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05/15/2017

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: PR 06-0422

Caitlin T. Pabst, Esq.
45 Caddis Fly Court
PO Box 161697
Big Sky, MT 59716
(518) 593-1176
cpabst14@gmail.com

MAY 15 2017

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

In re:

CAITLIN T. PABST,

Petitioner.

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Case No. PR 06-0422

**PEITION FOR REVIEW AND
REGRADE OF BAR EXAM**

COMES NOW, Petitioner, CAITLIN T. PABST, and hereby requests the Court, pursuant to Rule 106(E) of the Montana Bar Examiner's Rules, to grant this Petition for Review and Regrade of the written portion of Petitioner's February 2017 Montana Bar Exam.

FACTUAL BACKGROUND

1. Petitioner is a former resident of Cook County, Illinois and is a graduate of The John Marshall Law School of Chicago, Illinois.
2. Petitioner passed the July 2015 Illinois Bar Exam was admitted to the Illinois State Bar to practice law in November 2015; Petitioner remains active and is in good standing to practice law in Illinois.
3. Petitioner practiced law in Illinois prior to moving to Big Sky, Montana in April 2016.
4. Petitioner is currently a resident of Gallatin County, Montana.

5. In 2013, Montana adopted the Universal Bar Exam (or “UBE”) to be administered as the Montana State Bar Exam with a passing score of 270.
6. After adopting the UBE, the pass rate for the Montana Bar Exam plummeted. To remedy this, the Montana Supreme Court lowered the passing score to 266 in an attempt to reverse the trend of low pass rates.
7. Petitioner took the February 2017 Montana Bar Exam in Helena, Montana.
8. The minimum passing score in Montana is 266 out of 400 (which includes a score of 265.5, rounded to the nearest whole number). Accordingly, an applicant must receive a 66.375% to pass the Montana Bar Exam.
9. On April 12, 2017 Petitioner was notified via U.S. Mail that she failed the bar exam; she received a combined score of 265.4, or 66.350%.
10. Petitioner promptly contacted the Montana Bar Admissions Administrator and requested a copy of her written essay exam answers for review.
11. On April 21, 2017 Petitioner received a copy of her answers as well as a copy of the test questions, the grading rubric, and model answers via U.S. Mail.
12. Upon thorough review of Petitioner’s essay answers, Petitioner respectfully disagrees with the combined score assigned and is challenging her score by requesting the Court to grant this Petition for Review and Regrade of the written portion of Petitioner’s bar exam.

LEGAL STANDARDS

The Montana Constitution provides that the Supreme Court of Montana has the power and obligation to regulate the admission of attorneys to the Montana Bar. Mont. Const. art. VII, § 2, cl. 3. “The Montana Supreme Court has final authority as to whether

an applicant may be admitted to practice law in Montana.” *Rules for Admission to the Bar of Montana*, Sec. XI (A). “The Court may, under circumstances it deems sufficient, waive any requirement under these rules.” *Id.* In January 2013, the Montana Supreme Court adopted the current Montana Bar Examiner’s Rules. The Rules provides that, “an applicant may file a Petition for Review with the Supreme Court of Montana within thirty days following service upon the applicant of the decision.” *Montana Bar Examiner’s Rules*, Rule 106(E).

ARGUMENT

I. Errors Made By the Bar Examiners in the Grading Process Unfairly Resulted in a Failing Score.

Errors were made by the bar examiners in grading the essay portion of Petitioner’s exam because the manner in which the essays were graded was inconsistent, inadequate and unfair. The unique circumstances set forth herein provide sufficient reasoning for the Court to grant Petitioner’s request for review and regrade.

A. The Examiners’ Inconsistent Application of the Grading Scale Resulted in Grading Errors

The Grading Scale provided by the Montana Board of Bar Examiners specifically states, “the grading of essay examinations necessarily involves the exercise of *subjective judgment* by those grading.” See attached **Exhibit A** (emphasis added). Accordingly, there is an inherent factor of human error in grading the written portion of the exam.

Based on Petitioner’s review of her exam essay answers and the corresponding scores, there is a clear error of inconsistency in how the essays were graded. Some of the essays contained markings, notes and comments made by the bar examiners as to why

a point was being deducted. On the contrary, other essay answers with absolutely no markings from the bar examiners - none - still received point deductions.

This inconsistency in grading the essays likely resulted in an improper and unfair exam score. Accordingly, the essay portion of Petitioner's exam should be reconsidered.

II. The Examiners' Improper Oversight of Essay Answer Components that Deserved Credit Was in Error

The bar examiners failed to give credit for certain essay components on the Multistate Performance Test ("MPT") portion of the exam, specifically the second MPT. The examiners also failed to give Petitioner credit for certain parts of the Multistate Essay Examination ("MEE"), specifically in the subjects of Contracts, Family Law/Conflict of Laws, and Agency.

A. Multistate Performance Test Grading Errors

A comparison of Petitioner's response for the first MPT ("MPT 1") to the sample answer shows remarkable similarities. Yet, no markings were made on the essay answer itself. Each potential conflict identified and discussed in the sample answer was also identified and discussed in the Petitioner's answer. Furthermore, Petitioner reached the correct conclusions for each of the identified conflicts.

In turning to the second MPT ("MPT 2"), the directions provided to the examinees regarding the format for the response to the MPT 2 reads as follows:

"Proposed Conclusions of Law: Concisely state the legal conclusions necessary to support our claim or defense. Organize this section by *first* stating general rules and *then* applying these rules to specific facts from the Findings of Fact. Include citations to the legal authorities that support the relevant conclusions."

See attached **Exhibit B** (p. 3). (emphasis added). A review of Petitioner's exam answer shows that Petitioner adequately laid out the Findings of Fact, the Conclusions of Law,

and *then* included a subsection labeled “Discussion” in which she applied the rules to specific facts from the Findings of Fact as instructed. Assuming, *arguendo*, that if Petitioner merely omitted the sub-heading labeled “Discussion,” then the examiner would have given her credit for the remainder of her answer, this reasoning is not only flawed, but is also improper.

Furthermore, the Drafter’s Point Sheet provided to Petitioner for MPT 2 reads as follows:

“Conclusions of Law...After stating general legal principles, *the examinee should draft a series of paragraphs that apply the law to the facts* so as to reach conclusions that resolved the issues in this case. Again, there should be citations to the supporting legal authorities.”

See attached **Exhibit C** (p. 2). (emphasis added).

Here, Petitioner applied the law to the facts as instructed in her discussion subsection to reach conclusions that resolved the issues. Citations to legal authorities were also provided. Rather than taking into consideration this analysis, the examiner simply drew a large “X” over the last two and one-half pages of Petitioner’s response. This indicates that the examiner failed to even consider half of Petitioner’s answer in assigning a score. The reason provided by the examiner for crossing out nearly half of Petitioner’s answer was as follows: “Directed to draft findings & conclusions, not a discussion – *much of what is in your discussion belonged in your finds and conclusion.*” See attached **Exhibit D** (p. 5). (emphasis added). However, a closer review of Petitioner’s exam answer shows that the “Discussion” section was merely a subsection involving a persuasive analysis of the “Conclusions of Law.” Accordingly, it is apparent that Petitioner did, in fact, follow directions by “drafting a series of paragraphs that apply

the law to facts.” Accordingly, points should not have been deducted for failure to satisfy the examiner’s subjective interpretation of the directions provided.

Based on the MPT answers alone, Petitioner would be severely prejudiced by being forced to go through the time and expense of the Montana Bar Exam process all over again because the error lied with the examiners’ grading methods, and not the examinee.

B. Multistate Essay Examination Grading Errors

There were also errors in how the Petitioner’s answers to the MEE questions were graded. With regards to the Contracts Analysis question, it appears that Petitioner did, in fact, spot the issues and answered the question in a clear, organized manner. On the issue of revocability (Point Two (60%)), the Points Sheet provided states, “NOTE TO GRADERS: Nonetheless, an examinee should receive credit if he or she concludes the gardener has become a merchant by virtue of the sale of all of his tomato crop and then goes on to discuss the gardener’s liability to the cook under theory of promissory estoppel.” See attached **Exhibit E** (p.2). Upon review of Petitioner’s answer, she reasonably concludes that the gardener was a merchant and therefore the UCC applied, making the offer irrevocable. Petitioner further notes at the end of her essay answer that the cook could sue the gardener for damages based on promissory estoppel. *Id.* Although the analysis was not a perfect replication of the model answer provided, the answer itself deserved more than the half-credit given by the examiners.

Upon review of the Family Law/Conflict of Laws Analysis question, it appears the score assigned was also in error. First, the examiner failed to make any markings on the essay to indicate where or why points were taken off. This makes it nearly

impossible to understand the examiners' reasoning for taking points off. Second, it appears that the only issue Petitioner failed to spot was the putative-spouse doctrine (Point Two (b) (25%)). *See* attached **Exhibit F**. All other issues were correctly identified, analyzed, and adequately answered. Accordingly, Petitioner should have received a higher score than what was assigned for the Family Law/Conflicts of Laws essay answer.

With regard to Petitioner's answer for the Agency Question, she also should have received more credit than that which was assigned by the examiners. First, there are absolutely no markings on Petitioner's essay answer indicating where and why credit was not given. Again, upon review of Petitioner's answer, the content is very similar to that of the model answer. *See* attached **Exhibit G**. It appears Petitioner's only mistake was in her analysis and conclusion of the third issue (Point Three (40%)). Petitioner correctly concluded that the inventor was liable on the shutoff switches contract by virtue of ratification, but did not conclude that the woman was also liable by reason of a partially disclosed principal. *Id* Despite this minor mistake, Petitioner still should have received approximately half the credit for Point Three (e.g., 20%, or one additional point) based on what she did answer correctly. Thus, the score for Petitioner's answer to the Agency question was assigned in error and Petitioner would be severely prejudiced if her Petition was not granted.


CONCLUSION

The bar exam is widely recognized as a grueling test of legal competence regarding an examinee's smarts, strategy and stamina. An applicant must score a passing grade of 266 (inclusive of 265.5) to become eligible for admission to the State Bar of

Montana. However, the essay portion of the exam is subjectively graded and, therefore, subject to an inherent factor of human error. Based on the argument presented above, it is clear that Petitioner's essay answers were given unfair, inadequate, and inconsistent reviews by the examiners which resulted in grading errors. Furthermore, the examiners failed to consider certain parts of Petitioner's essay answers altogether.

In consideration of the circumstances, and the fact that it is impossible to fail the bar exam by any less of a margin, a review and regrade of Petitioner's exam is not only necessary, but is also in the interest of fairness. Therefore, Petitioner respectfully requests the Court to grant her Petition for Review and Regrade of the essay portion of her bar exam.

RESPECTFULLY SUBMITTED this 10th day of May, 2017.


Caitlin T. Pabst