

State of New Hampshire  
Supreme Court

NO. 98-817

2000 TERM

AUGUST SESSION

IN THE MATTER OF:  
KENNETH P. ATKINS

RULE 10 APPEAL FROM ADMINISTRATIVE DECISION OF THE  
BOARD OF EXAMINERS OF PSYCHOLOGY AND MENTAL HEALTH PRACTICE

BRIEF OF PETITIONER, KENNETH P. ATKINS

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## QUESTIONS PRESENTED

1. Is Mr. Atkins entitled to certification as a Marriage and Family Therapist in New Hampshire based on his license in Massachusetts, the requirements for which are substantially equivalent to those in the New Hampshire statute?
2. Is Mr. Atkins entitled to certification as a Marriage and Family Therapist in New Hampshire based on his clinical membership in the American Association of Marriage and Family Therapists, the requirements for which are equivalent to those in the New Hampshire statute?
3. Did the Board err in not granting Mr. Atkins certification as a Marriage and Family Therapist in New Hampshire pursuant to the “grandfather” clause contained in 1992 LAWS § 280:13,II, which requires the board to certify applicants who met the certification requirements before January 1, 1993?
4. Is the Board estopped from not granting Mr. Atkins certification as a Marriage and Family Therapist in New Hampshire when he complied with the Board’s January 23, 1996 letter?

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Until relatively recently, the profession of marriage and family therapy was largely unregulated, or self-regulated in part by voluntary professional organizations. Only recently have states begun to regulate therapists and clergy who were providing these services. *See* Jeanne Fischer, *State Regulation of Psychologists*, 58 WASH.U.L.Q. 639 (1980).

The American Association of Marriage and Family Therapy (AAMFT) is the professional association for marriage and family therapists since 1942. The organization publishes the leading professional journal in the field, the *Journal of Marital and Family Therapy*, provides continuing professional education for its members, and develops standards for graduate education and training, clinical supervision, professional ethics and the clinical practice of marriage and family therapy. Clinical membership, the organization's highest category, is somewhat limited because of the rigorous educational and experiential requirements. *See* CLINICAL MEMBERSHIP CATEGORIES, *Appx. to N.O.A. in In the Matter of Kenneth P. Atkins, No. 95-583 (N.H. Sup. Court.)*, at 21; <http://www.aamft.org/>.

Because of this, many state certification statutes, including New Hampshire's, reference the AAMFT and its standards.

Kenneth P. Atkins received his Bachelor of Education from Worcester State College in 1962, a Masters of Education from Bridgewater State College in 1970, and a Certificate of Advanced Graduate Studies (CAGS) in counseling from the University of New Hampshire in 1989. Board's DECISION AND ORDER, *N.O.A.* at 12, 13. Although he completed his clinical training and supervision before the New Hampshire Mental Health Practice Act was enacted, *see* VARIOUS, *Exhibits 1-9 to Trn. of June 19, 1998 Hearing*, its quantity complied with the yet-to-

be-passed law. Board's DECISION AND ORDER, *N.O.A.* at 12, 14; CHART, *Exhibit 31 to Trn. of June 19, 1998 Hearing.*

Mr. Atkins has practiced his profession since 1989, and has maintained an independent therapy practice in Hampton, New Hampshire since 1994. He makes his livelihood from his profession.

In 1992, Mr. Atkins, then 59 years old, demonstrated his competence and became a full clinical member of the AAMFT. Board's DECISION AND ORDER, *N.O.A.* at 12, 13; LETTER from Celeste Zbikowski, Evaluation Staff, AAMFT, to Whom it May Concern, New Hampshire Board of Examiners for Psychology and Mental Health Practice (May 17, 1995), *Exhibit 20 to Trn. of June 19, 1998 Hearing.* Also In 1992, Mr. Atkins received his certification to be a marriage and family therapist in Massachusetts under that state's then recently enacted statute based on documented evidence of his attainment of 200 hours of clinical supervision in marriage and family therapy and over 1,000 client counseling hours in marriage and family therapy. Board's DECISION AND ORDER, *N.O.A.* at 12, 13; LETTER from Michelina Martignetti, Massachusetts Division of Registration, to Peggy Lynch, New Hampshire Board of Examiners of Psychology (June 20, 1998) (omitted from notice of appeal but in Supreme Court record).

In 1993, because he had moved to New Hampshire, he applied for a New Hampshire Marriage and Family Therapist certification under the then brand-new "Mental Health Practice Act." 1992 LAWS 280:1, *et seq.* Because of his education, experience, clinical membership in AAMFT, and Massachusetts licensure, he applied for his New Hampshire certification under the statute's grandfather provision. The Board of Examiners of Psychology and Mental Health Practice, however, turned him down. Board members explicitly expressed their distaste for the

grandfather clause, *2/17/95 Trn.* at 15-17, and refused Mr. Atkins his certification probably in direct contravention of its purpose and letter. This court unfortunately declined his appeal. *In the Matter of Kenneth P. Atkins*, No. 95-583 (N.H. Sup. Court., appeal declined Dec. 29, 1995).

Several days after this Court's declination, Mr. Atkins wrote to the Board seeking advice on how to amend his application to meet its approval. LETTER from Ken Atkins to Board of Examiners for Psychology and Mental Health Practice (Jan. 3, 1996). *Exhibit 22 to Trn. of June 19, 1998 Hearing.* The board responded with a letter specifying he had to take the National Marriage and Family Therapy Examination, and also provided an application. Mr. Atkins took and passed the exam, and in July 1997, amended his original application by filing another, which is the subject of this appeal.

During the hearing before the Board, Mr. Atkins again argued that he should be grandfathered, to which the Board's two lawyers raised no *res judicata* defense. He also argued that he should get a certification based on reciprocity with his Massachusetts license under RSA 330-A:13, or in the alternative that he should get a certification based on recognition of his AAMFT membership under RSA 330-A:16-f,III. Finally, he argued that the board's January 23, 1996 letter to him specifying the conditions on which he could get certified was binding on the Board, and having met its conditions the Board should issue him certification.

The board did not certify Mr. Atkins, however, because it found that his 200 hours of supervision were not done with a supervisor approved by AAMFT or the Board. Board's DECISION AND ORDER, *N.O.A.* at 12.

There is no dispute that Mr. Atkins has completed the requisite number of hours of supervised practice. Because he completed his education so long ago, and long before New

Hampshire regulated his profession, however, he could not substantiate that his supervision was conducted by a state-approved supervisor. In effect, without the grandfather clause, the board was asking Mr. Atkins to supply proof that his supervisors were state-approved when at the time of Mr. Atkins supervision there was no state approval process.

New Hampshire (as well as Massachusetts and AAMFT clinical membership) requires 200 hours of supervision. Acquiring that supervision is difficult, time-consuming, and expensive. “Supervision” for a family and marriage therapist is comprised of meetings with an approved supervisor who does case management and clinical mentoring. The applicant must pay the supervisor. *6/19/98 Trn.* at 54. In regular practice, if one works full time seeing about 30 patients, one would get about one hour per week of supervision. *Mental Health Practice Act: Hearing on HB 1399 Before the New Hampshire Senate Committee on Executive Departments*, April 7, 1992, minutes at 30 (Statement of Philip J. Kinsler, Ph.D., for the Board of Examiners of Psychology and Mental Health Practice). Thus, 200 hours takes a minimum of about four years and would cost nearly \$20,000.

Mr. Atkins is now almost 59 years old. Because of his age, it is unlikely that he can re-complete supervision with approved supervisors anytime before his retirement. Without certification, however, Mr. Atkins cannot easily get third-party payment, *6/19/98 Trn.* at 62, which is essential to a successful practice in our managed health-care environment.

After conducting his hearing *pro se*, the Board again refused to give Mr. Atkins certification because he could not prove his supervision was conducted by approved supervisors, and this appeal followed.

## SUMMARY OF ARGUMENT

Mr. Atkins first argues that he is entitled to certification by the Board of Examiners of Psychology and Mental Health Practice under New Hampshire's Marriage and Family Therapist Act based on his license in Massachusetts and his membership in the American Association of Marriage and Family Therapists. He argues that the New Hampshire statute allows certification because he is licensed in a state with substantially equivalent requirements. He also argues that he is entitled to certification by the Board based on his clinical membership in the AAMFT because the requirements for his membership are equivalent to the terms of the New Hampshire statute.

Mr. Atkins then argues that because his qualifications were all met before the effective date of the Act, he is entitled to certification under the grandfather statute. He further argues that *res judicata* does not bar this claim.

Finally, Mr. Atkins argues that a letter sent to him from the Board, which required only that he take an examination to gain certification, is binding on the Board.

## ARGUMENT

### **I. Kenneth Atkins is Entitled to a Marriage and Family Therapist Certificate Because of Reciprocity with Massachusetts and His Membership in the AAMFT**

New Hampshire has a long tradition of issuing medical licenses based on reciprocity with other jurisdictions. *See Goldsmith v. Kingsford*, 92 N.H. 442 (1943).

The New Hampshire Mental Health Practice Act has two reciprocity provisions. One is for New Hampshire certification recognizing licensure in another state. RSA 330-A:13. The other is for New Hampshire certification recognizing membership in the national professional organization, American Association of Marriage and Family Therapy (AAMFT). RSA 330-A:16-f,III.<sup>1</sup>

In this case, Kenneth Atkins meets both.

#### **A. Kenneth Atkins is Entitled to a Marriage and Family Therapist Certificate Because of Reciprocity with Massachusetts**

RSA 330-A:13 provides: “The board may certify any applicant who is certified in any other state, provided the other state’s certification requirements are substantially equivalent to or higher than those of this state.”

The language of the statute is permissive rather than mandatory, but an agency may not withhold certification for reasons that are arbitrary or capricious. *Petition of Dunlap*, 134 N.H. 533 (1991); *Petition of Bagley*, 128 N.H. 275 (1986).

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<sup>1</sup>The Mental Health Practice Act was originally enacted effective January 1, 1993. 1992 LAWS 280:1, *et seq.* As of October 31, 1998, the act was repealed and re-enacted, with licensure replacing certification. 1998 LAWS, 234:1, *et seq.* Because this case arose before the re-enactment, citations in this brief are to the law as it was before the re-enactment. The former RSA 330-A:13, cited here, was unchanged in the re-enactment, except it is now codified as RSA 330-A:26 (1999). The former RSA 330-A:16-f,III, cited here, gained a comma in its last sentence and a upper-case ‘S’ for its last word, and is now codified as RSA 330-A:21 (1999).

Substantial equivalence means similarity of essential attributes. *Selke v. MedCare HMO*, 147 B.R. 895, 901 (N.D. Ill. 1992) (HMO found substantially equivalent to insurance company). To be found not substantially equivalent two things must clearly differ in kind. *Worthen v. Kingsbury*, 84 N.H. 304 (1930) (public notice required by statute to be “substantially equivalent” to the statutory notice; notice provided differed to such an extent to be not substantially equivalent). Thus, differences that are not materially significant are insufficient to make two things not substantially equivalent. *Fiber v. New Mexico Bd. of Med. Examiners*, 596 P.2d 510 (N.M. 1979) (“Things may differ one from the other and still be ‘equivalent,’ if they are of equal value, significance or import, in relation to a common standard, here the promotion and preservation of standards for practicing physicians in both states.”).

The rules for certification in New Hampshire require a masters or doctorate degree in marriage and family therapy from an accredited program, passage of the national exam, and completion of two years’ post-masters counseling experience, which must include:

“completion of a minimum of 1,000 hours of supervised practice of marriage and family therapy under supervision approved by the [AAMFT] or the board of mental health practice, and the individual must have completed 200 hours of face-to-face supervision by a supervisor approved by the [AAMFT] or the board.”

RSA 330-A;16-f,III.

The requirements for licensing in Massachusetts are nearly identical. A license there requires a masters degree in an approved program, passage of an exam, and two years of supervised clinical experience which must include:

“Two hundred hours of supervised clinical experience, at least one hundred hours of which shall consist of individual supervision with a clinician who has expertise in marriage and family therapy, rehabilitation counseling, educational psychology, or counseling and who holds a masters degree in social work, marriage and family therapy, rehabilitation counseling, educational psychology, counseling or an equivalent field or holds a doctorate degree in psychology, or a medical degree with a subspecialization in psychiatry.”

MASS.GEN.LAWS ch. 112 § 165.

Thus, although there are minor differences, the New Hampshire and Massachusetts statutes are substantially equivalent.

It is undisputed that Kenneth Atkins holds a Massachusetts license. Board’s DECISION AND ORDER, *N.O.A.* at 12, 13; LETTER from Michelina Martignetti, Massachusetts Division of Registration, to Peggy Lynch, New Hampshire Board of Examiners of Psychology (June 20, 1998) (omitted from notice of appeal but in Supreme Court record).

Accordingly, Mr. Atkins is entitled to a New Hampshire certification based on his Massachusetts license. The board’s failure to grant it is a violation of Mr. Atkins’s constitutional rights, *Petition of Grimm*, 138 N.H. 42 (1993), and must be reversed. *Appeal of Beyer*, 122 N.H. 934 (1982).

Reciprocity provisions are necessarily for people who do not comply with this state’s own requirements – otherwise the provision would be surplusage. “The reciprocity provision is clearly intended to allow licensure of applicants with less than the minimum requirements . . . because of their licensed status in other states.” *Ferro v. Utah Dept. of Commerce*, 828 P.2d 507, 513 (Utah App. 1992). Thus, to a reciprocity applicant, the minimum requirement provision is merely advisory. *Ferro*, 828 P.2d at 507. The purpose of the certification act is to protect the public, RSA 330-A:1, not to keep people from practicing their profession or to minimize

competition. Diane Ruder, *Antitrust and the Credentialing and Decredentialing of Physicians*, 19 N.KY.L.REV. 351 (1992).

Because successful applicants have little incentive to litigate, there are few reported decisions where a person has been granted a license based on reciprocity. Related issues, however, show that courts deny a license only where the differences between the two states' standards are significant.

In *Katz v. Bd. of Med. and Osteopathic Exam.*, 432 N.W.2d 274 (S.D. 1988), the applicant was convicted of medicaid fraud in one state, had permitted an unlicensed employee to practice medicine in another state, and had been found to have improperly performed physical examinations for the Federal Aviation Administration. Based on these misdeeds, he had been denied licensure in several states. The South Dakota court refused to grant a license there because its statute was substantially equivalent to those in the other states which had also denied a license.

Many courts have refused to grant a license because the standards in the state where the application had been filed were not substantially equivalent to the other state. Each of these cases have identifiable and substantial differences in licensing requirements. The decisions have been made on the basis of differences in education: *Boyer v. State Bd. of Examiners of Psychologists*, 834 P.2d 450, 453 (Okla.App. 1992) (Oklahoma required that to be psychologist applicant must complete “doctoral program primarily based upon an organized psychology program of study” while other state allowed license with substantially less education, which court held not substantially equivalent); *Sellers v. Bd. of Psychologist Examiners*, 739 P.2d 125, 127, 128 (Wyo. 1987) (Wyoming required education in a program “primarily psychological,” while

other state allowed license with merely “degree is in guidance and counselor education”; court held not substantially equivalent); *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521 (Minn. 1985) (Minnesota required education in school approved by accrediting agency which is recognized by the U.S. Department of Education, but applicant’s education was at school accredited by a non-recognized body which was comprised mostly of people who ran the school; applicant’s education held not substantially equivalent); *Lock v. New York State Educ. Dept.*, 477 N.Y.S.2d 783, *motion for clarification den.*, 484 N.Y.S.2d 1029, 475 N.E.2d 476 (N.Y.A.D. 1984) (court held that doctorate in physics not substantially equivalent to applicant’s missing one year of medical school). The decisions have also been made on the basis of differences in testing: *Frank v. Wyoming Bd. of Dental Examiners*, 965 P.2d 674 (1998) (doctor had been licensed in another state which allows license by passing certain dental exam, but Wyoming requires passing different exam; court held legislature could chose exams); *Callejo-Tolosa v. Bd. of Med. Examiners*, 875 S.W.2d 762 (Tex.App. 1994) (Texas required that if applicant had failed exam, licensing required an extra year of training, but other state allowed license without it; court held requirements not substantially equivalent); *Martinez v. State ex rel. Okla. Bd. of Med. Licensure*, 852 P.2d 173 (Okla.App. 1993) (Oklahoma required passage of test in one sitting, while other state allowed combining of scores on portions of test when taken repeatedly; court held requirements not substantially equivalent). And the decisions have also been made on the basis of differences in experience: *DiMauro v. Bd. of Medical Examiners*, 769 P.2d 759 (Okla. 1989) (Oklahoma had substantial clinical requirements while other states were minimal; court held requirements not substantially equivalent).

**B. Kenneth Atkins is Entitled to a Marriage and Family Therapist Certificate Because of His Membership in the AAMFT**

The statute setting forth the requirements for certification begins “The board shall issue a marriage and family therapist certificate to any person who meets all of the following requirements or their equivalent.” RSA 330-A:16-f.

The provision is mandatory (“shall”) and by allowing certification upon meeting “equivalent” requirements, contains its own bypass. The statute specifies the standards including the 1,000 and 200 hour supervision requirements quoted above, and in its final sentence provides:

“Supervision standards shall be equivalent to an American Association of Marriage and Family Therapy approved supervisor or approved alternate supervision as defined by the American Association of Marriage and Family Therapy Commission on supervision.”

RSA 330-A:16-f,III.

Thus, by its terms, the statute mandates granting a certification upon (in addition to education and testing) meeting the supervision requirements promulgated by the AAMFT.

Clinical membership in the AAMFT requires a masters or doctoral degree in marriage and family therapy from an accredited educational program, and a post-masters “minimum of two years clinical work experience in marriage and family therapy.” CLINICAL MEMBERSHIP CATEGORIES, *Appx. to N.O.A. in In the Matter of Kenneth P. Atkins, No. 95-583 (N.H. Sup. Court.)*, at 21.

The supervision requirements for clinical membership in the AAMFT are more carefully prescribed than the New Hampshire certification requirement.

“All post-master’s client contact hours must be supervised by an AAMFT

Approved Supervisor or supervisor-in-training registered with the AAMFT. Clinical work may be considered with an alternate supervisor on a case-by-case basis. At least 200 hours of supervision completed concurrently with a minimum of 1,000 hours of marriage and family therapy conducted in face-to-face contact with individuals, couples and families are required. A minimum of 100 of the 200 hours of supervision must be individual supervision. Individual supervision should be face-to-face with one supervisor and one or two supervisees. The remaining 100 hours of supervision may be group supervision. Group supervision may consist of no more than six supervisees, regardless of the number of supervisors.

*Id.* The AAMFT is aware that its supervision requirements exceed that of Massachusetts. The AAMFT notified the New Hampshire Board in this case that the AAMFT reviews state certification requirements

“to determine if the license requirements are substantially equivalent to the requirements for AAMFT Clinical membership. If so, the AAMFT will accept demonstration of a marriage and family therapy license from that state as fulfilling the requirements for [AAMFT] Clinical Membership. . . . The AAMFT Board has reviewed and does recognize the Massachusetts license in marriage and family therapy. This license is considered sufficient documentation for the completion of all education, post-master’s degree experienced and supervision requirements for Clinical Membership.”

LETTER from Celeste Zbikowski, Evaluation Staff, AAMFT, to Whom it May Concern, New Hampshire Board of Examiners for Psychology and Mental Health Practice (May 17, 1995), *Exhibit 20 to Trn. of June 19, 1998 Hearing, also see Board’s DECISION AND ORDER, N.O.A.* at 12, 13.

By his clinical membership in the AAMFT, and by his acquisition of a Massachusetts license by virtue of his clinical membership in the AAMFT, it is beyond dispute that Mr. Atkins has complied with the AAMFT standards. The reciprocity provision in the New Hampshire statute explicitly recognizes the AAMFT standards, and thus mandates issuance of a New Hampshire certification.

Courts have denied licenses when applicants have alleged equivalency of accrediting agency standards but the standards are clearly less than the statute requires. For instance, Mr. Atkins's case is not like *Metcalf v. Oklahoma Board of Medicine*, 848 P.2d 48 (Okla.App. 1992). There, the doctor was a "fellow" of the agency which accredited his medical speciality. Because being a fellow did not require an equivalent degree of proficiency as required by the state, he was properly denied the ability to advertise as a specialist. Likewise, in *Steelman v. Board of Medical Licensure*, 824 P.2d 1142, 1143 (Okla. App. 1992), to be a recognized specialist, the applicant was required to show successful completion of all requirements of the named accrediting agency, or "any other organization found by the Board to be equivalent thereto." The applicant could only show that he had attended a three-day program, which was far less and did not include the patient contact required by the accrediting agency. Similarly, in *Parmley v. Missouri Dental Board*, 719 S.W.2d 745 (Mo. 1986), a dentist sought a license in a sub-speciality which would allow him to advertise as a pedodontic specialist. The statute allowed licensure if the dentist was a member of the accrediting organization. While the applicant was a member, he had been grandfathered into it but had not satisfied its examination requirements which the statute was plainly trying to reference.

In the present case, Mr. Atkins Clinical Membership in the AAMFT is no less stringent than the New Hampshire requirements, and he has not attempted to get away with doing less than the New Hampshire statute requires.

The failure of the Board to issue a certification to be a marriage and family counselor in New Hampshire is without logical explanation. As such it is arbitrary and capricious, and in violation of Mr. Atkins's constitutional rights. Accordingly, the Board must issue the

certification. *See Appeal of Beyer*, 122 N.H. 934 (1982).

## II. Kenneth Atkins is Entitled to Certification Because he Met the Requirements of the Marriage and Family Therapist Act Before its Effective Date According to its Grandfather Clause

### A. The Grandfather Clause Applies to Mr. Atkins

This court reviews application of grandfather clauses *de novo*. *In re Hoyt*, 727 A.2d 1001 \_\_\_ N.H. \_\_\_ (decided April 29, 1999).

The grandfather clause in New Hampshire’s marriage and family therapist act provides:

“Any person meeting the requirements of RSA 330-A:16-f,III prior to the effective date of this act [Jan. 1, 1993] shall be granted certification as a marriage and family therapist by the board of psychology and mental health practice.”<sup>2</sup>

1992 LAWS, 280:13, II.

Grandfather clauses serve important purposes. They ensure continuity in the availability of the service, and protect the constitutional rights of those practicing their profession.

*Richardson v. Brunelle*, 119 N.H. 104 (1979) (nursing). By their nature, grandfather clauses “express[] a willingness to accept as proof of proficiency evidence of experience in practice without limitation, either as to the extent of such experience or as to the place where it was acquired. *Pffefferkorn v. Lewis*, 80 N.H. 518, 520 (1923) (veterinary).

If a person has complied with the terms of the grandfather clause, it applies. *Pffefferkorn*, 80 N.H. at 518; *Mourot v. Arkansas Bd. of Dispensing Opticians*, 685 S.W.2d 502 (Ark. 1985); *cf. Levy v. State Bd. of Examiners for Speech Pathology and Audiology*, 578 S.W.2d 646 (Tenn.App. 1978).

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<sup>2</sup>While the clause no longer appears in the Revised Statutes Annotated, it probably was not repealed. 1998 LAWS, 234:1. In any case, Mr. Atkins filed his application before the statutory recodification.

New Hampshire's Mental Health Practice Act became effective on January 1, 1993. Kenneth Atkins completed his supervised clinical training years before that. He was certified by the AAMFT in 1992, and licensed by the Commonwealth of Massachusetts also in 1992. The Board acknowledged both these accomplishments and dates. Board's DECISION AND ORDER, *N.O.A.* at 12, 13. In addition, the board acknowledged that Mr. Atkins had completed far more than the minimum number of required hours of practice and supervision. Board's DECISION AND ORDER, *N.O.A.* at 12, 14; *see also* CHART, *Exhibit 31 to Trn. of June 19, 1998 Hearing*. It is not disputed that Mr. Atkins has complied with the other terms of the statute.

Thus, there is no dispute that Mr. Atkins has completed the requisite number of hours of supervised practice. Because he completed his education and supervision so long ago, however, he cannot substantiate that his supervision was conducted by a *state-approved* supervisor. The supervision occurred long before New Hampshire regulated his profession, and it is simply anachronistic for Mr. Atkins to have inquired into this aspect of his supervisors' credentials. In effect, without the grandfather clause, the board is asking Mr. Atkins to supply proof that his supervisors were state-approved when at the time of Mr. Atkins supervision there was no state approval process.

Because Mr. Atkins was a practicing marriage and family therapist before the New Hampshire statute, he has a vested property right in the ability to practice his profession. *Petition of Grimm*, 138 N.H. 42 (1993). The board's failure to grant certification is a violation of these rights, and its denial must be reversed. *Appeal of Beyer*, 122 N.H. 934 (1982); *Whittle v. State Board of Examiners of Psychologists*, 483 P.2d 328 (Okla. 1971) (because psychologist was solo practitioner and could not comply with rule requiring letters from other psychologists acquainted

with her practice, board denied certification; court held rule unconstitutionally restrictive).

In its deliberations, the Board made clear that it made its decision based not on the merits of Mr. Atkins's case, but because it was chagrined at what it felt was the usurpation of its power by the legislature in delegating grandfathered certification decisions to the AAMFT,<sup>3</sup> and because the Board was unable due to the grandfather clause to look behind the raw facts of Mr. Atkins's credentials. *2/17/95 Trn.* at 15-17.

These limitations, however, are inherent in the nature of grandfather clauses.<sup>4</sup> *See Hickey v. Ohio State Medical Bd.*, 574 N.E.2d 1163 (Ohio App. 1989) (board prohibited from investigating quality of school from which applicant graduated because it was approved at the time of her graduation); *Texas State Bd. of Medical Examiners v. Gross*, 712 S.W.2d 639 (Tex.App. 1986) (board prohibited from denying license based on applicant's poor grades because he complied with statute by having graduated); *McPhail v. Montana Bd. of Psychologists*, 640 P.2d 906 (Mont. 1982) (board prohibited from inquiring into the

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<sup>3</sup>The Board's chagrin is somewhat disingenuous. In *Petition of Grimm*, 138 N.H. 42, 46 (1993), the Board explicitly relied on the standards of an outside professional organization (in that case the American Psychological Association Ethical Principles) to revoke the certificate of a psychologist accused of sexual relations with a client.

<sup>4</sup>Because she was instrumental in the legislation, Mr. Atkins approached his State Senator, Beverly Hollingworth. She wrote to the board, "Mr. Atkins appears to be precisely the sort of candidate the grandfathering provision of the statute was intended and designed to accommodate. As a legislator, I understand that the formal qualifications for any number of professions undergo constant change with which applicants cannot possibly keep pace. The purpose of grandfathering provisions is to ensure that the vagaries of form do not prevail over the value of substance by disqualifying otherwise able and experienced individuals for failing to satisfy formal requirements imposed after they prepared for and engaged in their professional careers. As I understand the statute and the record, Mr. Atkins' application should succeed on the strength of the grandfathering provision." LETTER from Beverly Hollingworth, to Paul B. Shagoury, Chairperson, Board of Examiners for Psychology and Mental Health Practice (Dec. 12, 1997), *Exhibit 28 to Trn. of June 19, 1998 Hearing.*

chronological order in which applicant conducted his education and clinical experience so long as he completed both).

The Board's displeasure with the grandfather clause is not sufficient cause to deny Mr. Atkins the certification to which he is entitled. *Petition of Dunlap*, 134 N.H. 533 (1991); *Petition of Bagley*, 128 N.H. 275 (1986).

**B. Mr. Atkins is Not Barred by Res Judicata From Arguing Application of the Grandfather Clause**

During the first part of this proceeding, in 1994, Mr. Atkins argued that the grandfather clause applied to him. The Board disagreed, and this court declined the resulting appeal.

In the more recent 1998 proceeding, from which the current appeal was taken, Mr. Atkins repeatedly claimed he was entitled to certification based on the grandfather clause, made legal arguments based on the grandfather clause, and provided testimony useful only as evidence of the application to him of the grandfather clause. *6/19/98 Trn.* at 16-18, 29, 36, 55-57, 59, 62-63, 65-67.

During the 1998 proceeding, the State had two lawyers present, Simon Leeming, Esq., who was presiding officer, and Douglas Jones, Esq., who was Board Counsel and Assistant Attorney General. Neither they, nor any member of the Board, ever mentioned the application of *res judicata*, either during the evidence phase or during legal argument. Accordingly, the matter was waived.<sup>5</sup> Instead, Attorney Leeming stated: "I'm going to take official notice of the entire

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<sup>5</sup>*Res judicata* bars litigation of not only issues that were decided, but also all issues that could have been raised. *Grossman v. Murray*, 141 N.H. 265 (1996). Thus, the Board's lawyers arguably could have raised a *res judicata* claim against Mr. Atkins's entire second proceeding. They did not. Consequently all matters Mr. Atkins raised in the proceeding are capable of decision by this court.

record of that [prior] matter, and I'm going to take official notice of [Mr. Atkins's] original application in October of 1994 and all of the documents that will support it with respect to that application." *6/19/98 Trn.* at 30. In its decision in this case the Board wrote: "[T]he 1994 denial may not automatically preclude the applicant from having evidence submitted in that application reconsidered in the context of the current application." Board's DECISION AND ORDER, *N.O.A.* at 12, 17.

Even if *res judicata* were not waived, it does not apply nonetheless because it is apparent that both the Board and Mr. Atkins considered the second proceeding merely a continuation of the first.

Several days after this court declined the former appeal, Mr. Atkins wrote to the Board asking for "clarification as to what the Board deems necessary for me to become certified." LETTER from Ken Atkins to Board of Examiners for Psychology and Mental Health Practice (Jan. 3, 1996). *Exhibit 22 to Trn. of June 19, 1998 Hearing.* Mr. Atkins did not contemplate a new application, but merely some additional information or action in the nature of an amendment to his existing application. While the Board gave the second proceeding a new docket number, it nonetheless considered Mr. Atkins's re-submission of his application as a mere amendment to the first application: the Board allowed him to re-argue the grandfather clause, and it incorporated the entire record of the first proceeding into the second. Rather than rely on the first proceeding, the Board apparently felt that the second was its continuation. During the hearing in the second proceeding, Mr. Atkins further made clear that he understood that the application being discussed was the one he filed in 1993. *6/19/98 Trn.* at 64.

Moreover, *res judicata* is an equitable doctrine, and should not be applied when it is not

equitable to do so, or when there is no prejudice to another party. *See Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961) (there are “two opposing policies”: “the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.”); Evans, *The Doctrine of Res Judicata in Workers’ Compensation Cases: Is There a Dichotomy Between Finality and Fairness?* 38 WAYNE L.REV. 383 (1991). Here, the other party is a state licencing board, which cannot be prejudiced by Mr. Atkins’s actions. Accordingly, *res judicata* should not apply.

Because the Board waived the *res judicata* argument, and because it does not apply on the facts or in equity, there is no bar to this Court reaching the merits of Mr. Atkins’s grandfathering argument.

### **III. The Board is Bound by the Letter it Wrote to Mr. Atkins Saying He Need Only Take an Exam for Certification**

Immediately after this court declined the former appeal, Mr. Atkins wrote to the Board seeking advice on what further actions to take to satisfy the Board. Mr. Atkins wrote for “clarification as to what the Board deems necessary for me to become certified.” LETTER from Ken Atkins to Board of Examiners for Psychology and Mental Health Practice (Jan. 3, 1996).

*Exhibit 22 to Trn. of June 19, 1998 Hearing.* The Board responded by letter which said,

“In order to become certified you must apply to this board by completing a full application, including all supporting documents sent to the board, and take and pass the national AAMFT exam. I have enclosed an application packet for you and a copy of the rules, regulations and statutory requirements necessary for certification.”

LETTER from Peggy Lynch, New Hampshire Board of Examiners of Psychology and Mental Health Practice, to Ken Atkins (Jan. 23, 1996).

A letter from an administrative agency representing statutory interpretation may be binding on the agency. In *Edgecomb Steel Company v. State*, 100 N.H. 480, 485-86 (1957), a land owner in a condemnation proceeding offered a letter from the state to show that the state had offered a certain sum for taking the owner’s land. This Court held that in taking proceedings there are statutory requirements, including the filing and return of a layout, that were not met. Thus, the Court held that even if the letter was otherwise binding, because the other statutory requirements were not met, the owner was not entitled to the sum. Similarly, in *In re Cote*, \_\_\_ N.H. \_\_\_ (decided Aug. 6, 1999), an employee offered a letter “issued by the special funds coordinator notifying him of his entitlement to cost-of-living adjustments.” This Court wrote: “[e]ven if we assume that the deference is owed” to the letter, the letter could not be construed as

creating an entitlement. Thus, while the court has not directly ruled on the matter, *Edgecomb* and *Cote* hold open the possibility that a letter from an agency is binding on the agency.

Mr. Atkins understood from the letter that he had to take the examination, but did not understand it to require anything further. This is because the letter was in response to his request of “clarification” and because he had previously already completed a “full application.” Based on this, Mr. Atkins took the exam, but took no further action. *See 6/19/98 Trn.* at 23-26, 30, 31, 37-39, 40-43, 61, 70.

Because Mr. Atkins’s understanding of the letter was reasonable in the context of the communication between he and the Board when read in conjunction with the grandfather statute, and because he relied on his interpretation, the letter is binding on the agency. Mr. Atkins did all that was requested in the letter and should receive certification based on it.

## CONCLUSION

In light of the forgoing, Mr. Atkins requests that the decision of the New Hampshire Board of Examiners of Psychology and Mental Health Practice be reversed, and that his license as a Marriage and Family Therapist be issued forthwith.

Respectfully submitted,

Kenneth P. Atkins  
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: August 6, 2000

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## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Kenneth P. Atkins requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 6, 2000, copies of the foregoing will be forwarded to Douglas N. Jones, Assistant Attorney General.

Dated: August 6, 2000

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