

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES H. BUSCH,)
)
 Petitioner,)
)
 vs.) Case No. 04-3045RX
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, BUREAU OF FIRE)
 STANDARDS AND TRAINING,)
)
 Respondent,)
)
 and)
)
 FLORIDA PROFESSIONAL)
 FIREFIGHTERS, INC.,)
)
 Intervenor.)
 _____)

FINAL ORDER

A formal hearing was conducted in this case on November 8, 2004, in Palatka, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James H. Busch, pro se
Post Office Box 1925
Hawthorne, Florida 32640

For Respondent: Gabriel Mazzeo, Esquire
Department of Financial Services,
Division of State Fire Marshal
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For Intervenor: Richard A. Sicking, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Florida Administrative Code Rules 69A-62.001, 69A-62.003, 69A-62.006, and 69A-62.007, constitute an invalid exercise of delegated legislative authority as defined in Sections 120.52(8)(d), 120.52(8)(e), and 120.52(8)(f), Florida Statutes (2004).

PRELIMINARY STATEMENT

On August 30, 2004, Petitioner James H. Busch (Petitioner) filed a Petition to Determine the Invalidity of a Rule with the Division of Administrative Hearings (DOAH). The petition alleged that proposed Florida Administrative Code Rule 69A-62 was an invalid exercise of delegated legislative authority.

On September 1, 2004, the undersigned issued a Notice of Hearing, scheduling the hearing for October 22, 2004.

In a letter dated September 13, 2004, Petitioner requested that the hearing take place in Palatka, Florida. According to the letter, Respondent did not object to the request. In an Amended Notice of Hearing dated September 24, 2004, the location of the hearing was changed from Tallahassee, Florida, to Palatka, Florida.

On September 14, 2004, Respondent Department of Financial Services, Bureau of Fire Standards and Training (Respondent), filed a Motion for Clarification of Order of Assignment. The motion asserted that the instant case involved a challenge to an existing rule under Section 120.56(3), Florida Statutes, as opposed to a proposed rule under Section 120.56(2), Florida Statutes. In an Order dated September 22, 2004, the undersigned ruled that the instant case would proceed as a challenge to an existing rule.

On September 14, 2004, Florida Professional Firefighters' Inc. filed a Petition for Leave to Intervene. On September 22, 2004, the undersigned issued an Order Granting Intervention to Florida Professional Firefighters' Inc. (Intervenor).

On October 11, 2004, Respondent filed an unopposed Motion for Continuance of Final Hearing. On October 12, 2004, the undersigned issued an Order Granting Continuance and Re-Scheduling Hearing for November 8, 2004.

On November 4, 2004, the parties filed a joint Pre-hearing Stipulation. According to the stipulation, Petitioner asserts that the rules at issue here are invalid exercises of delegated legislative authority as defined in Sections 120.52(8)(d), 120.52(8)(e), and 120.52(8)(f), Florida Statutes (2004).

During the hearing, Petitioner testified on his own behalf and presented the testimony of two additional witnesses.

Petitioner offered twenty exhibits that were accepted into evidence.

Respondent presented the testimony of two witnesses. Respondent offered three exhibits that were accepted into evidence.

Intervenor presented the testimony of two witnesses. Intervenor did not offer any exhibits for admission into the record as evidence.

The Transcript of the proceeding was filed on November 16, 2004. Petitioner and Respondent filed Proposed Final Orders on November 29, 2004.

FINDINGS OF FACT

1. Petitioner is and, at all times material to this case, was a volunteer firefighter.

2. The size of the volunteer firefighter population is dependent on the ability of volunteer fire departments to attract and keep volunteers. People are willing to volunteer as firefighters if the experience is rewarding, training is not excessive, and conflict is minimized. However, the greater weight of the evidence indicates that the subject rules do not detract from the volunteer experience, impose excessive training, or create between conflict between professional and volunteer firefighters.

3. Petitioner testified that a reduction in volunteer population will result in increased hazards to volunteers and a reduction in the delivery of services to citizens. This testimony is not persuasive for two reasons. First, there is no persuasive testimony that the subject rules will result in a reduction of the number of volunteer firefighters. Second, the most persuasive evidence indicates that the subject rules will reduce hazards to volunteers without impairing the delivery of services to Floridians.

4. Some labor unions that represent career firefighters discourage their members from volunteering their services with volunteer fire departments. The competition between the unions and the volunteer fire departments is commonly referred to as the "turf-war." There is no persuasive evidence that the subject rules contribute to the tension between the two groups of firefighters.

5. The firefighter labor unions are usually very active in the political arena. It is undisputed that the unions support legislation that benefits their members. However, the subject rules were not promulgated to eliminate or place hardships on volunteer fire departments and volunteer firefighters.

6. The safety needs and concerns of firefighters have evolved over time. Technology has improved firefighting equipment to such an extent that the greatest threat to

firefighters is from heart attacks and transportation accidents. Nevertheless, the fact that the subject rules focus on safety enhancement at the scene of a fire instead of firefighter health and transportation safety does not render them invalid.

7. Florida Administrative Code Rule 69A-62.003 provides as follows in pertinent part:

(3) With respect to 29 C.F.R. Section 1910.134(g)(4), the two individuals located outside the immediately dangerous to life and health atmosphere may be assigned to an additional role, such as incident commander, pumper operator, engineer, or driver, so long as such individual is able to immediately perform assistance or rescue activities without jeopardizing the safety or health of any firefighter working at an incident.

(a)1. Except as provided in subparagraphs 2., 3., and 4., no firefighter or any other person under the authority of the firefighter employer at the scene of a fire is permitted to participate in any operation involving two-in, two-out as one of the two or more persons inside the IDLH atmosphere or as one of the two or more persons outside of the IDLH atmosphere unless such firefighter or other person at the scene of a fire is certified in this state by the division as a Firefighter I or a Firefighter II, as established in subsections (1) and (2) of Rule 69A-37.055, F.A.C. Such training shall consist of the training described in subsection (6) of Rule 69A-37.055, F.A.C. This requirement specifically applies to volunteer fire departments and volunteer firefighters but is also applicable to any other person working under the authority of the Firefighter Employer at the scene of a fire.

2.a. A volunteer firefighter who possesses the State Basic Volunteer certificate previously issued by the division is exempt from the Firefighter I and Firefighter II requirement in subparagraph 1. The training encompassed in the basic volunteer certificate in itself may not meet "trained commensurate to duty" as defined depending upon duties or tasks assigned or undertaken in the exclusionary zone.

b. A volunteer firefighter who provides evidence of having completed curriculum equivalent to the Florida Firefighter I course of study as provided in subsection 69A-37.055(6), F.A.C., prior to January 1, 2004, is exempt from the Firefighter I and Firefighter II requirement in subparagraph 1., if

(I) The fire chief or other chief administrative officer of the fire department of which the firefighter is a member files with the State Fire Marshal form DFS-K4-1594, "Firefighter I Training Exemption Application," which is hereby adopted and incorporated by reference, and

(II) The said form is accepted by the State Fire Marshal after confirmation of the evidence provided. Form DFS-K4-1594 may be obtained by writing the Bureau of Fire Standards and Training, 11655 Northwest Gainesville Road, Ocala, Florida 34482-1486.

c. Any volunteer exempted by subparagraph a. or b. is permitted to take the Florida Firefighter I examination until December 31, 2005, upon the completion and filing with the division of form DFS-K4-1380, "Firefighter I Training Record," Rev. 03/00, adopted in Rule 69A-37.039, F.A.C., by a Florida certified instructor that verifies equivalent training and demonstration of competency.

8. The above-referenced rule sets forth ways that a firefighter, trained prior to the current regulations, may keep his or her interior-firefighter status without becoming certified as a Firefighter I or Firefighter II. The rule will not disqualify all previously qualified firefighters as long as they are "trained commensurate to duty" for any type of work they are requested to perform.

9. There is no persuasive evidence that Florida Administrative Code Rule 69A-62.003(3)(a) will cause a reduction in the number of volunteer firefighters due to newly created administrative hurdles. The rule, which has its basis in safety enhancement, clearly is not arbitrary or damaging to the safety of volunteers.

10. Florida Administrative Code Rule 69A-62.003(3)(a)4. states as follows:

4. Volunteer firefighters having NWCG S-130, S-190, and Standards for Survival certification by the Florida Division of Forestry are permitted to participate in wild land fire suppression without the Firefighter I certification.

11. The above-referenced rule allows a volunteer to fight wild-land fires without earning Firefighter I certification. The rule sets forth an exception to the Firefighter I certification requirement; it does not mandate that the NWCG

courses are the exclusive means to qualify as a wild-land firefighter.

12. Florida Administrative Code Rule 69A-62.003(3)4. is not invalid or arbitrary because it requires volunteers to pass training courses that are accepted as setting national standards or because the training courses teach firefighting techniques that are applicable across the nation as well as Florida. Petitioner presented no persuasive evidence to the contrary.

13. Florida Administrative Code Rule 69A-62.006 states as follows:

69A-62.006 Requirements for Recognition as a Fire Department.

(1) To be recognized as an organized fire department by the division, compliance with the following must be documented:

(a) Capability of providing fire protection 24 hours a day, seven days a week;

(b) Responsibility for response in an area capable of being depicted on a map; and

(c) Staffing with a sufficient number of qualified firefighters who are employed full-time or part-time or serve as volunteers and who shall have successfully completed an approved basic firefighting course recognized by the Bureau of Fire Standards and Training.

(2)(a) A fire department shall meet the requirements of the Insurance Services Office (ISO) for Class 9 Protection, the 2003 edition, the Fire Suppression Rating Schedule, effective February, 2003, which is hereby adopted and incorporated by reference

and which may be obtained from Insurance Services Office (ISO), 545 Washington Blvd., Jersey City, NJ 07310-1686 or at www.iso.com. If the fire department does not meet the requirements of this section, the fire department shall submit a plan of compliance which provides for meeting these requirements within 90 days of the date of submission of the plan.

(b) ISO measures the major elements of a community's fire-suppression system and develops a numerical grade ranging from 1 to 10. Class 1 represents the best public protection rating and Class 10 indicates no recognized protection.

(c) The requirements for ISO 9 may be obtained at the ISO website located at www.iso.com, or it may be obtained by writing to the Division of State Fire Marshal, Bureau of Fire Standards and Training, 11655 Northwest Gainesville Road, Ocala, Florida 34482-1486.

14. Florida Administrative Code Rule 69A-62.006(1)(a) is not invalid because it requires fire departments to document their capability of providing fire protection 24 hours a day/seven days a week. The requirement for full-time availability will provide significant safety enhancement for the communities being served. This is true because some voluntary fire departments in rural communities historically have provided only part-time service.

15. There is no persuasive evidence that requiring full-time fire protection will result in the following: (a) the creation of a fire-suppression performance standard that is

unauthorized by law; (b) the closing of some volunteer fire departments; (c) a reduction in services to the public; and (d) uncorrectable rule-violations; an increase in conflict between professional and volunteer firefighters.

16. Florida Administrative Code Rule 69A-62.006(1)(c) requires that each fire department be staffed with a sufficient number of qualified firefighters. The rule is not vague because it uses the word "sufficient" to determine the number of firefighters that are required. One must read the applicable rules in their entirety and consider the needs of each community to determine adequate staffing. There is no persuasive evidence that the staffing requirement fails to establish adequate standards for determining compliance.

17. Florida Administrative Code Rule 69A-62.006(2) requires fire departments to meet certain requirements of the Insurance Services Office (ISO) for Class 9 protection. This requirement determines the minimum equipment that is necessary to safely fight a structure fire.

18. There is no persuasive evidence that requiring a fire department to provide Class 9 protection will make it impossible to start a new voluntary fire department. The rule clearly is not arbitrary in setting this minimum standard.

19. Florida Administrative Code Rule 69A-62.007(1) states as follows in pertinent part:

69A-62.007 Minimum Requirements for Class 9 Protection.

(1) To be considered for Class 9 protection, the following minimum facilities must be available:

(a) Organization:

1. The fire department shall be organized on a permanent basis under applicable state or local laws. The organization shall include one person responsible for operation of the department, usually with the title of chief.

2. The fire department must serve an area with definite boundaries. If a municipality is not served by a fire department solely operated by or for the governing body of that city, the fire department providing such service shall do so under a contract or resolution. When a fire department's service area involves one or more jurisdictions, a contract shall be executed with each jurisdiction served.

(b) Membership: The department shall have a sufficient number of firefighters/members to assure the response of at least 4 firefighters/members that can assemble at the scene of a fire as contemplated by subsection (1) of Rule 69A-62.003, F.A.C., to be compliant with Rule 69A-62.003, F.A.C., the two-in, two-out rule. The fire chief may be one of the 4 responding firefighters/members.

20. The above-referenced rule does require fire departments to have four "interior-qualified" firefighters at the scene of a structure fire. The requirement is necessary to comply with the longstanding "two-in, two-out" rule. However, the rule does not preclude a fire department from relying on

mutual-aid from other fire departments in order to comply with the rule. The rule clearly is not vague.

21. Florida Administrative Code Rule 69A-62.007(4)(a) states as follows in relevant part:

(4)(a) The chief of any fire department that includes volunteer firefighters shall annually submit a Roster of Volunteer Firefighters to the State Fire Marshal utilizing form DFS-K4-1581, effective 05/04, which is hereby adopted and incorporated by reference, no later than June 30 of each year. Form DFS-K4-1581 may be obtained by contacting the Division of State Fire Marshal, Bureau of Fire Standards and Training, 11655 Northwest Gainesville Road, Ocala, Florida 34482-1486 or at the division's website located at <http://www.fldfs.com/SFM/>. The roster shall include:

1. The fire department name,
2. The fire department identification number (FDID),
3. The complete fire department address,
4. The fire department contact person, telephone number and the fire department fax number, if any,
5. The certification level for each firefighter reported and, if any equivalency exemption has been issued, the number of persons for whom such exemption has been issued, and
6. The firefighter certification number, the issue date of the certification, the status of the certification, i.e., volunteer or career, and the status of each firefighter who has been issued an equivalency exemption, i.e., volunteer or career, if any.

22. The above-referenced rule requires the chief of a fire department to submit an annual roster of volunteer firefighters.

Petitioner objects to the rule because some career firefighters volunteer their off-duty hours with the local volunteer fire department. Career firefighters who also perform volunteer work may do so contrary to their union rules. Publication of the roster might keep some professional firefighters from volunteering their services. Nevertheless, there is no persuasive evidence that losing some speculative number of career/volunteer firefighters will undermine the safety of firefighters or the public.

23. The information that the roster contains is a public record. The information is necessary so that Respondent can perform statutorily-mandated studies involving injuries to firefighters. The rule clearly is not arbitrary.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.56(3), Florida Statutes (2004).

25. Petitioner has standing pursuant to Sections 120.56(1)(a) and 120.56(3)(a), Florida Statutes (2004).

26. Petitioner has the burden to prove, by a preponderance of the evidence, that the subject rules are an invalid exercise of delegated legislative authority. See § 120.56(3)(a), Fla. Stat. (2004).

27. Section 120.52(8), Florida Statutes (2004), states as follows in pertinent part:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if an one of the following applies:

* * *

(d) The rule is vague, fails to establish adequate standards for agency decision, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person county or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

28. Section 633.01(1), Florida Statutes (2004), provides the State Fire Marshal with authority to adopt rules that adhere to "generally accepted standards of fire safety" and that "balance and temper the need of the State Fire Marshall to protect all Floridians from fire hazards with the social and economic inconveniences that may be caused or created by the rules." Additionally, Section 633.01(2), Florida Statutes (2004), provides that the State Fire Marshall has the duty to "minimize the loss of life and property in this state due to

fire." The subject rules are within the powers, functions, and duties delegated by the Legislature.

29. Petitioner has not met his burden of proving that the subject rules are invalid. To the contrary, the greater weight of the evidence indicates that the challenged rules do not meet the definition of an invalid rule as defined in Sections 120.52(8)(d), 120.52(8)(e), and 120.52(8)(f), Florida Statutes (2004).

ORDER

Based on the foregoing Findings of Facts and Conclusions of Law, it is

ORDERED:

That the Petition to Determine the Invalidity of a Rule is dismissed.

DONE AND ORDERED this 9th day of December, 2004, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.