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SUPREME COURT OF FLORIDA

**JOHN O. WILLIAMS,
Appellant**

v.

**THE FLORIDA BAR,
BOARD OF GOVERNORS,
Appellee**

CASE NO. 92,038

APPELLANT'S INITIAL BRIEF

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APPELLANT'S REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that this matter be set for oral argument.

STATEMENT OF THE CASE

This case is an appeal of an order of the Florida Bar Board of Governors that denied Appellant credit for correct answers on his real estate certification exam.

Appellant is a member of the Florida Bar who took the examination for certification by the Florida Bar as a real estate specialist. Appellant did not receive a passing grade and appealed to the Grade Review Panel. The Grade Review Panel increased Appellant's score on essay question #6 from a 3 to a 4 and deemed all other grading correct.

Appellant next appealed to the Certification Plan Appeals Committee, which remanded his exam to the Grade Review Panel with instructions to review question #1 in light of the Bar's review course material. Appellant relied on the Bar's review materials in his answer to question #1 and the Bar refused to give him credit therefor. Despite the correctness of his answer and the instructions of the Appeals Committee, the Grade Review Panel refused to increase Appellant's score.

Appellant has appealed this grade and the grading procedures (or lack thereof) to the Board of Governors with the same result.

STATEMENT OF THE FACTS

After purchasing the Bar's review course materials prepared for the real estate certification exam, Appellant took the real estate certification exam. The Bar set the passing grade for that exam at 69 points. Appellant received a grade of 65.08 points. Appellant appealed his score on several questions, and pursues two in particular herein, essay question #1 and essay question #6.

Appellant's answer to question #1 is legally correct and is supported by review course materials that the Bar prepared and sold specifically for preparation for this exam. Appellant's answer is also supported by case law and Attorney's Title Fund Notes, which are the industry standard in the real estate field. The Bar refused to give credit to Appellant because his answer did not match the Bar's model answer for that question.

Appellant's answer to question #6 is mutually exclusive of the model answer created by the Bar. During the course of appealing his exam score, the Bar admitted that Appellant's answer is correct, but then proceeded to increase Appellant's score from 3 to 4 rather than the possible 6. (Under the holistic grading process used, this translates into an increase in Appellant's score from 65.08 points to 66.91.) The Bar's change of score does not make sense in this situation.

Appellant has sought information on the grading and review processes, and the Bar has provided no information except a generic

pamphlet on the concept of holistic grading. The Bar has refused to make public any information on how exams are scored, how model answers are created, how the validity of model answers is determined, how passing grades are determined, why, contrary to usual statistical practices, holistic grading is used with such a small population, what standards are used to grade exams, etc.

SUMMARY OF ARGUMENT

Appellant is 2.09 points short of a passing grade on the real estate certification exam, and the Florida Bar refuses to give him credit for a correct answer that is worth up to 5.49 points. Not only is Appellant's answer supported by case law and the Attorney's Title Fund Notes (which are widely regarded as the industry standard among real estate practitioners), Appellant's answer is supported by the review materials that the Florida Bar itself prepared for applicants to the real estate certification exam. The Florida Bar compiled and sold review course materials specifically designed to prepare applicants for the real estate certification exam. Appellant parroted back the answer from those materials, and the Florida Bar now refuses to give him credit for his answer. This is fundamentally unfair.

This Court has on numerous occasions expressed its concern over a lack of standards and excess discretion in the certification process because of the potential for and/or appearance of impropriety, protectionism, abuse, and favoritism that could result. E.g., The Florida Bar Re: Amendment to Rules Reulating the Florida Bar Chapter 6 (Legal Specialization and Education), 548 So.2d 1120, 1151-1152 (Fla. 1989) (Shaw, J., dissenting); The Florida Bar Re: Amendment to the Bylaws under the Integration Rule (Florida Certification Plan), 487 So.2d 22 (Fla. 1986); The Florida Bar Re: Amendment to Integration Rule (Certification Plan), 399 So.2d 1385 (Fla.

1981). This case provides a clear example of those problems in the grading and review processes established by the Florida Bar. The Florida Bar has refused to give Appellant the points he deserves because his answer does not match their model answer, notwithstanding the fact that Appellant's answer is at least as correct as the model answer arbitrarily chosen by the Bar. Appellant's procedural challenges were also denied without any reason. The Bar's actions are problematic in several respects.

First, exam question #1 has no one clear answer; rather, several approaches are reasonable under the current state of the law. The Florida Bar exercised its discretion in an arbitrary and capricious manner when it chose one answer as the "right" answer and penalized any applicant who wrote an answer that was legally correct but did not happen to guess which answer the Bar was looking for.

Second, the grading and review processes are shrouded in secrecy. After arbitrarily denying Appellant credit for his answer, the Florida Bar allows challenges solely to its procedure, **which it refuses to disclose**. The Bar neither publishes nor reveals upon request any of the following relevant information: How are model answers created? How is their correctness determined? How are other possible approaches to the question treated? By what criteria are applicants' answers compared to model answers? How is the passing score determined? Why, contrary to norms in the statistical field, is holistic grading deemed suitable with such a small applicant pool?

Assuming questions are to be graded holistically (i.e., using a comparative rather than absolute process), how can the Grade Review Panel make any valid assessments when the Bar's own rule forbids the reviewer's access to the range of papers, thus preventing any comparison?

With regard to exam question #6, the Florida Bar has admitted its error in the original grading, but provided no basis for the extent of the grade change. The Bar essentially admitted that Appellant's answer was correct and the model answer was incorrect, and yet the Bar granted Appellant only one "holistic" point, rather than the maximum points possible (which would raise the Appellant's grade 3.66 points, which would exceed the minimum passing score).

Appellant's qualifications far exceed those required for board certification in real estate. His exam demonstrates ample competency. He has been denied his certification because of actions by the Florida Bar that are fundamentally unfair, arbitrary, and capricious. This Court should order the Florida Bar to certify Appellant as a specialist in real estate.

ARGUMENT

- I. It is fundamentally unfair to deny Appellant credit for a correct answer that is supported by case law, industry standard references, and the Florida Bar's own review course materials,

Appellant has not received credit for his answer to question #1¹ even though it is supported by 1. the Real Estate Certification review course materials published by the Florida Bar Continuing Legal Education Committee and endorsed by the BLSE, 1996 Real Estate Certification Review Course Lecture Outline, p. 1.48 (D.1), 2. the Attorney's Fund Title Notes, TN 20.01.15, and 3. case law. American Central Ins. Co. of St. Louis, Mo. v. Whitlock, 165 So. 380 (Fla. 1936), Espenship v. Carter, 514 So.2d 1108 (Fla. 1st DCA 1987), and Dixon v. Davis, 155 So.2d 189 (Fla. 2nd DCA 1963). There is no statute or case law that clearly supports the answer the BLSE chose for Question #1 and/or that refutes the Appellant's answer. This is fundamentally unfair. The Appeals Committee recognized this and therefore remanded the exam back to the Grade Review Panel with instructions to consider the legal support for Appellant's answer. The Grade Review Panel did not take the hint; it refused to give Appellant the credit

¹ References herein to "Question #1" refer to one specific aspect of the question, namely, whether a conveyance to a husband and wife as joint tenants creates a tenancy by the entirety or a tenancy in common.

he deserves, and it refused to state any reason or cite any contrary authority.

The issue before the Court is **not** to decide a question of real estate law so as to determine whether the model answer or Appellant's answer is more correct. Rather, the issue before the Court is whether it is fundamentally unfair to deny Appellant credit when the Bar's model answer is inconsistent with the materials that the Bar advised the applicant to rely upon.

II. Where multiple correct answers to an exam question are possible, it is arbitrary and capricious to grant credit for only one of the correct answers and deny credit for all other correct answers.

Question #1 is composed such that it has no single clear answer and no binding authority to support any one of the reasonable possibilities to the exclusion of all others. The Bar has chosen one possible answer as its model answer and refuses to give credit for any other answer, even if such an answer is legally correct. This constitutes precisely the "arbitrary or capricious action" prohibited by Standing Policy 2.08(g). As stated earlier, Appellant's answer is supported by I. the Real Estate Certification review course materials published by the Florida Bar Continuing Legal Education

Committee and endorsed by the BLSE, 1996 Real Estate Certification Review Course Lecture Outline, p. 1.48 (D.1), 2. the Attorney's Fund Title Notes, TN 20.01.15, and 3. case law. American Central Ins. Co. of St. Louis, Mo. v. Whitlock, 165 So. 380 (Fla. 1936), Espenship v. Carter, 514 So.2d 1108 (Fla. 1st DCA 1987), and Dixon v. Davis, 155 So.2d 189 (Fla. 2nd DCA 1963). Further, there is no statute or case law that clearly supports the answer the Bar chose for Question #1 and/or that refutes the Appellant's answer. Appellant's answer is thus a valid response to questions #1 and the Bar's refusal to honor it constitutes arbitrary and capricious action.

The Bar's grading review processes are flawed in that they ask only whether an examinee's answer matches the Bar's model answer. The process precludes any challenge to the validity of the model answer itself and thus makes possible the absurd situation confronting Appellant.

III. The grading and review procedures are shrouded in secrecy and produce unexplainable results: the procedures thus violate this Court's numerous admonitions against a lack of standards and excess discretion.

The secretive operations of the Bar violate the purpose and spirit of Standing Policy 2.08(g). The Bar conceals how the exam is created, how the passing score is determined, and the methods and standards of grading and

review. This method of operation places a cloak over all actions and limits the opportunity to observe and challenge the actions that Standing Policy 2.08(g) is designed to prevent. The Bar thus exposes itself to a charge of "conspiracy of silence" by failing to publish or even make available the basis for establishing a passing score for the exam or the standards that should be utilized in the grade review process. Although a lack of written standard is not necessarily arbitrary or capricious per se, the Caligula-esque² secrecy represents a greater danger because it creates the opportunity for unchallengeable abuse. More importantly, it creates the appearance of impropriety which this fine organization simply does not deserve.

This Court has on numerous occasions expressed its concern over a lack of standards and excess discretion in the certification process because of the potential for and/or appearance of Impropriety, protectionism, abuse, and favoritism that could result. E.g., The Florida Bar Re: Amendment to Rules Regulating the Florida Bar Chapter 6 (Legal Specialization and Education), 548 So.2d 1120, 1151-1152 (Fla. 1989) (Shaw, J., dissenting); The Florida Bar Re: Amendment to the Bylaws under the Integration Rule (Florida Certification Plan), 487 So.2d 22 (Fla. 1986); The Florida Bar Re: Amendment to Integration Rule (Certification Plan), 399 So.2d 1385 (Fla.

² Caligula was the post-Caesar Roman emperor who published his laws high atop a building where none of his subjects could read them. He proceeded to charge them with knowledge of information that he had made unobtainable. He is also well known for having made his horse a senator.

1981).

IV. Where the initial grade is determined by ranking and comparing all applicants' exams, the Bar's rule that forbids comparison at the review level renders the reviewer's conclusions invalid.

The initial grade on essay questions is apparently determined by comparing an applicant's answer to all other answers submitted. See Response of BLSE, p. 8. As such, there is no objective benchmark available to measure any single answer. In reviewing a grade, the question is not whether the answer is right or wrong, but whether the answer is better or worse than that of other applicants, and if so, by how much. However, the review is apparently performed by persons without the benefit of having seen the entire population of answers. Standing Policy 2.08(f)(3). ("No member of the [review] panel shall have had prior involvement with that examination either as a committee member, drafter or grader.") The reviewers read single answers in a vacuum; they must determine whether a grade, which represents relative rank, is correct. They are thus cast adrift without the necessary criteria for the determination they must make.

The review panel raised this applicant's grade on essay question #6 by one point (on a scale from 1 to 6) without the benefit of a comparison with the other applicants' answers.

CONCLUSION

The Florida Bar has been fundamentally unfair in grading Appellant's exam. Its actions have been arbitrary and capricious. Its secretive grading and review policies violate this court's admonitions against unbridled discretion and the appearance of impropriety.

The Appellant is highly qualified and has demonstrated clear competence on his exam. Appellant respectfully requests that this Honorable Court order the Florida Bar certify Appellant as a real estate specialist.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was served by U.S. Mail on Thomas Ervin, Attorney for the Florida Bar, Ervin, Varn, Jacobs & Ervin, P.O. Drawer 1170, Tallahassee, FL 32302 and on Dawna Bicknell, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399 on this 3rd day of January, 1998.



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