

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIMOTHY E. GARNER,)
)
 Petitioner,)
)
 vs.) Case No. 05-1353
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on June 16, 2005, in Naples, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Adam J. Oosterbaan, Esquire
Adam J. Oosterbaan, P.A.
2500 Airport Road South, Suite 306
Naples, Florida 34112

For Respondent: Casia R. Sinco, Esquire
Department of Financial Services
200 East Gaines Street, Room 612
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to a passing grade on the Self-Contained Breathing Apparatus ("SCBA") part of

the Firefighter Minimum Standards Examination for firefighter certification.

PRELIMINARY STATEMENT

On December 8, 2004, Petitioner took both the written and practical portions of the Minimum Standards Examination.

Petitioner passed the written portion, but did not achieve a passing score on the practical portion, because he failed the SCBA section of that examination.

Petitioner took the Minimum Standards practical examination retest on February 24, 2005. Petitioner also failed this retest, which covered only the SCBA portion of the examination. Petitioner was eligible for only one retest. On February 25, 2005, the Department of Financial Services, Division of State Fire Marshall, Bureau of Fire Standards and Training (the "Department"), sent Petitioner a letter stating that he had failed both the Minimum Standards practical examination and the retest and was, therefore, denied certification as a Florida firefighter. Petitioner disputed the Department's determination and filed a timely Election of Rights form requesting a formal administrative proceeding.

On April 15, 2005, the Department forwarded this case to the Division of Administrative Hearings. On May 6, 2005, a Notice of Hearing was issued scheduling the hearing for June 16, 2005. On May 25, 2005, the Department filed a motion to amend

the denial letter in order to set forth more specific factual and legal grounds for the denial of Petitioner's application for certification as a firefighter. Without objection, the motion was granted by Order dated June 7, 2005, and the case proceeded based upon the First Amended Denial Letter.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Keith Perry, firefighter for the Isles of Capri Fire and Rescue Department, and Emilio Rodriguez, chief of the Isles of Capri Fire and Rescue Department. Chief Rodriguez also testified in rebuttal. Petitioner's Exhibits 1 through 3 were admitted into evidence. The Department presented the testimony of Larry McCall, an examiner for the Department. The Department's Exhibits 1 through 8 were admitted into evidence. Official recognition was taken of Section 633.35, Florida Statutes (2004), and of Florida Administrative Code Rules 69A-37.055 and 69A-37.056.

A one-volume Transcript of the proceeding was filed on July 5, 2005. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

All citations are to Florida Statutes (2004) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner applied for certification as a firefighter in August 2004.

2. In order to be certified, Petitioner was first required to successfully complete the Minimum Standards Course, which consists of 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 or "evolutions," including the SCBA, the hose pull, the ladder operation, and the fireground skills section.

4. 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 elements or skills that are graded. The SCBA test contains 11 skills related to checking, donning, and properly activating the SCBA that enables a firefighter to breathe in a hostile environment, such as a burning building. The SCBA test must be completed in not more than one minute and 45 seconds.

6. After completing the Minimum Standards Course, Petitioner took the initial Minimum Standards Examination on December 8, 2004. Petitioner passed the written portion of the

exam, but did not pass the practical portion of the initial exam because he exceeded the maximum time for the SCBA test.

7. In a memorandum dated December 21, 2004, the Department formally advised Petitioner that he had failed the SCBA portion of the practical exam. The memorandum also informed Petitioner that he had been automatically scheduled to retake the SCBA test.

8. In another memorandum dated December 21, 2004, the Department advised Petitioner that he was scheduled to retake the SCBA portion of the practical examination at the Florida State Fire College in Ocala, Florida, on February 24, 2005.

9. Petitioner took the retest of the SCBA portion of the practical examination as scheduled. Petitioner again failed the SCBA test. Though he completed each of the 11 skills with no deduction of points, he again exceeded the maximum time of one minute and 45 seconds. Petitioner's time was one minute and 50 seconds.

10. Larry McCall is a field representative with the Department. Mr. McCall described "field representative" as a "glorified name for an examiner." Mr. McCall was the examiner who tested Petitioner on the retake of the SCBA portion of the practical exam on February 24, 2005. He observed Petitioner perform the 11 skills, and he timed Petitioner with a stopwatch.

11. Mr. McCall has been an examiner for 15 years. He is a certified firefighter and a certified fire service instructor. He retired from the City of Jacksonville Fire Department after 30 years. Mr. McCall estimated that he has administered 10,000 SCBA tests.

12. Petitioner testified that before taking the retest, he practiced the SCBA test upwards of 50 times and never exceeded the time limit. Petitioner testified that he was certain that he completed the test within the time limit on February 24, 2005.

13. Petitioner is currently a volunteer at the Isle of Capri Fire and Rescue Department. The chief of that department, Emilio Rodriguez, testified that he administered the SCBA test to Petitioner in practice situations over a dozen times, and Petitioner never went over one minute and ten seconds. Keith Perry, a veteran firefighter working for the Isle of Capri Fire and Rescue Department, testified that he has timed Petitioner many times and that Petitioner has never exceeded the time limit, averaging between one minute and five seconds and one minute and ten seconds.

14. Neither of Petitioner's witnesses was present when he took the SCBA retest on February 24, 2005, and, thus, could not testify as to whether he passed the test on that day. Petitioner's subjective feeling that he passed the test based on

the many times he practiced, is necessarily less persuasive than the time actually recorded by Mr. McCall.

15. The students are assigned an applicant number on the day of the test. The examiners refer to the students by this number, rather than their names, during the testing process. After the test has been administered, the examiners coordinate the names with the numbers and assign final scores.

16. At the hearing, Petitioner suggested that a mistake had been made in coordinating the names and numbers and that he had mistakenly been assigned the failing score of another candidate. Petitioner offered no evidence for this speculative suggestion, which, therefore, cannot be credited.

17. Petitioner also noted that Mr. McCall had recorded a time of 20 seconds for Petitioner's performance on the "seal check," an exercise to ensure that the face piece of the SCBA equipment is securely sealed such that the firefighter is breathing only from his air tank. The candidate must perform the seal check for at least ten seconds. Petitioner persuasively contended that 20 seconds is an extraordinarily long time for the seal check, because the candidate must hold his breath for the duration of the check. Further, Petitioner noted that candidates are trained to count off the required ten seconds, making it unlikely that he would inadvertently take twice the required time to complete the check. Petitioner's

theory was that Mr. McCall's mistaken recording of 20 seconds was enough to account for the five seconds by which Petitioner failed the overall SCBA test.

18. However, Mr. McCall testified that he used a stopwatch with a split timer to record Petitioner's time for the SCBA test. A split timer independently records a span of time within the overall time being measured. When Petitioner commenced the seal check portion, Mr. McCall triggered the split timer, and he stopped the split timer when Petitioner completed the seal check. The split timer has no effect on the total time. Whether the split for the seal check had been ten seconds, 20 seconds, or more, Petitioner's overall time would have been one minute and 50 seconds.

19. 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 establish that he was entitled to a passing grade for his performance on the SCBA section.

20. Respondent established that Mr. McCall appropriately administered the subject SCBA section pursuant to the applicable provisions of Florida Administrative Code Chapter 69A-37, which set forth guidelines for the practical examination.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

22. Section 633.35, Florida Statutes, provides, in relevant part, as follows:

(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. . . .

* * *

(4) A person who fails an examination given under this section may retake the examination once within 6 months after the original examination date. An applicant who does not retake the examination within such time must take the Minimum Standards Course, pursuant to subsection (1), before being reexamined. . . .

23. Florida Administrative Code Rule 69A-37.056 pertains to the Firefighter Minimum Standards Test and provides, in relevant part, as follows:

(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%.

* * *

(d) Only one retake of the state examination is permitted

24. Petitioner is an applicant for certification as a firefighter in the State of Florida. Accordingly, as the party asserting the affirmative of an issue before this administrative tribunal, Petitioner has the burden of proof. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner must establish facts by a preponderance of the evidence that the Department improperly denied his application for certification as a firefighter. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

25. Petitioner argues that he should be permitted an additional retake of the SCBA section, given the questions he raised concerning the test's administration and the fact that he missed a passing grade by a mere five seconds. The rationale underpinning his argument is rejected as being contrary to the factual findings that the examination was properly administered and graded. Moreover, his requested relief is inconsistent with

the provisions of Subsection 633.35(4), Florida Statutes, and Florida Administrative Code Rule 69-37.056(6).

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order finding that Petitioner failed the SCBA section of the practical portion of the Firefighter Minimum Standard Examination administered February 24, 2005.

DONE AND ENTERED this 29th day of August, 2005, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2005.

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.