, have been more than satisfactory.

(R. pp. 75-76.) Those who observed Dr. Fussell's performance in the University of Utah internship believed she was one of the best two interns to have ever participated in the program in its history. (Testimony of Drs. Morrill, Spinelli and Paul (R. 50-51, 63-64 and 69-70.))

The testimony is unrebutted that had Dr. Fussell completed the

identical course of studies at the University of Utah, she would have received a doctoral degree in counseling psychology, and qualified for licensure under the Utah statute and regulations. The testimony is further unrebutted that Dr. Fussell has completed all of the distribution requirements set forth in Regulation R153-25-8(4)(i). Even Drs. Malouf and Shenkenberg could not testify to the contrary, because they did not review her transcripts, course descriptions or syllabi.²

The overarching consideration in evaluating Dr. Fussell's licensure is that she be qualified and not present a risk to the public to practice psychology at the doctoral level. As is now apparently admitted by the State, Dr. Fussell is qualified to

² Any inference to the contrary within Drs. Malouf and Shenkenberg's testimony is wholly without foundation. Indeed, it is difficult to understand how these gentlemen could opine upon Dr. Fussell's academic qualifications without reviewing her course work. John Malouf testified:

"I did not review the transcripts, because from where I sat, the thing I was looking at, it wasn't really relevant what classes she had taken. I just didn't think, as I looked at it, that that was really an important factor. The important factor was: Is that a program designed to train psychologists?"

(R. 130). Dr. Malouf later testified that Dr. Fussell's course requirements satisfied the licensing requirements as far as he knew, but reiterated that he did not review her transcripts with care. (R. 138.) Dr. Shenkenberg, when asked what classes Dr. Fussell lacked or should have taken to qualify her for the practice of psychology at the doctoral level, stated that the course work Dr. Fussell had taken was not the issue. (R. 173-74.) He stated that the Board had not reviewed Dr. Fussell's course work to check it out course by course to see if it qualified or not according to the statutory requirements. (R. 174.) In contrast, Dr. Fuhrman, who testified on behalf of the Board, did review Dr. Fussell's transcripts and course work, and when asked what Dr. Fussell might have taken or what would be required of another applicant to practice psychology at the doctorate level in Utah, answered "...I think she's taken -- she's probably taken more than she needs." (R. 102-103.)

practice psychology at the doctoral level in the State of Utah. Contrary to the Agency's unexplained assertion, there is no distinction in qualifications or otherwise between practicing psychology on the doctoral level and practicing independently as a licensed psychologist. Undisputedly qualified to practice at the doctoral level, Dr. Fussell should now be licensed to do so.

POINT II.

THE AGENCY'S DENIAL OF LICENSURE TO DR. FUSSELL WAS ARBITRARY AND CAPRICIOUS. THE AGENCY'S FINDINGS CANNOT BE SUPPORTED UNDER THE SUBSTANTIAL EVIDENCE OR "WHOLE RECORD TEST."

The single most significant factor rendering the Agency's decision arbitrary and capricious in this case is that the Agency did not consider the course work completed by Dr. Fussell. It is undisputed that 80-90% of the courses completed by Petitioner were either psychology courses offered through an American Psychological Association (APA) approved program or crosslisted for credit in those programs. (Findings of Fact No. 11 R.480.) Fifty-eight percent of the courses completed by Dr. Fussell were offered by the APA approved and "Designated Doctoral Programs in Psychology" listed psychology departments at Vanderbilt University. Id. Fussell's doctoral dissertation was psychological in nature, supervised by three licensed psychologists. (R. 24; 51-52.) She completed a course in ethics and an APA approved internship at the University of Utah and excelled as one of the two top students ever to participate in that program. (R. 240 and 218; R. 49-51, 58-60, 63-65 and 68-70.) Had Fussell completed the same course work and

experience and submitted the same dissertation at the University of Utah she would have qualified for a doctoral degree in counseling psychology. (R. 52.) She has completed the distribution requirements required by the regulations interpreting the Utah statute. The Agency's own witness, Dr. Addie Fuhrman, acknowledged that fact. However, in evaluating her application, the Board failed to evaluate her course work or the descriptions of those courses. Rather, testimony of Drs. Malouf and Shenkenberg testimony indicates that the Board relied for its decision upon criteria which are either 1) conclusions without appropriate foundation or 2) requirements not disclosed in regulations, which run afoul of the Supreme Court's concerns in Athay v. State Department of Business Regulation, 626 P.2d 965 (Utah 1981). In that case, the Utah Supreme Court announced that "it is the responsibility of the administrative body to formulate, publish and make available to concerned persons rules which are sufficiently definite and clear that persons of ordinary intelligence will be able to understand and abide by them." 626 P.2d 968. (Emphasis added.)

Given the Agency's failure to consider the course work completed by Dr. Fussell, the Agency's conclusions regarding Dr. Fussell's degree are conclusory and without foundation. As such they cannot support the findings of the Board respecting Dr. Fussell's doctoral degree. Without reviewing Dr. Fussell's course work, the Agency could not possibly evaluate her program of studies or determine whether she had obtained a doctoral degree based upon

a program of studies whose content was primarily psychological. The Agency has noted in its Brief, page 12, that Dr. Malouf testified that brochures did not state that their intent was to train psychologists, and that Dr. Fussell's program did not appear to be a psychology program. Because he did not review her program, Dr. Malouf's conclusion could only be determined from the four brief paragraphs from the catalog introducing the Human Development Counseling Department at Peabody/Vanderbilt. Dr. Malouf expressed a concern that "the program outlined by Fussell [the one he did not review] seemed extremely limited and was not intended to train a psychologist." (R. 127-129.) Without reviewing Dr. Fussell's transcript to determine what courses she had taken in psychological research, Dr. Malouf opined that a program that de-emphasizes research to that extent does not qualify to train psychologists. Without reviewing Dr. Fussell's transcript or considering the courses she actually completed, Dr. Malouf was concerned that Dr. Fussell's program did not have the necessary focus or emphasis on psychology. And without reviewing her transcript to determine that she completed her courses with A's and B's, he was concerned that there was no process by which someone could be disqualified or taken out of the program if they were failing or did not have the proper skills or the personal traits to become a psychologist. (R. 130-132.) While Dr. Malouf's concerns might be legitimate in the abstract, given his failure to review Dr. Fussell's course work and her transcript, Dr. Malouf's conclusions are without foundation and unwarranted respecting Dr. Fussell.

Two other factors render the Agency's decision arbitrary and capricious. After their unfounded conclusions regarding Dr. Fussell's program of studies, the Agency's witnesses expressed further concern that the Human Development Counseling Program at Peabody Vanderbilt was not APA approved. See testimony of Dr. Fuhrman, passim. Yet, at R. 105, the Agency admits that nothing in the regulations or the statute require APA accreditation of a doctoral degree program. Likewise, the Agency's witnesses were concerned that the Human Development Counseling Program at George Peabody was not listed in the publication entitled "Designated Doctoral Programs in Psychology" (hereafter "DDPP") Yet in its responding brief, the Agency concedes that such a listing is not a licensing requirement. (Respondent's Brief, pp. 18-19). To the extent the Agency's denial of licensure was based on these two undisclosed factors, the decision was arbitrary and capricious.

In her opening brief, Dr. Fussell maintained that any requirement that the degree granting program be APA approved or listed in DDPP violated the requirements of Athay, supra, because these requirements are not published, available to concerned persons and thus not sufficiently definite and clear that applicants might be able to understand and abide by them. The Agency now concedes that neither factor is a requirement of Utah law for licensing of applicants. The Agency accuses Fussell of attempting to distract the court from "the more relevant issues" by even raising the argument. (Agency's Brief, p. 19.) But if a DDPP listing or APA approval are not prerequisites to qualification of

a doctoral degree for licensure, then why did the Agency's witnesses express concern that Dr. Fussell's program lacked them? If these are requirements, undisclosed as they are, they violate Athay, because there is no "objective, identifiable standard against which the [applicant's] qualifications could be judged." Athay, 626 P.2d at 966. If such designations are even considered in determining the intent and viability of a program of studies, they should be disclosed under Athay in the interests of due process of law.

If DDPP listing and APA approval are not requirements to qualify a doctoral degree, then the only basis the Board had to conclude that Fussell's degree did not qualify her was four introductory paragraphs in the course catalog generally describing the degree granting program Human Development Counseling at Peabody/Vanderbilt. If all Dr. Fussell had done was to complete a standardized program for training of counselors or teachers described in that catalog, the Board's licensure denial might be more easily understood. But the record is undisputed (and the State even admits) that this is not what Dr. Fussell did. She and her faculty advisors structured her program to accommodate her interest in practicing psychology as a counseling psychologist on the doctoral level.³ She completed all distribution requirements and course work set forth in Regulation 4(i) that are required of

³ The State curiously criticizes Dr. Fussell for designing her own program (Agency Brief, p. 13) at the same time it judges her on the basis of four general, introductory paragraphs out of the course catalog. How the State can synthesize those two positions into denying the license escapes Petitioner.

other applicants for a Utah license. Some 80-90% of her courses were offered by or cross-listed for credit in the Psychology Department at Peabody/Vanderbilt.⁴ Fifty-eight percent of the courses that Dr. Fussell completed were taken in that APA approved program, where Dr. Fussell, along with other psychology students, learned under the tutelage of eminent psychologists teaching the courses. Dr. Fussell completed this program of studies with outstanding grades. Since the Agency failed to consider these facts in concluding that Dr. Fussell's degree granting program did not qualify her for licensure, it is obvious that the only basis for the conclusion is the four short paragraphs in the course catalog. That conclusion is erroneous and arbitrary because the State did not review Dr. Fussell's degree.

The agency notes that Dr. Fussell does not have a basic "right" to a doctoral level psychologist's license. Fussell has never contended that she has a "right" to practice as a psychologist. What Fussell does contend is that she has a right to have her application for licensure considered on a basis which is consistent with due process and equal protection of the laws. By refusing to consider her course work and relying completely upon a four paragraph general description of a department in a course catalog, which concededly does not reflect Fussell's program of studies which even the Agency asserts Dr. Fussell designed for herself with the help of her faculty advisors (see Agency Brief, p.

⁴ Notably, the Psychology Department at Peabody/Vanderbilt is APA approved and is listed in DDPP.

29), the Agency has acted arbitrarily and capriciously in denying this license. The point is not that Fussell has a right to a license but that Fussell has a right not to be treated arbitrarily or to be judged by virtue of vague, or unwritten, undisclosed requirements.

The Agency argues that its regulations were written for the purpose of clarifying the requirements for licensure as a psychologist. That is precisely what Fussell contends the regulations do not do.⁵ The Agency expresses concerns that Dr. Fussell's program did not focus on psychology. Yet, the Agency had no basis for those concerns. It did not review Dr. Fussell's program. It did not consider the course work she completed, or the descriptions of those courses that Dr. Fussell provided. Without this analysis, the Agency's determination cannot be but arbitrary and capricious and a denial of Dr. Fussell's rights to due process of law.

POINT III.

THE STANDARD OF REVIEW MUST TAKE INTO CONSIDERATION THAT THE REGULATIONS RELIED UPON BY THE AGENCY TO DENY DR. FUSSELL LICENSURE ARE OUT OF HARMONY WITH THE STATUTE AND ARE A NULLITY.

The Agency has apparently misunderstood the standard of review

⁵ The Agency erroneously argues that prior to receiving her degree, Dr. Fussell had reason to know she did not qualify for licensure in Utah. However, with the exception of one ethics course, Dr. Fussell completed her course work prior to coming Utah. But even if she had not, the requirements in the regulations are not so definitive and definite as to give notice to an applicant what is required. How could anyone know from reading the regulations that an introductory, departmental catalog description, irrespective of course work actually completed, would be determinative of one's qualifications to be licensed?

propounded by Petitioner. The Agency has argued, and Petitioner agrees, that the standard of review is "an intermediate standard", covering "the Board's conclusions, [which] must be reasonable and rational' as measured against the language and purpose of the governing legislation.'" In addition, however, whether an agency has properly interpreted its statutory powers and authority is a question of law wherein no deference is given to the agency's view of the law. Bevans v. Industrial Commission of Utah, 790 P.2d 573 (Utah App. 1990). To the extent that the Agency has improperly interpreted its statutory powers and authority or misconstrued the statute in adopting regulations to implement the enabling statute, the review is based upon a correction of error standard. In this case, the Agency has denied Petitioner licensure based upon a regulation that improperly interprets the Agency's statutory powers. To the extent it has done so, the Agency's conclusions in this case are not reasonable or rational.

The enabling statute governing this application requires that the applicant have completed a doctoral degree based upon a program of studies whose content was primarily psychological. In interpreting that statute, the Agency has promulgated Regulation 4(b) (R153-25-8(4)(b)), which provides that the program wherever it may be administratively housed, must be clearly identified and labeled as a psychology program. The "program" to which the regulation refers is an administrative unit, as only administrative units or university departments may be "administratively housed." The regulation also requires that the program be identified and labeled

as a psychology program.

Neither of these requirements promulgated by the Agency is in harmony with the statute. While the statute does not require it, the Agency has engrafted to the licensure process the requirement that an applicant obtain a degree in psychology. Nothing in the statute allows the Agency to do so. The statute only requires that an applicant's degree be "based on a program of studies whose content was primarily psychological." The statute does not refer to an institutional unit or department at a university. It refers to the degree completed by the applicant. The degree must be "based on" a program of studies, not "from" a program of studies. To the extent Regulation 4(b) requires a degree in psychology or matriculation from an institutional unit labeled as a psychology program it is out of harmony with the statute and is a nullity.⁶

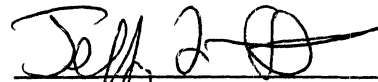
Contrary to the Agency's assertion that Tennessee's standards are lower (Agency Brief, p. 26), the Tennessee statute under which Petitioner is already licensed is very similar to the Utah statute. Both statutes give the licensing boards similar discretionary judgment to accept applications. However, the regulations the

⁶ Other provisions of Regulation 4 indicate that in promulgating the rule the Agency has misinterpreted the statute. The focus of the regulation is on "institutional entities." See Rule 4(c) (the psychology program must stand as a recognizable, coherent organizational entity within the institution). Regulation 4(f) (there must be an identifiable psychology faculty and a psychologist responsible for the program.) All of these requirements in the regulation indicate a focus by the Agency upon institutional departments or entities as opposed to the qualifications of an individual applicant. To this extent, the regulation is misdirected.

Agency has promulgated under the Utah statute have caused the Agency to abdicate its responsibility and decline to exercise that judgement. The purpose of the Utah statute is to allow licensure to a candidate who has completed a program of studies whose content is primarily psychological. The Utah licensing board thus has a responsibility to examine a candidate's program of studies. The Agency cannot outright reject any program that isn't labeled "psychological." But that is what has happened to Petitioner's application. Despite the fact that she has undisputedly completed a program of studies well within the purview of the statute, the Agency has declined to even look at her program, much less license her, on the sole ground that her program was not adequately labeled.

To the extent the Agency relied on Regulation 4(b) in denying Dr. Fussell's application, the Agency's denial is not reasonable or rational in light of the purposes of the enabling statute. To the extent the Regulation allows the Agency to ignore Petitioner's actual program of studies and deny her licensure based on the labeling of her degree or based on four general introductory paragraphs from a course catalog, the regulation and the Agency's action are out of harmony with the statute. The Agency's arbitrary disqualification of Petitioner given its failure to review the course of studies she completed must be reversed and the Agency directed to proceed with the licensing process.

DATED this 4th day of February, 1991.



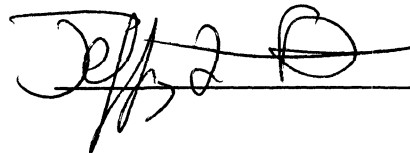
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MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage fully prepaid, on the 4th day of February, 1991 to the following:

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