STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BENNETT B. RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 06-0427RU
	)	06-1920RP
DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,	)	
	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing in this proceeding on July 10, 2006, in Tallahassee, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Larry D. Scott, Esquire
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STATEMENT OF THE ISSUES

The issues in this proceeding are whether Petitioner has standing to challenge an unwritten rule and a proposed rule and,

if so, whether either rule is an invalid exercise of delegated legislative authority within the meaning of Subsections 120.56(4) and 120.56(1), Florida Statutes (2005), respectively.

PRELIMINARY STATEMENT

This proceeding began on February 3, 2006, when Petitioner challenged an agency statement of eligibility in the Special Risk Class of the Florida Retirement System. Respondent began rulemaking proceedings, and the undersigned issued an order on March 28, 2006, which stayed the original rule challenge pursuant to Subsection 120.56(4)(e)2., Florida Statutes (2005).

Respondent developed a proposed rule, and Petitioner challenged the proposed rule on May 26, 2006. On June 7, 2006, the undersigned rescinded the stay because the proposed rule addressed an agency statement that was different from the agency statement challenged as an unpromulgated rule. On June 19, 2006, the undersigned consolidated the challenge to the proposed rule with the original rule challenge.

At the formal hearing, Petitioner presented the testimony of five witnesses and submitted 28 exhibits for admission into evidence. Respondent called one witness and submitted nine exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing filed with DOAH on July 26, 2006. The undersigned

granted Petitioner's unopposed request for extension of time in which to file proposed final orders (PFOs). The parties timely filed their respective PFOs on August 17, 2006.

FINDINGS OF FACT

1. Respondent is the state agency responsible for administering the Florida Retirement System (FRS). From June 1, 1994, through the present (the uncontested period), Petitioner has been employed by Martin County, Florida (Martin County), as a firefighter and has been a member of the Special Risk Class of the FRS pursuant to the firefighter criteria in Subsection 121.0515(2)(b), Florida Statutes (2005).

2. In 1999, the legislature added Subsection 121.0515(2)(d), Florida Statutes (1999), to include in the Special Risk Class those employed as an emergency medical technician (EMT) by a licensed Advance Life Support (ALS) or Basic Life Support (BLS) employer. In 2000, the legislature authorized those employed as an EMT by an ALS or BLS to upgrade prior creditable service earned as an EMT.[1]

3. Sometime in December 2004, Petitioner requested credit for prior service with Martin County that Petitioner rendered as an "EMT/Ocean Lifeguard" from February 26, 1989, through May 31, 1994 (the contested period). In a Final Summary Order issued on April 19, 2006, Bennett Richardson v. Division of Retirement, Case No. R-04-03631-MIA (hereinafter, "Richardson I), Respondent

denied the request on the ground that the identical issue had been fully litigated on October 15, 2001, and a final order denying the request was issued on January 3, 2002, in Beckett et al. v. Division of Retirement, Case No. ROO-67-MIA (hereinafter, "Beckett"). The Final Summary Order issued in Richardson I is currently on appeal to the Fourth District Court of Appeal.[2]

4. On February 3, 2006, Petitioner filed a petition challenging an agency statement by Respondent as a rule that had not been adopted in accordance with rulemaking procedures in violation of Subsections 120.54(1)(a) and 120.56(4), Florida Statutes (2005) (unwritten rule). The agency statement emerged during the deposition of an employee of Respondent on January 20, 2006.

5. On March 28, 2006, the undersigned stayed the challenge to the unwritten rule because Respondent proceeded to rulemaking pursuant to Subsection 120.56(4)(e), Florida Statutes (2005) (the proposed rule). On May 26, 2006, Petitioner filed a petition challenging the proposed rule pursuant to Subsection 120.56(2), Florida Statutes (2005).

6. On June 7, 2006, the undersigned rescinded the previous stay on the ground that the proposed rule addresses a statement that is different from the statement in the unwritten rule. The undersigned consolidated the two rule challenges on June 19, 2006.

7. Petitioner has standing in each of the rule challenges in this proceeding. The interests of Petitioner during the contested period are within the zone of interests the legislature seeks to protect.

8. Petitioner's interests during the contested period are evidenced by organizational charts maintained by Petitioner's employer. Respondent relies, in relevant part, on organizational charts of employers to determine whether applicants for membership in the Special Risk Class satisfy relevant statutory criteria.

9. From the beginning of the contested period through the present, Petitioner has been employed by the Emergency Services Department of Martin County. The Emergency Services Department includes the Fire Rescue Division, in which Petitioner was employed during the uncontested period, as well as the Marine Safety Division, in which Petitioner was employed during the contested period.[3]

10. Petitioner's interests during the contested period are evidenced by his job title. Respondent relies, in relevant part, on job titles in position descriptions to determine whether applicants for membership in the Special Risk Class satisfy relevant statutory requirements.

11. Petitioner's job title during the contested period was "EMT/Ocean Lifeguard." Prior to the contested period,

Petitioner's job title was limited to "Lifeguard." From the beginning of the contested period through the present, Petitioner has been employed by the Emergency Services Department of Martin County as a certified EMT in compliance with relevant criteria in Subsection 121.0515(2)(d), Florida Statutes (2005).[4]

12. Petitioner's interests during the contested period are evidenced by the job description for the job title Petitioner held during the contested period. Respondent relies, in relevant part, on job descriptions developed by employers to determine whether applicants for membership in the Special Risk Class satisfy relevant statutory criteria.

13. A major function of the job Petitioner performed during the contested period was to provide:

> [S]killed protection of the lives, health, safety and welfare of the public by providing pre-hospital emergency medical care including injury and drowning prevention on Martin County beaches.

Petitioner's Exhibit 7. The refusal to provide on-site emergency medical care during the contested period was a ground for disciplinary action against Petitioner. The job description required physical strength and agility sufficient to perform rescue and medical duties. Those job requirements fall within the scope of legislative intent in Subsection 121.0515(1), Florida Statutes (2005).

14. The agency's denial of membership in the Special Risk Class affects the substantial interests of Petitioner by limiting the annual retirement benefit calculator (multiplier) to 1.6 percent annually. Membership in the Special Risk Class during the contested period would increase the annual multiplier to 3.0 percent.

15. The agency statement challenged as an unwritten rule is evidenced in the deposition testimony obtained during discovery in Richardson I and in a written memorandum issued by Respondent. The agency states that the statutory provision in Subsection 121.0515(2)(d), Florida Statutes (2005), which requires the primary duties and responsibilities of an EMT to include on-the-scene emergency medical care, is not satisfied unless 50 percent or more of the duties performed by an EMT are on-the-scene emergency medical care (the 50 percent rule).

16. The challenged agency statement is a rule within the meaning of Subsection 120.52(15), Florida Statutes (2005). The statement satisfies the requirement of "general applicability." The agency applies the statement to determine whether any applicant satisfies the criteria in Subsection 121.0515(2)(d), Florida Statutes (2005). Respondent has applied the statement in all such applications through the date of the hearing.

17. The agency statement "implements, interprets, or prescribes" the statutory criteria in Subsection 121.0515(2)(d),

Florida Statutes (2005), within the meaning of Subsection 120.52(8), Florida Statutes. The agency statement does not fall within any exception prescribed in Subsection 120.52(8)(a)-(c), Florida Statutes (2005).

18. The agency statement was not adopted by rulemaking procedures in violation of Subsection 120.54(1)(a), Florida Statutes (2005). Respondent stipulated during the formal hearing that the 50 percent rule was not addressed in the proposed rule.

19. The proposed rule and the 50 percent rule are substantially similar statements within the meaning of Subsection 120.56(4)(e), Florida Statutes (2005). Both rules establish a quantitative or numerical standard for determining whether the primary duties and responsibilities of an EMT include on-the-scene emergency medical care.

20. The proposed rule would add the following language to Florida Administrative Code Rule 60S-1.0059(2):

> Whenever the term "primary duties and responsibilities" is used in Rule 60S-1.0051, 60S-1.0052, 60S-1.0053, or 60S-1.00535, F.A.C., it means those duties of a position that:
>
> (a) Are essential and prevalent for the position and are the basic reasons for the existence of the position;
>
> (b) Occupy a substantial portion of the member's working time; and

> (c) Are assigned on a regular and recurring basis.
>
> Duties and responsibilities that are of an emergency, incidental, or temporary nature are not "primary duties and responsibilities."

The law implemented by the proposed rule includes Section 120.0515, Florida Statutes (2005).

21. The requirements that on-the-scene emergency medical care must be "prevalent" and "occupy a substantial portion of the member's working time" are substantially similar statements to the unwritten 50 percent rule. Both impose quantitative standards to determine whether on-the-scene emergency medical care is a primary duty or responsibility of an EMT.

22. Quantitative standards in the proposed rule and the unwritten rule enlarge or modify the specific provisions of the law implemented within the meaning of Subsections 120.52(8)(c) and 120.57(1)(e)2.b., Florida Statutes (2005). The law implemented adopts a qualitative standard for determining whether on-the-scene emergency medical care is a primary duty or responsibility of an EMT.

23. The plain and ordinary meaning of the term "primary" requires on-the-scene emergency medical care to be the "principal" duty or responsibility; or the "first or highest in rank, quality, or importance." The American Heritage Dictionary of the English Language, at 1393 (4th ed. 2000; Houghton Mifflin

Company). On-the-scene emergency medical care was a principal duty of first importance that Petitioner was required to perform during the contested period, irrespective of whether he performed those duties 50 percent of his workday; irrespective of whether those duties were "prevalent" each day; and irrespective of whether on-the-scene emergency medical care occupied a "substantial portion of the member's working time" each day.

24. The record discloses no evidentiary basis for deference to agency expertise that would justify a departure from the plain and ordinary meaning of the term "primary." Rather, the record shows that Respondent effectively grafted onto the proposed rule quantitative standards in federal regulations applicable to certain federal employees as a means of defining and implementing the term "primary duties" in the state law criteria prescribed in Subsection 121.0515(2)(d), Florida Statutes (2005).[5]

25. The legislature adopted a quantitative standard for determining membership in the Special Risk Class in Subsection 121.0515(2)(f), Florida Statutes (2005). In relevant part, the legislature required anyone seeking membership under that provision to "spend at least 75 percent of his or her time" performing qualifying duties.

26. The legislature could have adopted a similar quantitative standard in Subsection 121.0515(2)(d), Florida Statutes (2005), but did not do so. The quantitative provisions in the proposed rule and unwritten 50 percent rule would effectively amend or modify the relevant statutory criteria in Subsection 121.0515(2)(d), Florida Statutes (2005), by imposing a quantitative standard similar to that in Subsection 121.0515(2)(f), Florida Statutes.

27. The proposed rule excludes emergency services from the definition of "primary duties and responsibilities." That exclusion modifies or contravenes the statutory requirement that primary duties and responsibilities of an EMT must include "emergency" medical care.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and the subject matter in this proceeding. §§ 120.54(1)(a), 120.56(2), and 120.56(4), Fla. Stat. (2005). DOAH provided the parties with adequate notice of the formal hearing.

29. Standing has been equated with subject matter jurisdiction. Grand Dunes, Ltd. v. Walton County, 714 So. 2d 473, 475 (Fla. 1st DCA 1998). Petitioner established that the proposed change to the existing rule would cause him to suffer an "injury in fact" and that the interest he seeks to protect is within the "zone of interest" sought to be protected by the

statutory provisions to be implemented by the proposed change. All Risk Corporation of Florida v. State, Department of Labor and Employment Security, 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982). See also Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981); Florida Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978).

30. The 50 percent standard in the unwritten rule, the quantitative standards in the proposed rule discussed in the Findings of Fact, and the exclusion of emergency services in the proposed rule constitute an invalid exercise of delegated legislative authority. Each enlarges, modifies, or contravenes the specific provisions of the law in Subsection 121.0515(2)(d), Florida Statutes.

31. Respondent is authorized to adopt only those rules that:

> implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation. . . .

§ 120.52(8), Fla. Stat. (2005).

32. Respondent is an agency of the executive branch of government and is constitutionally prohibited from exercising powers reserved to the legislative branch of state government.

Art. II, § 3, Fla. Const. Nor may the legislature delegate legislative powers to an agency of the executive branch. Rather, the legislature must provide statutory standards and guidelines in an enactment that are ascertainable by reference to the terms of the enactment. Bush v. Shiavo, 885 So. 2d 321 (Fla. 2004); B.H. v. State, 645 So. 2d 987, 992-994 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

ORDER

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

ORDERED that quantitative criteria in the unwritten 50 percent rule and the proposed rule, identified in the Findings of Fact, constitute an invalid exercise of delegated legislative authority within the meaning of Subsections 120.52(8)(c) and 120.57(1)(e)2.b., Florida Statutes (2005).

DONE AND ORDERED this 19th day of September, 2006, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of September, 2006.

ENDNOTES

1/ The legislative history is at Ch. 99-392, § 23, Laws of Fla.; Chs. 2000-161, § 4, 2000-169, § 6, and 2000-347, § 4, Laws of Fla.

2/ The scope of this proceeding does not reach the merits of the issues addressed in Richardson I and Beckett but is limited to the validity of the unwritten rule and the proposed rule.

3/ Neither the agency statement challenged as an unwritten rule nor the proposed rule determine that the Emergency Services Department of Martin County was not an ALS or BLS within the meaning of § 121.0515(2)(d), Fla. Stat. (2005), and that requirement is not at issue in this proceeding.

4/ The disjunctive requirement for employment as either a certified EMT or paramedic has remained unchanged from the time the statute was first enacted in 1999.

5/ In relevant part, the federal regulations provide:

> "Primary duties" are those duties of a position that --
>
> 1. Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;
>
> 2. Occupy a substantial portion of the individual's working time over a typical work cycle; and
>
> 3. Are assigned on a regular and recurring basis.
>
> Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion.

> In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are deemed to be his or her primary duties, without the need for further evidence or support.

Respondent's Exhibit 17.

COPIES FURNISHED:

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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.