

IN THE MATTER OF

*

BEFORE THE

ANDREA GAYLE

*

MARYLAND STATE BOARD OF

APPLICANT

*

CHIROPRACTIC EXAMINERS

* * * * *

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to Md. Code Ann., Health Occ. ("H.O.") § 3-315(a), and Maryland Code of Regulations (COMAR) 10.43.02.07, the Maryland State Board of Chiropractic Examiners (the "Board") hereby renders the following final decision and order:

BACKGROUND

The Applicant's application for renewal of her massage therapy certification was initially denied, pursuant to Massage Therapy Practice Act, (the "Act"), H.O. § 3-5A-01, *et seq.* Specifically, it is believed that the Applicant lacked the requisite qualifications for certification as a massage therapist in Maryland, this a violation of the following provisions of the Act:

H.O. § 3-5A-05. Requirements for certification and registration.

(a) *Persons permitted to practice massage therapy.*

(1) Except as otherwise provided in this subtitle, an individual shall be:

(i) Certified by the Board before the individual may practice massage therapy in this State;

(d) *Waiver-In General.*

(1) Subject to the of paragraph (2) of this subsection, the Board may waive any of the qualifications required for a certificate under this subtitle for an applicant who:

(i) Pays the application fee set by the Board;

- (ii) Provides evidence acceptable to the Board that the applicant has practiced massage therapy for at least a total of 2 years after October 1, 1994 and before October 1, 1999 and has performed at least 300 paid massage therapy sessions; and
- (iii) 1. Completes a Board approved program in the study of massage therapy; or
 - 2. Passes an examination approved by the Board.
- (2) The authority of the Board to grant a waiver under this subsection shall terminate on January 1, 2002.

A hearing on the merits was held on April 10, 2003. Present were the following Board members, which constituted a quorum: Dr. Jack Murray, Jr., President of the Board, who presided at the hearing, Dr. Marc Gamerman, Ivy Harris, Issie Jenkins, Dr. Margaret Renzetti and Dr. Brian Ashton. Also present were Roberta Gill, Assistant Attorney General/Administrative Prosecutor, Benjamin Sutley, Esquire, Andrea Gayle, Applicant, Richard N. Bloom Assistant Attorney General/ Board Counsel, James J. Vallone, J.D., Board Executive Director, Gwen Wheatley, Board Deputy Director and Eric Wilson, a member of the Massage Therapy Advisory Committee and liaison to the Board.

EXHIBITS

The following exhibits were introduced at the hearing:

STATE'S EXHIBITS

No. 1	Application
2	Application Review
3	Exam Registration
4	Cash Receipt Log
5A	Applicant Sign In
B	I.D. Form
C	6/13/00 Exam
D	6/28/00 Letter from Board
6A	I.D. Form
B	8/1/00 Exam
C	8/4/00 Letter from the Board
7A	I.D. Form

- B 8/25/00 Exam

- C 8/28/00 Letter from Board.
- 8A I.D. Form
- B 9/18/00 Exam
- 9 Computer Print-out
- 10 Renewal Application
- 11 Murphy investigative Report
- 12A 8/25/00 Memo From Dicoco
- B 8/25/00 Memo From Dicocco
- 13 9/2500 Letter From Board
- 14A 12/16/02 Letter From Board to Applicant
- B Notice of Initial Denial
- C Request for Hearing
- D 1/16/03 Letter from Gill to Stutley

APPLICANT'S EXHIBITS

- No. 1 School Store Receipt
- 2 Massage Therapy Certificate
- 3 Wall and Wallet Certificate

SYNOPSIS OF CASE

In summarizing the State's case, Ms. Gill informed the panel that on December 12, 1999 Ms. Gayle applied for massage therapy certification under the waiver provision of the Massage Therapy Practice Act. Although she met none of the enumerated requirements for licensure, Ms. Gayle was granted a license. In October of 2002, when Ms. Gayle attempted to renew her certification, it was discovered that at no time had she been approved been for certification. (T. 8 22-25, 9 1-13).

Gwendolyn Wheatley, Board Deputy Director, testified that since Ms. Gayle met none of the educational requirements for licensure, she was eligible for a waiver providing she submitted documentation of 300 hours of paid massage and passed the Board's examination. Ms. Wheatley noted that the documentation of 300 hours of paid

massage was inadequate in that it did not meet the Board's criteria for appropriate documentation. (T. 14, 5,16). The witness testified further that upon review of Ms. Gayles application the reviewer questioned whether or not the hours were acceptable and the application was not approved. (State's Exhibit 2). However, she was allowed to sit for the Board's examination.

Ms. Gayle failed the June 13, 2002 examination with a score of 40. (State's Exhibit 5-C). According to Ms. Wheatley, a passing score is 75. (T. 3-15). Provisions were made for Ms. Gayle to retake the examination on August 1, 2000 and again she failed with a score of 44. (State's Exhibit 6B). On August 25, 2000 the test was administered again and again she failed with a score of 73. (State's Exhibit 7B). Ms. Gayle was given the test a fourth time, September 18, 2000, and again failed with score of 56. (State's Exhibit 8B). After each administration of the examination Ms. Gayle was sent a letter advising that she had failed and that she could retake it at a later time. (State's Exhibits 5 D, 6 C, 7 C, 8 C). Ms. Gayle's was issued a license on October, 6, 2000. A renewal certificate for 2002-2004 was not issued. (T. 26-10-18).

After having taken the examination a fourth time, Ms. Gayle testified that she was verbally informed that she had passed the test and that she received a letter from the Board confirming this. (State's Exhibit 13). She further stated that she had not received a letter from the Board advising her to the contrary. (T. 76 1-17). A letter dated September 20, 2002 was mailed to Ms. Gayle advising her that she had failed the examination taken on September 18, 2000. (State's Exhibit 8C).

FINDINGS OF FACT

The Board makes the following Findings of Fact:

1. That Andrea Gayle was erroneously granted massage therapy certification.
2. That she failed the Board's examination four times.
3. That documentation of massage sessions were inadequate.
4. That each of the four letters advising that she had failed the examination were mailed to the same address.

OPINION

Although H.O. § 3- 5A-01 *et seq.* contains no provision expressly authorizing the Board to deny renewal of certification that had been granted erroneously, the power to do so is implied. *Kuddla v. Modde*, 537 F. Supp. 87 (E.D. Mich. 1982). The Court in *Pickett v. State Board of Social Work Examiners* (Circuit Court for Baltimore City, No. A-61688/A-38 (1982) held that the Social Work Board had implied power to revoke a license to correct a licensing error. The Court stated further that if a licensee is unqualified, he or she is not entitled to be licensed and where a license was granted erroneously, the Board lacks authority to renew that license. In spite of having failed to meet licensure requirements, Ms. Gayle was erroneously granted certification to which she is not entitled. The fact that Ms. Gayle may have relied on the erroneously granted certification, does not give her the rights she would not have otherwise had. *Lipsitz v. Parr*, 164 Md. 222, 164 A. 743 (1933).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Opinion, the Board concludes, as a matter of law, that Andrea Gayle violated H.O. § 3-5A-05 *et seq.* She lacked the requisite qualifications to be certified as a massage therapist in Maryland and that the erroneously granted massage therapy certification, is considered void from the beginning.


ORDER

Based on the foregoing Findings of Fact, Opinion and Conclusions of Law, it is, this 16th day of MAY, 2003 by the Maryland State Board of Chiropractic Examiners hereby

ORDERED that, pursuant to the authority vested in the Board of Chiropractic Examiners by Md. Code Ann., Health Occ. Article, § 3-5A-09, the Applicant, in order to gain massage therapy certification, shall, within sixty days of the date of this Order, be given one opportunity to take and pass an examination administered by the Board.

MAY 16 2003

Date



Jack Murray, D.C.
Board President

NOTICE OF RIGHT OF APPEAL

In accordance with Md. Code Ann., Health Occ. Article, § 3-316, you have a right to take a direct judicial appeal. A petition for appeal shall be filed within thirty days of your receipt of this Findings of Fact, Conclusion s of Law and Order and shall be made as provided for judicial review of a final decision in the Maryland Administrative

Procedure Act, Md. Code Ann., State Gov't Article, §§ 10-201 *et seq.*, and Title 7

Chapter 200 of the Maryland Rules.