

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:

JOSEPH ELENBAAS,
Water Works Certification No. 001996,

Petitioner.

Master Case No. M2010-139

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER ON REVIEW OF
BRIEF ADJUDICATIVE PROCEEDING

APPEARANCES:

Joseph Elenbaas, Petitioner, pro se

Department of Health Drinking Water Program (Program), by
Office of the Attorney General, per
Dorothy H. Jaffe, Assistant Attorney General

PRESIDING OFFICER: Jerry D. Mitchell, Health Law Judge

Joseph Elenbaas (the Petitioner) asks for administrative review of the Brief Adjudicative Proceeding (BAP) Officer's Findings of Fact, Conclusions of Law and Order on Brief Adjudicative Proceeding (the BAP Order) date June 7, 2010. The Secretary of Health delegated this matter to the Presiding Officer. RCW 18.130.0505(8). The Presiding Officer conducted a review of the matter pursuant to RCW 34.05.491 and WAC 246-10-701. Having reviewed the record in this matter, the Presiding Officer now issues the following:

PROCEDURAL HISTORY

The following documents were filed in support of the BAP proceeding request:

Exhibit 1: May 17, 2010 cover letter from Richard Sarver.

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- Exhibit 2: List of documents provided by the Program for inclusion in the preliminary record.
- Exhibit 3: Basis for the Programs actions denying relevancy of training courses.
- Exhibit 4: Chapter 246-292-WAC, Water Works Operator Certification Rule.
- Exhibit 5: Waterworks Operator Certification Program Guideline.
- Exhibit 6: Fact Sheet-Relevancy of Training for Certified Waterworks Operators.
- Exhibit 7: Articles from ODW Water Tap newsletters relating to operator certification professional growth requirements.
- Exhibit 8: CEU status template from Washington Certification Services.
- Exhibit 9: Package of documents from Joseph Elenbaas to justify CEU.
- Exhibit 10: February 13, 2010 letter from Joseph Elenbaas to Cheryl Bergener proving information why ODW should approve training.
- Exhibit 11: January 21, 2010 letter and pertinent documents from Cheryl Bergener to Joseph Elenbaas granting request for review of courses.
- Exhibit 12: Relevancy Review Committee documents for Relevancy review of courses.
- Exhibit 13: March 13, 2010 notes from Richard Sarver in preparation of letter to Joseph Elenbaas dated April 1, 2010.
- Exhibit 14: April 1, 2010 letter from Richard Sarver to Joseph Elenbaas affirming no additional training courses will be considered by the Program.
- Exhibit 15: April 25, 2010 letter from Joseph Elenbaas to Richard Sarver requesting reconsideration of previous Department decisions

and approval of additional training courses not previously submitted.

- Exhibit 16: May 6, 2010 letter from Richard Sarver to Joseph Elenbaas in response to Elenbaas's letter of April 25, 2010 denying request for reconsideration for additional training courses.
- Exhibit 17: Application for grandparent certification dated February 15, 2001.
- Exhibit 18: Affidavit and Written Presentation from Joseph Elenbaas mailed May 17, 2010 and received by Presiding Officer on May 20, 2010.
- Exhibit 19: Denial of Request for Oral Argument from Presiding Officer to Joseph Elenbaas dated May 24, 2010.

ARGUMENT

The Petitioner's argument relates to the BAP Order entered on June 7, 2010. The Petitioner raised the following issues: (1) the report of the advisory committee was incomplete; (2) oral argument was improperly denied; (3) the Program failed to submit all correspondence from appellant for the BAP; (4) overall criteria and the Program application acts in a discriminatory manner; (5) the Program failed to consider additional classes; (6) the Petitioner was denied opportunity to submit to an exam; (7) the Program failed to list all classes; (8) that Paragraph 1.21 of the BAP Order is incorrect; and (9) the Program received, accepted, posted, and reimbursed Petitioner for license fees. The Program denies these allegations.

I. FINDINGS OF FACT

- 1.1 Joseph Elenbaas is a certified water works operator, #001996.

1.2 The Program has authority to determine if courses qualify as relevant for a Water Works Operator certification professional growth requirement pursuant to WAC 246-292-090 Renewal of certificates, and as defined in WAC 246-292-010 Definitions-Relevant water system training.

1.3 The Petitioner submitted two courses to meet the professional growth requirement for operator certification renewal as follows:

- A. Plumbing Code Update with Water Supply & Drain Waste Vent System Review; and
- B. National Electric Code Update 2008.

1.4 By December 31, 2009, the Petitioner had obtained 1.9 Continuing Education Units (CEUs) and had not met the required 3.0 CEUs to meet the professional growth requirements for water works operator certification renewal.

1.5 On January 4, 2010, the Program notified the Petitioner that the submitted courses did not meet the relevancy criteria for WAC 246-292-090(3)(a). The Petitioner requested reconsideration of this decision, and the request was forwarded to the Water Works Operator Certification Advisory Committee, Relevancy Subcommittee.

1.6 On January 27, 2010, the Relevancy Subcommittee recommended denial of the two courses.

1.7 On February 13, 2010, the Petitioner again requested reconsideration of the decision, while providing additional information. That request was denied.

1.8 On March 12, 2010, the Petitioner requested a BAP. Teresa Phillips was appointed as the Presiding Officer for the BAP. On June 7, 2010, the BAP Officer issued

the BAP Order. The BAP Order concluded that the Petitioner failed to accumulate the minimum 3.0 CEUs of relevant training.

1.9 On June 28, 2010, the Petitioner filed a Petition for Administrative Review (Petition). Health Law Judge Jerry D. Mitchell was appointed as the Presiding Officer for the Petition.

1.10 The Petitioner failed to serve the Program with a copy of the Petition. WAC 246-10-701(2) requires that Petitions for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within twenty-one days of service of the initial order.” The BAP Order was served on June 7, 2010, which required the Petitioner to serve the Program and file with the adjudicative clerk office on or before June 28, 2010. As of July 2, 2010, the Program had not been served.

1.11 The review and decision by the BAP Presiding Officer is based on the record. See WAC 246-10-502 and WAC 246-10-503(2) and (5). The criteria for relevancy are as follows:

- (i) Has an influence on water quality, water supply, or public health protection;
- (ii) Is directly relevant to the operation, or maintenance of a water system; or
- (iii) Is directly related to managing the operation, or maintenance of a water system.

WAC 246-292-090(3)(a).

The Petitioner alleged that the “report of advisory committee [was] not complete.”

The Petitioner failed to state which documents were missing or how the report was

incomplete, and he fails to state how he was harmed by any missing documents. The Program has a detailed process for submittal, review, approval, reporting, and recording of relevant water system training. The Program submitted to the Relevancy Subcommittee all required documents, and the Relevancy Subcommittee made an independent assessment of the two courses. The two courses were properly denied for relevancy.

1.12 On or about May 20, 2010, the Petitioner requested oral argument in the BAP proceeding. Oral arguments are not mandated by the Administrative Procedure Act (APA). WAC 246-10-503(3) states that “the presiding officer for brief adjudicative proceedings may, in his or her discretion, entertain oral argument from the parties or their representatives, at a time and place designated by the presiding officer for brief adjudicative proceedings.” The Petitioner failed to articulate how oral argument would assist the BAP Presiding Officer in determining whether the Program properly denied the two courses for not meeting relevancy criteria. On May 24, 2010, BAP Presiding Officer Theresa Phillips denied the request for oral argument.

1.13 The Program provided the Presiding Officer with all required documentation relevant to the determination of whether the two courses met the relevancy requirements of WAC 246-292-090(3). The Petitioner had an opportunity to submit additional documents and failed to do so.

1.14 The Petitioner alleges that “overall criteria and Department application thereof acts in a discriminatory manner contrary to allowance of const. and/or regs promulgated thereto.” The Petitioner failed to provide any documentation or legal argument to support this allegation. The operator certification rules require all operators to renew their certificate

by January 1 of each year, pay the applicable fee, and demonstrate completion of the required professional growth as described in the Program's guideline, "Water Works Certification Program Guideline." WAC 246-292-090(1). The program did not misapply the relevancy criteria and the criteria are not discriminatory or contrary to state law.

1.15 WAC 246-10-090(3) allows an applicant the opportunity to take an exam in lieu of the CEU requirements. The Petitioner argues that he was denied that opportunity by the Program. On April 1, 2010 and on May 6, 2010, the Program recommended to the Petitioner that he take the examination as a way to regain his certification without meeting the 3.0 CEU requirements. There is no evidence that the Program denied the Petitioner the right to take the examination

1.16 The Petitioner alleges that the Program received and accepted the Petitioner's license fees and subsequently reimbursed the Petitioner. The Program notified the Petitioner that the Revenue Section received and processed the renewal payment in error, and that the renewal should have been denied and returned since he was not eligible to renew his operator certification for failure to meet professional growth requirements.

II. CONCLUSIONS OF LAW

2.1 The Secretary of the Department of Health (and by delegation, the Presiding Officer) has jurisdiction over the Petitioner and the subject matter of this proceeding.

2.2 The burden of proof on the Petitioner is preponderance of evidence.
WAC 246-10-606.

2.3 Applicants for renewal of certification to practice as a water works operator must satisfy the requirements of WAC 246-292-090(3). Under WAC 246-292-090(3) a certified water works operator has three options for demonstrating professional growth. A water works operator may (1) accumulate a minimum of three CEUs, or college credits that meet the relevancy criteria; (2) advance by examination in the Washington water works operator certification program within the classifications Water Distribution Manager and Water Treatment Plant Operator to a level 2, 3, or 4; or (3) achieve certification by examination in a different classification.

2.4 Applicants must satisfy the requirements of WAC 246-292-090(3) to renew certification to practice as a water works operator in the state of Washington. In this instance, the Petitioner has failed to satisfy the requirements.

2.5 WAC 246-10-701(2) requires that “Petitions for administrative review must be served upon the opposing party and filed with the adjudicative clerk office twenty-one days of service of the initial order.” The Petitioner failed to comply with these requirements for initiating an administrative review.

III. ORDER

3.1 Petitioner failed to timely and properly file and serve the Petition for Administrative Review.

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3.2 The BAP Order concluding that the Petitioner did not satisfy the requirements of WAC 246-292-090(3) is correct and is AFFIRMED.

Dated this 15 day of July, 2010.

/s/
JERRY D. MITCHELL, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Drinking Water Program
P.O. Box 47822
Olympia, WA 98504-7822

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-10-704. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

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The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

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