

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Examination for
Certification as a Hearing Instrument
Dispenser by James M. Gott.

**ORDER ON MOTION
FOR SUMMARY DISPOSITION AND
RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Beverly Jones Heydinger on the Department of Health's motion for summary disposition. The Department filed its motion for summary disposition on November 1, 2005. The Applicant, Mr. James M. Gott, did not file any response by November 30, 2005. The record, with respect to the motion, closed on November 30, 2005.

Audrey Kaiser Manka, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, represented the Department of Health ("Department"). James Gott, 102 Main Street, P.O. Box 11, Bethel, MN 55005, represented himself without counsel ("Mr. Gott" or "Applicant").

Based upon all of the file, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER AND RECOMMENDATION

IT IS HEREBY ORDERED:

That the Department's motion for summary disposition is **GRANTED**.

IT IS HEREBY RECOMMENDED:

That the Department's decision to deny a an Examination for Certification as a Hearing Instrument Dispenser to the Applicant be **AFFIRMED**

Dated this 16th day of December, 2005

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Dianne Mandermach, Commissioner, Department of Health, Freeman Building, 625 Robert St. N PO Box 64975, St. Paul, MN 55164-0975, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Minnesota law requires individuals who engage in hearing instrument dispensing to be licensed.¹ In order to obtain a license, individuals must achieve a passing score on a hearing instrument certification examination which is administered by the Minnesota Department of Health several times a year.² Because the exam requires individuals to demonstrate practical proficiency using hearing instruments, the Department tests only twenty five candidates at each examination. The Department accepts applications to take an examination on first-come, first-served bases until either the twenty five examination slots are filled or the published application deadline has passed.³

An examination consists of a written test, which has two parts, and a practical examination, which has three parts. Applicants are required to pay a \$500 nonrefundable fee.⁴ Half of the fee, \$250, is for the written portions of the exam. The remaining \$250 is for the practical portions of the exam. Applicants

¹ Minn. Stat. § 153A. 14.

² Minn. Stat. § 153A. 14, subd. 2h.

³ *Id.*

⁴ Minn. Stat. § 153A. 17. The statute reads in part: " All fees are nonrefundable...the examination fee is \$250 for the written portion and \$250 for the practical portion each time one or the other is taken..."

must achieve a passing score for all five parts of the examination. Applicants who fail to pass all five parts of the exam have two years from the date they first tested to retake the failed portions of the exam.⁵

James M. Gott first took the hearing instrument dispensers examination on July 11, 2002. He passed two of the five parts of the exam. On November 21, 2002, Mr. Gott retook the three remaining portions of the exam and passed two more parts. Mr. Gott did not apply to take any portion of the hearing instrument certification examinations offered by the Department in 2003. Mr. Gott called the Department on March 9, 2004 and again on June 29, 2004 to inquire about taking the exam. Mr. Gott's inquiries were made after the deadlines to apply for both the March and the July 2004 examinations had passed and after the twenty five testing slots had already been filled for each examination. On November 19, 2004, more than two years after he first took the hearing instrument dispensers examination, Mr. Gott submitted an application to take only the practical portion of the examination and sent the Department a check for \$250.⁶

The staff recommended that the Commissioner of the Department of Health deny Mr. Gott's application to take the examination for certification as a hearing instrument dispenser because he was required to take the full examination and he did not pay the fee required to take the written portion of the examination. Mr. Gott told Department staff that he should not have to take the entire examination and should not have to pay the full \$ 500 fee. He objected to the Department's testing procedure and subsequently requested a contested case hearing.

A prehearing conference was held on October 11, 2005. Both the Department and Mr. Gott, appearing on his on behalf, participated. The Department stated during the prehearing conference that it intended to move for summary disposition. A Prehearing Order was issued on October 12, 2005 which directed to Department to file and serve its motion for summary disposition by October 31, 2005 and further directed Mr. Gott to file a response by November 30, 2005. The Department moved for summary disposition on October 31, 2005. No response was received from the Applicant on November 30, 2005, nor was there any request for an extension.

The Department's request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. Summary disposition is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law.⁷ A material fact is one that is substantial and will affect the result or outcome of the proceeding, depending upon the determination of that fact.⁸ In

⁵ Minn. Stat. § 153A.14, subd. 2h (c). The statute reads in part: "An applicant must achieve a passing score on all portions of the examination within a two-year period. An applicant who does not achieve a passing score on all portions of the examination within a two-year period must retake the entire examination and achieve a passing score on each portion of the examination."

⁶ Affidavit of Patti Fuller.

⁷ Minnesota Rules of Civil Procedure, Rule 56.03.

⁸ *Highland Chateau v. Minnesota Dep't. of Public Welfare*, 356 N.W.2d 804 (Minn. App. 1984).

considering the Motion for Summary Disposition, an Administrative Law Judge must view the evidence in the light most favorable to the nonmoving party.⁹

To obtain a summary disposition, the moving party must establish that there is no genuine issue of material fact. The initial burden is on the moving party to establish a prima facie case for the absence of material facts at issue.¹⁰ Once the moving party has established a prima facie case, the burden shifts to the nonmoving party.¹¹ To defeat a motion for summary judgment successfully, the nonmoving party must show that there are disputed facts that have a bearing on the outcome of the case.¹² The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden.¹³

The Administrative Law Judge and the Commissioner of Health have jurisdiction over license application appeals pursuant to Minn. Stat. §§ 14.50 and 153A.14. At a hearing, an applicant for examination for certification bears the burden of proof to demonstrate by a preponderance of the evidence that he or she has complied fully with Minn. Stat. § 153A.14 and other applicable laws or rules.¹⁴

The facts in this matter are straight forward. On July 11, 2002, Mr. Gott first took the examination. He passed two of the five parts. On November 21, 2002, Mr. Gott retook the three parts of the exam he had not passed in July. He passed two parts but again failed the fifth portion of the exam. He did not take the remaining portion of the exam by July 11, 2004.

The Department offered the examination three time in 2003; March 13, July 10 and December 11, 2003. The Department sent notices and applications to Mr. Gott for the March and July, 2003 examinations. Mr. Gott did not apply to take any of the three examinations offered in 2003. The Department again offered the examination on March 11, 2004. The deadline for submitting an application for that examination was February 19, 2004. Mr. Gott called the Department on March 9, 2004 and asked to be allowed to take the March 11, 2004 examination. The Department told him that he could not take the exam because the deadline for application had passed and that all twenty five examination spots had been filled.

On April 19, 2004, the Department sent Mr. Gott an application for the July 8, 2004 examination, the last examination date offered by the Department during two year period that began on July 11, 2002. The deadline for applications was June 17, 2004. Mr. Gott did not submit an application but instead, on June 29, 2004, called the Department and asked to take the July 8, 2004 examination.

⁹ *Grandahl v. Bulluck*, 318 N.W.2d 240 (Minn. 1982); *Nord v. Herreid*, 305 N.W.2d 337 (Minn. 1981); *American Druggists Insurance v. Thompson Lumber Co.*, 349 N.W.2d 569 (Minn. 1989).

¹⁰ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

¹¹ *Minnesota Mutual Fire & Casualty Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990).

¹² *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

¹³ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

¹⁴ Minn. Stat. § 153A. 14.

The Department again told Mr. Gott that he could not take the exam because the deadline for application had passed and that all twenty five examination spots were filled.

On October 29, 2004, the Department sent Mr. Gott an application to take the December 10, 2004 exam. On November 19, 2004, the Department received Mr. Gott's application to take the practical portion of the examination and a check for \$250. On November 23, 2004 staff for the Department informed Mr. Gott that because he had not achieved a passing score on all parts of the examination within two years as required by statute, he would have to retake the entire examination and pay an additional \$250 since the full fee was \$500. Mr. Gott refused to pay the full fee and on April 13, 2005, requested a contested case hearing.

The Department has submitted evidence to support each material fact; Mr. Gott has offered no evidence placing any material fact at issue. The statute requires all candidates for certification as hearing instrument dispensers to achieve a passing score on all portions of the examination within a two-year period. Mr. Gott failed to achieve a passing score on all parts of the examination within the prescribed two-year period which began on July 11, 2002 and ended on July 11, 2004. On two occasions, on March 9, 2004 and again on June 29, 2004, Mr. Gott called the Department after the deadline for applications had passed and asked to be allowed to take the examination. The requests were properly denied because the examination spots had been filled and the deadline for applications had passed. There is no evidence that the Department made any misrepresentation about the application process to Mr. Gott.

There are no remaining issues to be addressed. The ALJ recommends that the Commissioner affirm the denial of Mr. Gott's challenge to the procedures used in administering the hearing instrument certification examination.

B.J.H.