

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PEDRO M. HERNANDEZ, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 02-3450  
 )  
 DEPARTMENT OF INSURANCE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for final hearing on November 21, 2002, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington, of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Pedro M. Hernandez, pro se  
600 Southeast 8th Street  
Hialeah, Florida 33010

For Respondent: Mechele R. McBride, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to a passing grade on the practical portion of the Florida Minimum Standards Examination for firefighters taken May 22, 2002.

PRELIMINARY STATEMENT

When Petitioner applied for re-certification as a firefighter in November 2001, his existing certification was scheduled to expire May 22, 2002. Because he had not been active as a firefighter for the past three years, Petitioner was required to sit for and pass the four-section practical portion of the Florida Minimum Standards Examination (the practical examination) to maintain his certification.

Petitioner sat for and failed all four sections of the practical examination administered December 5, 2001. Petitioner was permitted by rule to re-take the practical examination, which by happenstance was scheduled for May 22, 2002, the date his certification was to expire. Petitioner re-took the practical examination on May 22, 2002. Thereafter Respondent notified Petitioner that he had failed two sections of the examination, that his application for re-certification was denied, and that he would have to complete additional training before being permitted to re-apply for certification.

Petitioner thereafter requested a formal administrative hearing to challenge the scoring of the examination he took on May 22, 2002, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the final hearing, Respondent presented its case first to expedite the proceeding. Respondent presented the testimony

of Larry McCall and Ralph Chase, Jr., both of whom are field representatives with the State Fire Marshal's Bureau of Fire Standards and Training. Field representatives, including Mr. McCall and Mr. Chase, were responsible for administering and grading the practical examinations Petitioner took on December 5, 2001, and May 22, 2002. Respondent offered seven exhibits, each of which was accepted into evidence. Petitioner presented no testimony and no exhibits.

The transcript of the final hearing was filed on December 4, 2002. Respondent's Proposed Recommended Order, filed December 23, 2002, has been considered by the undersigned in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

#### FINDINGS OF FACT

1. At times pertinent to this proceeding, Petitioner held certification as a firefighter (Firefighter Certificate of Completion #81191) issued by the State Fire Marshal. For at least three years prior to December 5, 2001, Petitioner had not been active as a firefighter or as a volunteer firefighter with an organized fire department. Pursuant to Section 633.352, Florida Statutes, Petitioner was required to successfully complete the practical portion of the Florida Minimum Standards Examination for firefighters to retain his certification. 1/

2. The practical examinations at issue in this proceeding consisted of four sections: the Self Contained Breathing Apparatus (SCBA) section, the Hose and Nozzle Operation section, the Ladder Operation section, and the Fireground Skills section. A candidate must pass each section to pass the practical examination.

3. On November 16, 2001, Petitioner applied to sit for the practical examination scheduled for December 5, 2001. Petitioner sat for and failed all four sections of the practical examination administered December 5. Respondent's Rule 4A-37.0527(6), Florida Administrative Code, permits a candidate to retake the practical examination once without further training. Petitioner thereafter applied to retake the examination, which was scheduled for May 22, 2002.

4. Petitioner passed the Hose and Nozzle Operation and the Ladder Operation sections of the practical examination on May 22, and the scoring on those sections are not at issue in this proceeding. At issue in this proceeding is whether Petitioner failed the SCBA section and/or the Fireground Skills section of the practical examination administered May 22, 2002.

5. The SCBA section of the practical examination consisted of questions for which a candidate was awarded credit and certain items that a candidate was required to successfully complete (fatal items). If a candidate missed a fatal item, the

candidate failed the SCBA section of the examination and, consequently, the entire practical examination.

6. The Firegrounds Skills section of the examination tests a candidate on a variety of skills a firefighter is expected to demonstrate while fighting a fire, and the candidate is awarded a score for his or her performance.

7. To pass each part of the practical examination, including the SCBA and the Fireground Skills sections, a candidate must achieve a score of 70 points and must not miss a fatal item.

8. The SCBA section of the practical examination requires the candidate to properly don certain protective gear in 1 minute and 45 seconds. The failure to complete the exercise in the allotted time is a fatal item. In addition, the candidate must activate and check a personal alarm system as part of the exercise. The failure of the candidate to properly wear and activate the alarm system is also a fatal item.

9. The greater weight of the credible evidence established that Petitioner's performance on the SCBA section of the practical examination was appropriately and fairly graded. Petitioner failed to timely complete the exercise, which is a fatal item. Petitioner failed to properly activate the personal alarm system, which is also a fatal item. Petitioner was awarded no points for 5 of 10 items for which points could be

awarded (each item was worth 10 points). Even if he had passed the fatal items noted above, Petitioner would have failed the SCBA section because he failed to achieve a passing score of 70 on that section of the examination. Petitioner failed to establish that he was entitled to additional credit for the SCBA section of the practical examination.

10. Petitioner received a failing score on the Firegrounds Skills section of the practical examination administered May 22, 2002. The greater weight of the credible evidence established that Petitioner's performance on the Firegrounds Skills section of the practical examination administered May 22, 2002, was appropriately and fairly graded. Of the 100 points available for this section of the examination, Respondent established that Petitioner deserved no credit for the following: 20 points on the forcible entry part of the section; 12 points on the ladders and fire service tools part of the section; and 4 points on the hazardous materials part of the section. Consequently, Respondent established that Petitioner was entitled to a total of 64 points on the Firegrounds Skills section of the practical examination administered May 22 2002, which is a failing grade. Petitioner failed to establish that he was entitled to additional credit for the Firegrounds Skills section of the practical examination administered May 22, 2002.

11. Respondent established that the administration and grading of the subject exams were consistent with the provisions of Chapter 4A-37, Florida Administrative Code, which set forth by rule applicable guidelines for the practical examination.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof pursuant to Chapter 120, Florida Statutes.

13. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to passing grades on all sections of the practical examination. See Harac v. Department of Professional Regulation, 484 So. 2d 1333 (Fla. 3d DCA 1986); State ex rel. I. H. Topp v. Board of Electrical Contractors for Jacksonville Beach, Florida, 101 So. 2d 583 (Fla. 1st DCA 1958); and State ex rel. Glaser v. J. M. Pepper, 155 So. 2d 383 (Fla. 1st DCA 1963). Petitioner did not meet that burden in this proceeding.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order adopting the Findings of Facts and Conclusions of Law set forth herein. It is further RECOMMENDED that the final order deny Petitioner's application for re-certification as a firefighter.

DONE AND ENTERED this 14th day of January, 2003, in  
Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of January, 2003.

ENDNOTE

1/ Section 633.352, Florida Statutes, provides, in pertinent part, as follows:

Any certified firefighter who has not been active as a firefighter, or as a volunteer firefighter with an organized fire department, for a period of 3 years shall be required to retake the practical portion of the minimum standards state examination specified in rule 4A-37.056(6)(b), Florida Administrative Code, in order to maintain her or his certification as a firefighter. . . .

COPIES FURNISHED:

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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.