

STATE OF IOWA
BEFORE THE BOARD OF EXAMINERS FOR MASSAGE THERAPY

IN THE MATTER OF:)	DIA NO. 03DPHMT002
)	
ZERO BALANCING ASSOCIATION)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
APPELLANT)	DECISION AND ORDER

On January 23, 2003, Zero Balancing Association (Appellant) filed a Combined Notice of Appeal and Petition For Rule Making from a decision of the Board of Examiners for Massage Therapy (Board) denying its Application for Approval of Continuing Education Credit for a course entitled "Zero Balancing Core I and II", which was scheduled for March 27-30, 2003 in Des Moines, Iowa.

A Notice of Hearing was issued on January 27, 2003, which set a hearing date of March 4, 2003. The hearing was continued at the Appellant's request. The hearing was held on June 3, 2003 at 9:30 a.m. in the fifth floor conference room, Lucas State Office Building, Des Moines, Iowa. The following members of the Board participated in the hearing: Howard Sonksen, Public Member, Chairperson; Mary McGuire, LMT; Robert Buchanan, LMT; and Carla Eshelman and Kenneth Lang, Public Members.

The Appellant, Zero Balancing Association, was represented by Morgan Rivers. Chantelle Smith, Assistant Attorney General, appeared for the State. The testimony was tape recorded. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, assisted the Board in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1) (2003).

After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f), to deliberate their decision. The administrative law judge was directed to prepare the Board's decision for their review, in accordance with their deliberations. Following deliberations, the Board approved a motion in open session denying the Appellant's application for continuing education credit.

THE RECORD

The record includes the Notice of Hearing, Rescheduling Order, the testimony of the witness, State Exhibits A-E, and Appellant Exhibits 1A-1C, 2, 3-3E, 4-7.

FINDINGS OF FACT

1. On November 6, 2002, the Appellant submitted an Application to the Board for Approval of a Continuing Education Program. In the application, the Appellant requested prior approval of 25 clock hours of continuing education for a course entitled "Zero Balancing Program-Core Segments I & II", which was to be presented in Des Moines on March 27-30, 2003. This program was open to all licensed health care practitioners. (Testimony of Morgan Rivers; State Exhibit A; Appellant Exhibit 1)

The Appellant enclosed a copy of the course brochure and the outline of the program's content, which included the course's purposes and objectives. (Testimony of Appellant; Appellant Exhibit 7).

2. On December 17, 2002, the Board denied the application for approval of the course, noting that it does not meet the definition of massage therapy and/or continuing education. Effective July 31, 2002, the Board's rules on continuing education provided that courses on Zero Balancing could not be approved for continuing education credit. The Board's decision was mailed to the Zero Balancing Association on January 3, 2003. (State Exhibits A, B, E)

3. Morgan Rivers previously applied for continuing education credit for the Zero Balancing Core 1 & II course when it was offered in May 2002. That application was also denied and Ms. Rivers appealed. After reviewing the evidence presented by Ms. Rivers and considering the rules governing continuing education that were in effect at the time of the application, the Board decided to give Ms. Rivers partial credit for fifteen hours of continuing education. Although the Board's current rule excluding course on Zero Balancing had already been promulgated at the time of the prior hearing, it was not applicable to the prior application. The prior application was reviewed under the administrative rules in effect at the time that the application was filed. (State Exhibit C)

4. In support of this Appeal, the Appellant submitted some of the same information that had been submitted by Ms. Rivers in the prior appeal:

a. A letter from David Lauterstein, the Co-Director of the Lauterstein-Conway Massage School in Austin, Texas and a faculty member of the Zero-Balancing Association. Mr. Lauterstein stated that in his opinion, Zero Balancing conforms to the definition of massage therapy in the Iowa statute. He states that it is a form of soft tissue manipulation, which uses friction, effleurages, and gentle stretching of the soft tissues to positively affect the muscles and connective tissues of the body. He states that it is definitely not "energy work," but an advanced form of massage therapy which addresses both the myofascial structure and energy of the body. (Appellant Exhibit 5)

b. A letter from Fritz Frederick Smith, DO, MD, the developer of Zero Balancing. Dr. Smith states that the mission statement of Zero Balancing is "to reduce pain and suffering in the world through the use of skilled touch." He describes it as a hands-on body system that teaches its students anatomy, palpatory evaluation of the skeleton, joints, muscles and ligaments of the body and fulcrum manipulative techniques to release muscle and body tensions, rebalance dysfunction of joints, and to restore mobility and flexibility. (Appellant Exhibit 4)

c. Excerpts from the Zero Balancing Manual describing the special fulcrums for the upper cervical spine, the scapula/shoulder joint fulcrums, and the upper body. (Appellant Exhibit 3)

5. The Board's rules that were in effect at the time that the pending application was denied specifically excluded programs involving Zero Balancing from approval for continuing education credit. (State Exhibit E) The Appellant's Petition for Rule Making, which was filed with the Notice of Appeal, asserted that Zero Balancing may have been placed in the excluded category based on insufficient information regarding course content and that the program does meet the standards for massage therapists as outlined in 645 IAC 133.3(2)"a." The Petition for Rule Making further asserted that the inclusion of Zero Balancing in the excluded category appears inconsistent with the Board's

decision in the prior appeal (DIA No. 02DPHMT001). (State Exhibit B)

At its meeting on March 4, 2003, the Board reviewed the Petition for Rule Making and voted to amend the administrative rules to remove Zero Balancing as an exemption for continuing education. (State Exhibit D)

CONCLUSIONS OF LAW

The Massage Therapy Board was created, pursuant to the provisions of Iowa Code chapters 147 and 152C. The Board is authorized to adopt rules, pursuant to Iowa Code chapter 17A, and to establish a procedure for the licensing of massage therapists. Iowa Code section 152C.3(1)(2003). In addition, the Board is required to establish rules providing that massage therapists must complete at least twelve hours of continuing education annually regarding subjects concerning massage and related techniques or the health and safety of the public...Iowa Code section 152C.3(2) (a) (2003).

"*Massage therapy*" means performance for compensation of massage, myotherapy, massotherapy, bodywork, bodywork therapy, or therapeutic massage including hydrotherapy, superficial hot and cold applications, vibration and topical applications, or other therapy which involves manipulation of the muscle and connective tissue of the body, excluding osseous tissue, to treat the muscle tonus system for the purpose of enhancing health, muscle relaxation, increasing range of motion, reducing stress, relieving pain, or improving circulation... Iowa Code section 152C.1(3) (2003).

The Board has promulgated administrative rules governing continuing education for massage therapists. The rules in effect at the time the pending application for continuing education credit was submitted and denied are found at 645 IAC chapter 133. (State Exhibit E) The rules became effective on July 31, 2002.

645 IAC 133.3 provides the relevant standards for approval of this continuing education program. It provides, in relevant part:

645-133.3 (152C) Standards for approval.

133.3(1) General criteria. A continuing education activity which meets all of the following criteria is appropriate for continuing education credit if it is determined by the board that the continuing education activity:

a. Constitutes an organized program of learning which contributes directly to the professional competency of the licensee;

b. Pertains to subject matters which integrally relate to the practice of the profession;

c. Is conducted by individuals who have special education, training and experience by reason of which said individuals should be considered qualified concerning the subject matter of the program. The application must be accompanied by a paper, manual or outline which substantively pertains to the subject matter of the program and reflects program schedule, goals and objectives. The board may request the qualifications of presenters;

d. Fulfills stated program goals, objectives, or both; and

e. Provides proof of attendance to licensees in attendance ...

133.3(2) Specific criteria.

a. A licensee may obtain continuing education hours of credit by attending:

(1) Programs listed but not limited to: hydrotherapy; superficial hot and cold applications; vibration and topical applications; contraindications; pathology; HIV/AIDS education. Also included is therapy which involves manipulation of the muscle and connective tissue of the body to treat the muscle tonus system for the purpose of enhancing health, providing muscle relaxation, increasing range of motion, reducing stress, relieving pain, or improving circulation.

...

c. Unacceptable subject matter may include but is not limited to: meditation, Feng Shui, personal development, practice management, communication, government regulation, insurance, collective bargaining, community service presentations or courses that do not deal with manipulation.

d. Courses about energy-based techniques performed without physical manipulation of tissue are not eligible for approval.

e. Excluded from approval are programs involving modalities listed but not limited to: Alexander Techniques, Barbara Brennan Healing Sciences, Breema Bodywork, Feldenkrais, Healing Touch, Jin Shin Jyutsu, Reiki, Rosen Method, Therapeutic Touch, Trager Approach, and **Zero Balancing**. Also excluded are other modalities which involve emotions or energy.

(emphasis supplied)

The rule in effect at the time the application was submitted and denied specifically excluded Zero Balancing from continuing education approval. The Appellant knew that this rule was in effect, but did not apply for waiver of the rule. (See 193 IAC Chapter 5) In the absence of a waiver, the Board was required to apply the rule in effect at the time that the application was made and considered.

The Board realizes that a prior application for continuing education credit for the same course had a different result. However, at the time that application was submitted and reviewed, the Board's rules did not automatically and explicitly exclude Zero Balancing courses from approval. Under the former rule, the Board had the discretion to review the course to determine if its content met the standards of approval. The Board was persuaded by Ms. Rivers presentation and determined that the course was entitled to partial credit of fifteen hours. (State Exhibit C) At the time that Ms. Rivers made her presentation in the prior appeal, the Board's new rule excluding Zero Balancing from approval was already in effect.

The Appellant filed a Petition for Rule Making, asking the Board to reconsider its inclusion of Zero Balancing on the list of exempted courses. On March 4, 2003, the Board approved a motion to amend the rule to remove Zero Balancing from the list of excluded programs. Of course, it takes time for the rule change to be implemented. After the rule change is effective, future applications for Zero Balancing continuing education programs will not be automatically excluded from approval and can be reviewed for approval based on course content. However, the rule change cannot be retroactively applied in this appeal.

ORDER

IT IS THEREFORE ORDERED that Zero Balancing Association's Application for prior approval of the continuing education program entitled "Core Zero Balancing I & II Workshop", offered on March 27-30, 2003 is hereby DENIED.

This Findings of Fact, Conclusions of Law, and Decision and Order was approved by the Board on June 26, 2003.

Any petition for judicial review of a decision or order of the board must be filed in the district court within 30 days after the decision or order becomes final. A decision of the licensing board is final upon issuance. 645 IAC 11.29.