

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF TEACHING

In the Matter of the Appeal
of Mary Jo Beaty to the
EXAMINER
Denial of a Minnesota School
Psychologist I License.

REPORT OF THE HEARING

The above-entitled matter came on for hearing before Howard L. Kaibel, Jr., Hearing examiner, on June 28, 1983, in Saint Paul. The record closed on July 20, 1983, upon receipt of the State's Post-Hearing Memorandum.

Dr. Roger L. Barrett, an Attorney for the Minnesota Education Association, 41 Sherburne Avenue, Saint Paul, Minnesota 55103, appeared on behalf of Mrs. Beaty (hereinafter "Applicant"). Sheila S. Fishman, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, Saint Paul, Minnesota 55101, appeared on behalf of the Executive Secretary to the Board of Teaching.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 (1982) the final decision of the Board of Teaching shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Board of Teaching. Exceptions to this Report, if any, shall be filed with the Executive Secretary to the board, Room 608, Capitol Square Building, 550 Cedar Street, Saint Paul, Minnesota 55101.

STATEMENT OF ISSUE

Should Mary Jo Beaty be granted a Minnesota School Psychologist License? Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Applicant has been a teacher for 20 years, including experience as a teacher, an assistant principal and as a guidance counselor. The last 13 years of this experience has been employment as a guidance counselor in the

Marshall, Minnesota Public Schools. The Applicant has a Masters Degree in Educational Psychology and a total of 91 graduate credits relevant-- to this application. She is licensed and certified as an elementary school teacher, a middle school health teacher and as a guidance counselor for elementary, middle and secondary schools.

2. Applicant decided in 1982, to pursue certification as a school psychologist. A letter from the Marshall Superintendent of schools stating that this appeal has been granted attests to the need for her services, "in these times of financial hardships and cutting corners, we at Marshall are making every attempt to retain all of our programs and services for our students." (Ex. 5, Addendum H).

3. Applicant made no appointment and met with Dr. Kudella, an advisor at Mankato State University, on April 8, 1982, to determine what steps would be

necessary to obtain the license. Dr. Kudella indicated that Mankato's School

Psychologist program was not yet formally accredited by, the State Department

of Education for licensure, but that it had been pre-approved with minor sug-

gestions for improvement. dr. Kudella went over the past records of Appli-

cant's academic achievements, comparing them to the requirements for licensure

in the relevant rule, indicating to her what additional specific courses would

be needed for full certification, including the design of a 326-hour practicum.

4. four days later, on April 12, 1982, Applicant took the additional

precaution of calling the State Department of Education to make certain that

the classes at Mankato would qualify her for certification. The Board of

Teaching, which has ultimate jurisdiction over teaching licenses, is not part

of the Department of Education. Licenses are issued however through the

licensing section of the Department and its staff, particularly Dr. Lombard in

this case, plays a very major role in the actual day-to-day licensing

process. After being referred to five or six people, she spoke with Mr.

Peatross, the Board's Executive Secretary. He was unsure of the status of

Mankato's program, promising to check it out and call her back.

5. Mr. Peatross called the Applicant back approximately one week later

with the results of this inquiry. He indicated that the only potential compe-

tition for program certification was St. Cloud State University, which had not

even submitted a first proposal yet. It confirmed that Mankato's program had

been through the pre-approval process with a review committee and that there

was no reason to fear disapproval by the State Department of Education. Ap-

plicant inquired specifically whether it would be wiser to take the necessary

courses at Moorhead State University, some 200 miles from her home in

Marshall, because it already had final formal accreditation. Kr. Peatross

indicated that he did not think it was, considering the distance involved.

6. Relying in part on this advice, Applicant registered for the 1982 sum-

mer session at Mankato and took all three courses prescribed by Dr. Kudella at

a cost of roughly \$500. (Ex. 5).

7 Applicant then set up and carried out the practicum between August

1982 and January 1983, under the supervision of Henry Hauck, a Marshall School

District psychologist who possesses Department of Education Psychologist I

certification. The practicum involved work with a variety of students of

various ages including trainable handicapped, educable handicapped, learning

disabled, gifted and normal students. It involved practical experience with

the full range of competencies required under the rule, including adminis-

tering and scoring tests, consultations, presentation of reports and observa-

tions, child team meetings and parent conferences. Mr. Hauck, who worked with

the Applicant regularly throughout the practicum, submitted a letter ex-

pressing his 'professional opinion that the quality of work is v,ery accept-

able''. 2).

8. February 3, 1983, believing the work to be complete, Applicant

called the State Department of Education to obtain the necessary license ap-

placation forms. She was then told by Dr. Lombard of the Department of Eluca-

tion Staff, for the first time, that Mankato's program had not been approved.

9. Applicant then called Mr. Peatross at home. He clchecked into it and

returned the call the next day, indicating that Mankato State had decided not

to proceed with final approval at this time because of funding cutbacks. Applicant's subsequent call to Dean Orr of the Mankato State University College of Education confirmed this to be the case.

10. On February 8, 1983, Applicant requested a more thorough review of her specific qualifications and competencies under the specific requirements of the rule.

11. (On February 11 1983, Mr. Peatross met with Dean Orr to discuss the degree to which Applicant's coursework and qualifications met the requirements of the licensing rule.

12. On Monday, February 14, 1983, Dean Orr reported to the Applicant that Mr. Peatross was "very encouraging" but that he was going to have to review the matter with Dr. Lombard, who is the Department of Education official with the primary responsibility in this area.

13. Two days later on February 16, Mr. Peatross called to report Dr. Lombard's reaction which was very discouraging. He felt that the Applicant should start all over again at Moorhead State University taking another 90 graduate credits. A year of residency at the College would also be required - Applicant responded that it did not seem to make sense to take a year off from her job move her family and spend the money, involved, particularly in light of all of the effort that had already been expended. She indicated that it would be smarter to use such a year to finish her doctorate. Mr. Peatross encouraged her to do that.

14. Two days later, Dr. Lombard called and after considerable discussion, outlined a much more encouraging proposal to the Applicant. He agreed that a total of six to nine courses (roughly 18 to 27 credits) would satisfy the requirements. I of these courses, however, would be repetition of classes that the Applicant had already taken. There would also be no need for the year of residency. He thought that the courses could be taken at St. Cloud or through Independent Study, suggesting that the coursework should be done "under the umbrella" of an approved program such as that at Vermillion College in South Dakota.

15. Later that day, the Applicant contacted Dr. Monroe at Vermillion, who agreed to attempt to help get some more specific requirements from Dr. Lombard in writing.

16. Three days later, the Applicant checked with a Pipestone, Minnesota Class II Psychologist regarding possible supervision for such repeat course-work.

17. The next day, Tuesday, Applicant tried to contact Dr. Lombard twice but could not reach him. He returned her calls at 4:35 p.m., leaving a message that he would be out all week, asking her to call him the next week.

18. Applicant called Mr. Peatross the next day, February 23, to say: (1) she was sending in her official application for the license; (2) she was willing to and intended to take the courses that Dr. Lombard required; and (3) "I needed in writing exactly what was lacking". (Ex. 5, Addendum F).

19. The Psychologist II from Pipestone called the Applicant a week later on February 26 to request specific information on the nature of the proposed supervision, so that she could get permission from her superiors to take on the responsibilities. Applicant, in turn, called Mr. Peatross who told her that a letter was being drafted and that she would get it in a day or two.

20. Five days later three days after the letter was supposed to have arrived, Applicant attempted to call Lombard and Peatross to get the information for the Piipestore psychologist who was meeting that evening with her superiors, but both were out and unreachable. Dr. Droubie of the Department of Flucation Staff returned her call later that afternoon and read her the letter which had been drafted by Dr. lombard. Applicant also asked about the appeal procedures and was told to submit a request in writing to Mr. Peatross for the necessary forms and information on procedures.

21. The next day, March 8, Applicant wrote Mr. Peatross requesting appeal forms and instructions.

22. The March 7, 1983 letter from the Department to the Applicant (ac. 4) lists 10 courses that must be taken or retaken in nine different areas (roughly 32 credits) including repetition of the practicum under the supervision of a Psychologist II. It indicated that five of those courses would have to be taken at an approved school such as the University of South Dakota.

23. Applicant discussed her objections to each of the 10 required courses at length with Dr. rd on March 11. He suggested that she put together a written appeal and submit it to him relating to each of the 10 required areas of coursework.

24. Because she still had not received any appeal forms or instructions, Applicant put together the documentation suggested by Dr. Lomboard (Ex. 5) and submitted it to the Department of Educatiin on March 24, 1983.

25. The Department responded to Applicant's appeal in a letter dated April 21, 1983. (Ex. 6). This letter indicates that Applicant's required coursework should be revise[] because her appeal documentation contained "information that we previously did not have access to when performing our initial evaluation". The letter indicates that the endorsements, transcripts and course materials submitted eliminates any need to take four of the courses required in the march 7 letter. The other five areas of required coursework are discussed in subsequent Findings.

26. The March 7 letter required an additional course entitled, "Theories

of Personality". Applicant's appeal includes extensive documentation indicating that this subject was covered in another course of a different title. The April 21 letter indicates that this coursework would be considered adequate if the Applicant could obtain an endorsement from the chairperson of the psychology department supporting her claim. Such an endorsement has been obtained and submitted.

27. The March 7 letter contained a requirement that the Applicant take two additional courses on testing. Her documentation in her appeal according to the April 21 letter "partially meets the requirements" but Department Staff still felt that the Applicant should have additional coursework on the Stanford-Binet and Kaufman ABC tests. Applicant is currently enrolled in a course on the Stanford-Binet test and has registered for a November training workshop on the Kaufman test which is so new that this is the first time a course on the subject has been offered.

28. The March 7 and April 21 letters from the Department both required Applicant to take a course in "exceptional children with a major emphasis in mental retardation". The Department recommended that this course be taken at Mankato State University and the Applicant has subsequently done so.

29. Both Department letters required the Applicant to take an additional course in "issues in the practice of school psychology" and the April 21 letter indicates that the course at Mankato on this subject is adequate. Applicant is currently enrolled in this course.

30. Department Staff criticizes Applicant's practicum because it was not supervised by a currently practicing level II school psychologist, preferably with a doctorate". (EK. 4). There is nothing in any rules about preference for a doctorate. Current rules do not require level II supervision. Department Staff's interpretation of new rules which will take effect July 1, 1985, is that all school psychologists will have to be level II (because those rules will eliminate level I), however, even that rule goes on to state "local supervision in a practicum setting may be provided by other psychological personnel". Applicant's practicum was designed and ultimately, supervised by a competent university professor with a doctorate. It was locally supervised by a currently practicing school psychologist fully licensed at level I who was specifically approved by, the university professor. Licenses have been issued in the past to applicant's whose practicum was supervised locally by level I psychologists. If Mankato State had followed through with its accreditation as planned, there would be no question as to the sufficiency of Applicant's practicum.

CONCLUSIONS

1. That any of the foregoing Findings of Fact which are more appropriately designated Conclusions are hereby adopted as such.
2. That the Notice of Hearing dated and served May 16, 1983, is in all respects proper with regard to form, content, execution and filing.
3. That the Board of Teaching duly acquired and now has jurisdiction over the within proceeding.
4. That the Board of teaching has complied with all relevant substantive and procedural requirements of law and rule.
5. That Applicant's training and experience are essentially equivalent to that required in the existing rules (5 MCAR. 3.104) and the new rules which will go into effect July 1, 1985 (5 MCAR 3.1041). They would be adequate

under the rules if they had been acquired out of state (Dr in a foreign country. They were acquired however at Minnesota institutions which do not have programs "approved by the state department of education" as required by the existing rule.

6. That Applicant has documented and demonstrated that she possesses the competence and qualifications necessary to be licensed as a School Psychologist I.

7. That this is a proper case for application of the doctrine of equitable estoppel. Applicant has proceeded in good faith, relying upon the specific assurances and directives of Department of Education Staff. Denial of the license at this point, requiring the Applicant to redo all of her coursework at an approved college would be unfair and inequitable. Department Staff should be estopped from taking such action.

8. That issuance of the proposed license to the Applicant is in the interests of the public welfare and that denial would be contrary to those interests.

9. That the Applicant should be issued a School Psychologist license.

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Board of Teaching order the Department of Education Staff to issue a Psychologist I license to Mary Jo Beaty forthwith upon successful completion of the courses that she is currently taking and the November Kaufman ABC Workshop.

Dated: August 18 , 1983.

HOWARD L. KAIBEL, JR.
Hearing examiner

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1 (1982), the agency is required to

serve its final decision upon each party and the hearing examiner. by first class mail.

Reported: Taped

MEMORANDUM

The Findings and Conclusions in the attached Report involve resolution of three legal issues which are worthy of some further discussion.

Counsel for Board Staff objected to receipt of the April 21, 1983 letter to Applicant, alleging that it was a settlement offer which is not admissible under Rule 408 of the Minnesota Rules of Evidence. Discussions aimed at compromising or settling disputes are certainly to be encouraged, and the question was consequently given very careful consideration. In this case, however, the letter in question was not phrased or interpreted by the Applicant-Recipient as an offer of compromise. The letter does not say, in essence, "We still don't think you deserve a license, but if you will drop your appeal we will give you one if you do X, Y and Z," Instead, it is

phrased as a good faith reaction to additional information with specific in-structions as to courses that should be taken in order to secure the license.

Applicant enrolled in and took those courses this summer at a considerable investment of time and expenses (Mankato is roughly 100 miles from Marshall).

She expressed genuine surprise at receiving a letter a few days prior to the

hearing stating that the directives in the April 2-1 letter were "settlement

offers" and that they were "now withdrawn". She was "angry and confused" upon

realizing that the current position of the Department Staff is that she will

have to take these courses that she took at their direction this summer over

again at some approved institution.

failure to include the April 21 letter would leave a distorted record with regard to fundamental facts regarding the Applicant's conduct and qualifications. The State's final brief, for example, questions the Applicant's good faith indicating at one point, "She even took courses [at Mankato] after she knew that the program was not approved." She took those courses because she was told to do so in the April 21 letter and she took them at Mankato because the April 21 letter indicated that that would be acceptable. Exclusion of the April 21 letter would also lead the Board to basic errors with regard to the Applicant's qualifications, which is basically, what this dispute is about. For example, the March 7 letter states that the Applicant needs to take a course in statistics because the UMD Psychology Department Chairperson told the Department Staff that the course listed on her application "is not the basic course in statistics". The applicant submitted with her appeal a copy of a transcript from the University of Utah alleging that this course satisfies these basic requirements. The April 21 letter confirms that this is the case.

It should be clear from the attached Report that the April 21 - 'Letter is merely a further statement of the Department Staff position upon receipt of new information. Department Staff made it clear from the very beginning, long before any appeal was filed, that the unfortunate mutual error of taking the initial coursework at Mankato could be remedied by taking some additional coursework to establish that her qualifications would be essentially equivalent to those available through a degree at an approved institution. The April 21 letter is a final written statement of this proposed remedy and is consequently properly part of the record.

A second legal question involved in this conflict is whether the Board has the discretion to grant a license to a qualified applicant even though that applicant was not fully complied with the technical requirement under the Board's rules that courses must be taken at an institution with a program ap-

proved by the Department of Education. The statute involved states that, "Licenses shall be issued to such persons as the board of teaching . . . finds to be competent for their respective positions." (Minn. Stat. 125.05, subd.

1). Courts in Minnesota and elsewhere have generally recognized a broad discretion on the part of licensing authorities in making such judgments as to competency. *Troje v. Hastings*, 310 Minn. 183, 245 N.W.2d 596 (1976), for example, discusses this discretion. This case and others generally relate to refusal to issue a license after an applicant demonstrates technical competency. No cases have been uncovered upholding the exercise of this discretion in reverse, that is granting a license to a competent applicant who has not met all of the technical requirements. However, it is unlikely that such an exercise of licensing discretion would be subject to judicial appeal because there is no aggrieved party. The Board has the explicit discretion under the rules to issue licenses to applicants educated in other states or other countries if their preparation and competency is "essentially equivalent". (5 MCAR 3.050 A.2. and 3.142). It is submitted that the Board has a similar unwritten discretion with regard to applicants educated in state institutions in extraordinary circumstances such as this one, where the courses were taken in good faith in a program which had received the Department Staff's pre-approval.

Ordinarily, administrative agencies are bound to abide by their own duly adopted rules. (E.g., State v. Johnson, 65 N.W. 668 at 673 (1954)). However, this case and others establishing the principle, involves attempts of agencies to ignore provisions of rules to the detriment of the persons governed by them. In Johnson, the State Board of education was attempting to cut off funds to a local school district without complying with its own rule requiring notice and a hearing prior to such action. These cases do not require agencies to follow the letter of the rules in special circumstances where such action would work a substantial detriment upon the persons governed by them without any public interest being served.

It is well established that the power to make an administrative regulation includes the power to relieve individuals from complying with those regulations. (E.g., Goldstein v. Murphy 47 N.W.S.2d 438, 267 App. Div. 2482). It is also established that administrative agencies have the authority to waive their own rules or modify them in individual special circumstances. (E.g., Molinari v. Qualye 88 N.E.2d] 820, 300 N.Y. 55)). This is certainly such a special circumstances

The third legal doctrine involved in this proceeding is equitable estoppel. The Minnesota Supreme Court first applied this doctrine to governmental officials in 1977. Mesaba Aviation Div. v. County of Itasca 258 N.W.2d/i 877 at 880-881. It held that a governmental official who authoritatively makes a specific representation to a citizen, causing the citizen to act in reliance on that representation will not be estopped from acting contrary to that representation to the harm or detriment of the citizens. Here, the Department of Education directed the Applicant to take courses at Mankato in order to secure her license. She has relied on that representation, enrolling in and completing coursework this summer at Mankato. It would be unfair and inequitable to now require the Applicant to repeat all of that coursework at a different institution having an approved program. In Mesaba, the Court

stresses that justice is the "foundation of estoppel". In
Ridgewood Develop-
ment Co. v. State, 294 N.W.2d 288 (Minn. 1980) the Court has
added a require-
ment that the application of the doctrine not frustrate ,he
public interest
and that the equities must be sufficiently great to support use
of the doc-
trine. Here granting the Applicant the license would not
frustrate any public
interest and the equities manifestly require application of the doctrine.

Applicant is a conscientious professional who has
proceeded throughout
with good faith. Rae has done everything recommended by the
Department Staff,
including the coursework in which she is currently enrolled,
except repeat her
practicum. Is indicated in the attached Findings, that practicum
was designed
by a competent professor, locally supervised by a competent
psychologist and
fully complies with new rules. Its adequacy has not been
changed by the
failure of Mankato to follow through with accreditation. It
should not have
to be repeated.

H.L.K., Jr.