

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

USA TRAINING COMPANY, INC.,)
)
 Petitioner,)
)
vs.) Case No. 99-1707
)
DEPARTMENT OF HIGHWAY SAFETY)
AND MOTOR VEHICLES,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on August 3 and 4, 1999, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Mark K. Logan, Esquire
Smith, Ballard & Logan, P.A.
403 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Enoch Jon Whitney, General Counsel
Michael J. Alderman, Esquire
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A432
Tallahassee, Florida 32302-0504

STATEMENT OF THE ISSUES

The issues presented are whether the Department has the authority to approve Petitioner's distance-learning driver improvement course, whether Petitioner's delivery system is

effective, and whether Petitioner's method of delivery complies with statutory and rule requirements.

PRELIMINARY STATEMENT

Petitioner submitted its application for approval of a driver improvement course in 1997. By letter dated March 8, 1999, the Department denied Petitioner's application, and Petitioner timely requested an evidentiary hearing regarding that denial. This cause was thereafter transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

Petitioner presented the testimony of Barbara Lauer; Phil Ward; Marshall Scott Owens; Rick Whitworth; Tommy Edwards; Milton Grosz; Jon Crumpacker; Terry Heller, Ph.D., and Sandra Lambert. The Department presented the testimony of Richard I. Wark, Ph.D., and Sandra Lambert. Additionally, Petitioner's Exhibits numbered 1-12 and 14-20 and the Department's Exhibit numbered 1 were admitted in evidence.

FINDINGS OF FACT

1. Petitioner is a provider of basic driver improvement courses in a number of states, including Florida, Texas, and New York. These courses use the traditional classroom setting.

2. Petitioner also provides its course via distance learning in California and Texas. That course is conducted using video and computer technology. The Texas course has been evaluated three times by the Texas education agency, which has

determined that the delivery system is effective in achieving behavioral and attitudinal changes in drivers taking the course.

3. In 1996 Petitioner's representatives met informally with the Department's representative, Milton Grosz, to discuss offering in Florida Petitioner's interactive video course which is the same course as Petitioner's already-approved basic driver improvement course. As a result of that meeting, Grosz, who heads the Department's review committee, researched the literature regarding the effectiveness of distance learning. His research revealed a growing body of literature supporting learning by interactive video but none in the field of driver improvement. Grosz noted that other providers would complain that the course's methodology does not work or that it offers the potential for cheating but the literature did not support such claims. Grosz recommended that the Department pilot test Petitioner's course in a limited geographic area.

4. In 1997, Petitioner's representative in Tallahassee met with the Department's Director and explained that Petitioner proposed to introduce its distance-learning version of its course in Florida. After being encouraged to submit an application for approval, Petitioner did so on August 5, 1997.

5. On August 20, 1997, Barbara Lauer, the Chief of the Department's Bureau of Driver Education and DUI Programs, wrote to Petitioner advising that the Department had decided to proceed with the development of interactive video methodology, limited to

a single judicial circuit until the Department could pilot test that delivery system for effectiveness in Florida. That letter had been approved by the Director and the Assistant Director of the Department's Division of Driver's Licenses.

6. Petitioner's proposal for Florida uses video and computer technology. The process begins when a person cited for certain non-criminal traffic infractions elects to attend a basic driver improvement course approved by the Department in lieu of a court appearance. A person choosing Petitioner's interactive video course would check out a laptop computer and four-hour video tape from a Blockbuster Video outlet after signing a contract. The contract provides that the student pay a fee, agree to the terms of the course, acknowledge that he or she will be subject to a validation process, acknowledge that he or she will be tested as to the content and must answer correctly 32 of the 40 questions in order to pass the course, and forfeit all money paid if he or she does not pass the course.

7. Once the student agrees to the contractual terms, the student takes the video home, watches the video, and uses the laptop computer, linked to a data-base via modem, to answer questions generated by the computer based on the course content. The student must log into Petitioner's system several times during the course process. He or she is then subjected to a combination of verification and content questions including a final exam. The student also must answer unique identifying

questions particular to the student taking the course which are intended to ensure that the person answering the questions via the computer is the student who registered for the course.

8. The course contains situational learning segments where the student is encouraged to reflect on the driving situation covered. Throughout the course process the student is encouraged to use Petitioner's 1-800 number, manned by Florida-certified instructors 24 hours a day, should the student have a question about the course content or wish to discuss other driving situations. A different 1-800 number is provided for technical assistance 24 hours a day.

9. Upon return of the equipment to the Blockbuster Video location, the student is informed as to whether he or she passed or failed the course. If the student passed, he or she is issued a certificate of completion from Petitioner's central office. If the student failed, he or she is given a phone number to call which results in the student being given a verbal quiz by a course instructor, who can then determine that the student has passed the course. Five to seven percent of students typically fail the course.

10. Petitioner would establish a single Florida base of operations if the course were approved for use in this State. The address of each Blockbuster Video store where the course computer and materials are available would be registered with the State as a school.

11. Petitioner's interactive video course would be available in many languages and would be offered in several versions for handicapped and hearing-impaired individuals. Thus, the course would be uniquely accessible to drivers whose handicaps may not be accommodated by places where the traditional classroom version of the course may be offered. The course would be available also for drivers whose work schedules or personal obligations do not allow them to take the basic driver improvement course when offered in a classroom setting.

12. Several requests for additional information were made by the Department, and Petitioner responded to all. By letter dated July 6, 1998, the Department notified Petitioner that its application for course approval was complete and could be evaluated for content.

13. The Department routinely reviews applications for driver improvement course approval by using a review committee. The committee determines whether the application meets the requirements of the administrative code (the Department's rules) and the statutes and determines whether the course curriculum should be approved for use in Florida. The review committee members are the only Department personnel who have actually reviewed the curriculum, have sat through the videotaped course, and have used the interactive computer.

14. The review committee recommended that Petitioner's interactive video course be approved. Accordingly, the

Department determined that the course content promotes driver safety, driver awareness, and accident avoidance techniques.

15. In November 1998, the Director of the Department's Division of Driver's Licenses was contacted by a reporter regarding the use of Petitioner's interactive video course in a single county in Florida. After the article appeared, the Department's Executive Director received numerous letters from Petitioner's competitors.

16. The Department has never before denied an application which received the approval of its review committee. However, by letter dated March 8, 1999, the Department advised Petitioner that its application for approval was denied for the reasons that the law does not contemplate approval of a basic driver improvement course conducted in a non-classroom setting although the law does not prohibit such approval, that the Department had never before approved such a course, and that the concept of independent study was not the best choice for effectuating behavioral and attitudinal changes.

17. No one from the Department questioned its legal authority to approve Petitioner's interactive video course until Petitioner's competitors began contacting the Department. Even after those contacts, the Department did not raise any concern about its legal authority although it continued to correspond with Petitioner regarding other aspects of Petitioner's application. Only when the denial letter was issued did the

Department advise Petitioner that it did not have authority to approve the course even though such approval was not prohibited.

18. Petitioner provided to the Department as part of its application the effectiveness study performed for the State of Texas which had reviewed Petitioner's interactive video course three times, approving it on each occasion. That study concludes that the course is effective in changing driver behavior. The Department has historically accepted effectiveness studies done for other states. Further, the Department does not require the submission of an effectiveness study for approval of a course to be offered in a single judicial circuit.

19. The Department determined that the course participation validation process was acceptable and does not challenge that process now.

20. Jon Crumpacker, an expert in distance learning, has worked on distance learning projects for the Florida Departments of Corrections, Agriculture and Consumer Services, Education, Transportation, Management Services, Military Affairs, Juvenile Justice, and the Lottery, which have all embraced and used interactive technology similar to that proposed by Petitioner. He found Petitioner's technology to be effective in delivering course content and to be a particularly reliable form of interactive technology. He also concluded that Petitioner's technology is not "radical" as previously characterized by the Department.

21. A delivery system or mechanism is how a particular course content is imparted to a student. There are a variety of systems used today, including traditional classroom, computer-assisted instruction, and virtual classrooms on the Internet. The contractual element of Petitioner's course motivates students to participate in the learning process, as does the testing component, particularly when compared with the traditional classroom delivery system of the basic driver improvement course which includes no testing component. Petitioner's delivery system is a true interactive system and is an effective delivery system, likely to cause changes in attitude and behavior.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. Sections 120.569 and 120.57(1), Florida Statutes.

23. Section 318.14(9), Florida Statutes, provides, in part, that a person charged with certain traffic infractions

. . . may, in lieu of a court appearance, elect to attend in the location of his or her choice within this state a basic driver improvement course approved by the Department of Highway Safety and Motor Vehicles.
[Emphasis supplied.]

Although this Subsection uses the language "attend . . . a basic driver improvement course," Subsection (5) uses the language "attendance at a driver improvement school," and Subsection 10(a)(1) uses the language "attend a driver improvement course." Similarly, Section 318.1451, Florida Statutes, speaks in terms of

both courses and schools. See Subsections (1), (3), and (4). Section 318.15(1), Florida Statutes, uses language concerning attending schools, but Section 322.0261 regulates driver improvement courses as does Section 322.095.

24. The statutes provide no definitions for the words "attend" or "school." The Department has enacted rules regarding driver improvement courses. Chapter 15A-8, Florida Administrative Code. Rule 15A-8.001 provides that the purpose of the Chapter is to establish "the standards for approval of driver improvement courses," and the remainder of the Chapter does that. It does not appear to regulate schools. Rule 15A-8.002(7) does, however, contain a definition of a driver improvement school, as follows:

An authorized person, firm, partnership, association, corporation, public school system, public community college or public university which conducts Department approved Basic Driver Improvement, Advanced Driver Improvement, or Traffic Law and Substance Abuse Education courses in the State of Florida.

Thus, any entity can be called a school so long as it conducts an approved course. Petitioner intends to designate each Blockbuster outlet it uses as a school.

25. The Department's denial letter advised Petitioner that no take-home course had ever been approved. The Department conceded at final hearing that no prior application had been considered. The fact that no one else has proposed offering such a course is not a serious reason for denying the application but

merely sets forth that there is no precedent for approving or denying such a course.

26. The denial letter also advised Petitioner that independent study is not the "best choice." The Department has cited no statute or rule, and none has been found, which establishes "best choice" as a criterion for review or approval of a driver improvement course in the State of Florida. Further, the Department's explanation in its letter as to why independent study is not the "best choice" is not supported by the weight of the evidence in this cause. Rather, the weight of the evidence is that Petitioner's interactive video course is reliable and effective in achieving behavioral and attitudinal changes, and that a student voluntarily electing that delivery method is well motivated to learn using it.

27. The Department's primary reason for denying Petitioner's application is the Department's lack of authority to approve such a delivery system. The Department readily concedes that the law does not prohibit such a delivery system. The Department also concedes that it can pilot test innovative programs for driver training. See, for example, Section 322.025, Florida Statutes, and Rule 15A-8.006(3), Florida Administrative Code.

28. Petitioner bears the burden of showing that its proposed interactive video course complies with all statutory and rule criteria. The statutes and rules do not specify the method

of delivery of courses approved by the Department. Accordingly, the Department can interpret the statutes and rules to restrict the delivery method to only traditional classroom instruction, or the Department can interpret those same statutes and rules to allow for various delivery methods so long as the course content meets the statutory and rule requirements, as Petitioner's proposed course does.

29. The Department has enunciated no policy reason for interpreting Chapter 318 to permit only a traditional classroom setting. Moreover, there is no language in the governing statutes or in the Department's implementing rules requiring that the traditional classroom setting be the only delivery system for approved courses. The statutes and rules speak only in terms of the Department regulating course content, not the delivery system. It follows, then, that the Department does have the authority to permit the use of different delivery systems for courses where, as here, the course content complies with all statutory and rule criteria. Finally, the Department has articulated no reason for not permitting the use of Petitioner's interactive video course on a trial basis in a single judicial circuit, authority it readily admits it has.

30. The Department's arguments that it would have to adopt additional rules or amend its existing rules and that the Supreme Court of Florida would have to amend its traffic school Rule 6.330 are not persuasive and do not control the outcome of this

proceeding. The Department does not derive its legal authority to regulate driver improvement courses from either of those sources.

31. Equally unpersuasive is the Department's argument that Petitioner's delivery method precludes students from participating freely in the course. An instructor is available at all times to discuss course content or other driving concerns with a student taking Petitioner's interactive video course, and the selection of Petitioner's course is only by the student's own choice. No competent or credible evidence was offered that students learn more or better only if other students are present. Further, the "participate freely" requirement is only found in the Department's rules and is a subjective term.

32. Lastly, the Department argues that the course should not be approved because it includes a test and a test is not required under Florida law. No one is required to take Petitioner's course. If people choose to take it, and it is harder than the other courses approved by the Department, so be it. It is strange for the Department to argue for denial of the application because it exceeds minimum requirements or because the delivery system assures that students have learned something from the course, assumedly one of the Department's goals.

33. Petitioner correctly argues that the Legislature has embraced the concept of distance learning, as evidenced by Section 364.507, Florida Statutes. Indeed, the Legislature has

established the Florida Distance Learning Network. Although there is no evidence that Petitioner's proposed course is part of that system, Petitioner's argument is more persuasive as to legislative intent than the Department's. In other words, where the Legislature has considered different methods of delivery of curriculum, it has approved distance learning.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered granting Petitioner's application for approval of its interactive video course.

DONE AND ENTERED this 28th day of October, 1999, in Tallahassee, Leon County, Florida.

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 1999.

COPIES FURNISHED:

Charles J. Brantley, Director
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B439
Tallahassee, Florida 32399-5000

Enoch Jon Whitney, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B439
Tallahassee, Florida 32399-5000

Michael J. Alderman, Esquire
Department of Highway Safety
And Motor Vehicles
Neil Kirkman Building, Room B439
Tallahassee, Florida 32399-5000

Mark K. Logan, Esquire
Smith, Ballard & Logan, P.A.
403 East Park Avenue
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.