

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD JOHN OLLO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4445
	)	
DEPARTMENT OF INSURANCE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on February 28, 2003, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Mark D. Dreyer, Esquire 747 Jenks Avenue, Suite G Panama City, Florida 32401
For Respondent:	Elenita Gomez, Esquire Department of Financial Services Division of Legal Services 200 East Gaines Street 612 Larson Building Tallahassee, Florida 32399-0330

STATEMENT OF THE ISSUE

The issue is whether Respondent properly denied Petitioner's application for certification as a firefighter after Petitioner failed to successfully pass the practical

portion of the Minimum Standards Examination pursuant to Sections 633.34 and 633.35, Florida Statutes, and Rules 4A-37.056 and 4A-37.062, Florida Administrative Code.

PRELIMINARY STATEMENT

In a letter dated June 4, 2002, Respondent Department of Insurance (Respondent) denied Petitioner Richard John Ollo's (Petitioner) application for certification as a firefighter because he had failed the practical portion of the initial examination and the retest examination. On or about June 18, 2002, Petitioner filed a timely request for an informal administrative proceeding.

On July 19, 2002, Respondent filed a Motion to Amend Denial Letter, together with a First Amended Denial Letter. Respondent's Hearing Officer granted the motion by Order dated July 23, 2002.

On September 23, 2002, Respondent's Hearing Officer issued a Written Report and Recommended Order denying Petitioner's application for certification as a firefighter. The Written Report and Recommended Order also provided that Petitioner must meet the requirements of Rule 4A-37.056, Florida Administrative Code, before taking additional examinations.

On October 29, 2002, Respondent issued an Order finding that the Written Report and Recommended Order and the record of the informal proceeding presented disputed issues of material

fact. Accordingly, Respondent referred this case to the Division of Administrative Hearings on November 1, 2002.

The parties filed a Joint Response to Initial Order on November 26, 2002. On December 4, 2002, the parties filed a Joint Response to Request for Additional Dates. A Notice of Hearing dated December 4, 2002, scheduled the hearing for February 28, 2003.

During the hearing, Petitioner testified on his own behalf and presented the testimony of one additional witness. Respondent presented the testimony of one witness. The parties presented 10 joint exhibits, which were admitted into evidence.

A Transcript of the proceeding was filed on March 14, 2003.

Respondent filed its Proposed Recommended Order on March 24, 2003. Petitioner filed his Proposed Recommended Order on March 27, 2003.

#### FINDINGS OF FACT

1. Petitioner has served as a voluntary firefighter in Bay County, Florida, for approximately nine years. He first applied for certification as a firefighter in October 2001.

2. In order to be certified, Petitioner was required to successfully complete the Minimum Standards Course. The course consists of taking a minimum of 360 hours of training at an approved school or training facility.

3. After completing the training course, Petitioner was required to take the Minimum Standards Examination, which is structured in two parts: a written portion and a practical portion. The practical portion consists of four sections including the Self-Contained Breathing Apparatus (SCBA), the hose pull, the ladder operation, and the fire ground skills.

4. The purpose of the practical portion of the exam is to simulate real fire ground scenarios. To pass the four practical evolutions, an applicant must achieve a score of at least 70 percent on each one.

5. Each evolution of the practical exam has certain steps that are mandatory. Failure to complete a mandatory step results in automatic failure of that portion of the exam.

6. The mandatory steps for the SCBA evolution include the following: (a) complete the procedure in not more than one minute and forty-five seconds; and (b) activate the PASS device in the automatic position.

7. After completing the Minimum Standards Course, Petitioner took the Initial Minimum Standards Examination on May 1, 2002. He was well rested on the day of the test, having slept approximately eight hours the night before. Petitioner passed the written portion of the exam but failed the practical portion of the initial exam because it took him one minute and fifty-nine seconds to complete the SCBA evolution.

8. In a memorandum dated May 7, 2002, Respondent formally advised Petitioner that he had failed the SCBA portion of the practical exam because he exceeded the maximum time for the procedure. The memorandum also stated as follows in pertinent part:

Important information about retesting and certification renewal is enclosed. Please read it carefully.

You have automatically been scheduled for the next available examination, and written notification indicating your test date and location is enclosed. You are not required to call the Bureau for scheduling. Thank you. (Emphasis provided)

9. In another memorandum dated May 7, 2002, Respondent advised Petitioner that he was scheduled to re-take the SCBA portion of the practical examination at the Florida State Fire College in Ocala, Florida, on May 24, 2002, at 8:00 a.m. The memorandum included the following relevant information:

If you are unable to take the examination on the assigned date, please advise the Bureau and we will reschedule you for the next examination.

Note: You must retest within six (6) months of the original test date.

10. All an applicant has to do to reschedule a retest exam is to call Respondent's Bureau of Fire Standards and Training and request to be rescheduled. Respondent does not require applicants to provide a justifiable reason in order to be

rescheduled. It is a routine and standard practice for Respondent to reschedule exams.

11. Some applicants fail to show up for their retest exam without calling Respondent. In that case, Respondent automatically reschedules the retest.

12. Applicants must take their retest exams within six months of their initial exam dates. Applicants that fail to meet this requirement must repeat the training course. Respondent reminds applicants of these requirements when they call to reschedule retests or fail to show up for retest, and the next retest exam date falls outside of the six-month window. If applicants still wish to reschedule retests outside the six-month window, Respondent will accommodate the requests.

13. The next exam date that Petitioner could have taken his retest was in September 2002, which would have been within the six-month window.

14. Petitioner testified that he called Respondent on May 16, 2002, to reschedule his retest because May 24, 2002, was not convenient with his work schedule. Petitioner also testified that an unidentified female in Respondent's office told him that he could not change the date of his retest. Petitioner's testimony in this regard is not persuasive.

15. Petitioner's job involved working the "graveyard shift" at the Panama City Airport, loading and unloading planes.

On May 23, 2002, Petitioner began working at 2:00 a.m. He finished his shift at approximately 1:00 p.m. Petitioner then immediately loaded his gear and began the trip to Ocala, Florida.

16. The trip took about six hours, due to a traffic jam in Tallahassee, Florida. He arrived in Ocala at approximately 8:00 p.m. EST, located the testing site, and checked into a motel.

17. Petitioner reported to the testing site the next morning. He did not tell any officials at the testing site that he was too tired to take the test.

18. Petitioner failed the retest of the SCBA portion of the exam. Petitioner's time for the retest of the SCBA evolution was two minutes and twelve seconds. Additionally, Petitioner had point deductions for failing to complete the "seal check" and failing to properly don and secure all personal protective equipment correctly.

19. In a letter dated May 26, 2002, Petitioner alleged that Respondent had denied his request for a different test date. Petitioner claimed that fatigue had prevented him from succeeding at the test. He requested another opportunity to retest the SCBA evolution within the required six-month period.

20. Shortly thereafter, Fire Chief Tim McGarry from the Thomas Drive Fire Department on Panama City Beach, Florida,

called Respondent's Field Representative Supervisor, Larry McCall. During that conversation, Mr. McCall told Chief McGarry that Petitioner could have decided not to show up for the retest.

21. In a letter dated June 3, 2002, Mr. McCall responded to Petitioner's letter. In the letter, Mr. McCall stated that the question of whether Respondent erroneously denied Petitioner's request to reschedule the retest would be closed unless Petitioner could provide more specific details.

22. In a memorandum dated June 6, 2002, Respondent formally advised Petitioner that he had failed the retest.

23. In a letter dated June 6, 2002, Petitioner stated that he could not remember the name of the person he spoke to when he requested a change in his retest date. Once again, Petitioner requested an opportunity to take the retest.

24. Mr. McCall spoke to Petitioner in a telephone call on June 18, 2002. During that conversation, Petitioner indicated that he would file his Election of Rights form, requesting an administrative proceeding.

#### CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.



26. Petitioner has the burden of proving by the preponderance of the evidence that Respondent improperly denied his application for certification as a firefighter. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977)(Burden of proof, apart from statute, is on party asserting affirmative of issue before administrative tribunal).

27. Section 633.35, Florida Statutes, states as follows in relevant part:

633.35 Firefighter training and certification.--

(1) The division shall establish a firefighter training program of not less than 360 hours, administered by such agencies and institutions as it approves for the purpose of providing basic employment training for firefighters. . . .

(2) The division shall issue a certificate of compliance to any person satisfactorily complying with the training program established in subsection (1), who has successfully passed an examination as prescribed by the division, and who possesses the qualifications for employment in s. 633.34. . . .

\* \* \*

(4) A person who fails an examination given under this section may retake the examination once within 6 months after the original examination date. . . .

28. Rule 4A-37.056, Florida Administrative Code, states as follows in pertinent part:

4A-37.056 Specifications for Certifiable Training.

To be recognized for certification as a firefighter by the Division, training shall be obtained under the conditions as specified herein. . . .

(1) The training shall take place in a training center or facility approved for such training by the Bureau of Fire Standards and Training.

\* \* \*

(6) All tests, both written and practical, given during training shall require maintenance of a percentage score of not less than 70% on each subject listed in the prescribed Firefighter I and Firefighter II courses. If a minimum score of 70% is not achieved on any test, the student shall be afforded a one-time make up examination to achieve the required 70%. Tests used shall be designed to encompass all the significant contents of the subjects being taught.

(a) In order to sit for the state examination, the information required by Sections 633.34 and 633.35, Florida Statutes, must be furnished to the Bureau of Fire Standards and Training.

(b) State examinations, consisting of a written and a practical part, shall be administered by a Field Representative of the Bureau of Fire Standards and Training and shall encompass all components of the Firefighter I course for Firefighter I testing and all components of both Firefighter I and Firefighter II courses for State Certification as a Firefighter. The 70% score requirements for both written and practical examinations shall prevail in this testing environment as well.

(c) The state examination will be administered at the local training facility. Whenever possible, the Bureau of Fire Standards and Training will schedule the state examination date at the convenience of the training facility.

(d) Only one retake of the state examination is permitted. Retakes of the practical portion of the examination will be offered only at the Florida State Fire College during the months of February, May, September, and November. Retakes of the written portion of the examination will be offered at the Regional Testing Sites in February, May, September, November and monthly at the Florida State Fire College. Students must be pre-registered at least 10 business days prior to the date of the examination.

(e) The retake of the Firefighter II Certification Examination must be taken within 6 months of the initial examination date.

29. In this case, Petitioner does not deny that he failed the retest of the SCBA evolution. Instead, he argues that Respondent refused to change the date of his retest and, therefore, should be estopped from denying his application. Petitioner seeks a third opportunity to pass the SCBA evolution without having to repeat the training course.

30. During the hearing, Petitioner was unable to identify the name of the person he allegedly spoke to on May 16, 2002. There is no evidence that the person he allegedly spoke to had authority to speak on Respondent's behalf.

31. Petitioner chose to take his retest as scheduled. He did not attempt to contact someone in authority to discuss the obvious contradiction between the statement in the May 7, 2002, memorandum and the alleged statement by the unidentified person regarding rescheduling examinations. He did not inform anyone

in authority on the day of his exam that he was fatigued and needed to reschedule the test.

32. There is insufficient evidence to prove that Respondent improperly denied Petitioner's application. The facts of this case do not support the application of estoppel against Respondent.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Respondent enter a final order denying Petitioner's application.

DONE AND ENTERED this 10th day of April, 2003, in Tallahassee, Leon County, Florida.

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SUZANNE F. HOOD  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of April, 2003.

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.