

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM SAM WALTHOUR,)
)
 Petitioner,)
)
 vs.) Case No. 08-0227
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, DIVISION OF STATE)
 FIRE MARSHAL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held on March 7, 2008, by video teleconference at sites in Tallahassee and Orlando, Florida, before Carolyn S. Holifield, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William "Sam" Walthour, pro se
4055 Salmon Drive
Orlando, Florida 32835

For Respondent: Regina Keenan, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues are: (1) whether Respondent properly scored Petitioner's retake of the Practical Examination for Firefighter

Retention; and (2) whether Petitioner's application for firefighter recertification was properly denied.

PRELIMINARY STATEMENT

On or about September 26, 2007, Respondent, Department of Financial Services, Division of State Fire Marshal ("Division"), notified Petitioner, William "Sam" Walthour ("Petitioner"), that he did not pass the Practical Examination for Firefighter Retention ("Retention Examination") re-test. The notice also advised Petitioner that because he did not pass the Retention Examination re-test, his Firefighter Certificate of Compliance No. 3381 expired on September 13, 2007.

Petitioner challenged the scoring on certain parts of the Retention Examination re-test and requested a formal administrative hearing. The Division referred the matter to the Division of Administrative Hearings on January 11, 2008, for assignment of an Administrative Law Judge to conduct the hearing.

At hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 4 were received into evidence. The Division presented the testimony of Charles Brush and Philip Dean Oxendine. The Division's Exhibits A through D were received into evidence.

At the request of the Division, the undersigned took official recognition of: (1) Sections 633.01, 633.30, 633.35,

and 633.352, Florida Statutes^{1/}; (2) Florida Administrative Code Rules 69A-37.0527, 69A-37.055, 69A-37.056, and 69A-37.062; and (3) Sections 3-1.1, 3-1.1.2, 3-3.1, A-1-4 and A3-3.1 of the National Fire Protection Association ("NFPA") Standard 1001, "Fire Fighter Professional Qualifications", 1997 edition, adopted by reference in Florida Administrative Rule 69A-37.055(6)(a)2.

The hearing Transcript was filed on March 21, 2008. Petitioner filed his Proposed Recommended Order and revision thereto on March 26 and 28, 2008, respectively. The Division filed its Proposed Recommended Order on March 28, 2008. The parties' Proposed Recommended Orders have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner has worked in the fire service for almost 28 years. During that time, Petitioner served as the assistant fire marshal and the fire marshal for the City of Orlando. After Petitioner retired from the City of Orlando, he served as fire chief, building official, and code enforcer officer of Eatonville, Florida.

2. After more than a three-year time period of not working as a firefighter or in the fire service field, Petitioner accepted a job as fire marshal in Hillsborough County, Florida. Although there is no legal requirement that a fire marshal be

certified as a firefighter, a condition of Petitioner's employment with Hillsborough County was that he be recertified as a firefighter.

3. In Florida, a firefighter retains his firefighter certification if he remains an active firefighter with an organized fire department. However, a firefighter who has not been active for a period of three years must successfully complete the Retention Examination in order to retain his certification.

4. The Retention Examination is the practical portion of the examination given to new applicants.

5. Because Petitioner has not been an active firefighter for the past three years, in order to be recertified as a firefighter, he was required to successfully complete the Retention Examination.

6. The Retention Examination consists of the following four parts: Self-Contained Breathing Apparatus ("SCBA"), Hose Operations, Ladder Operations, and Fireground Skills. To pass the Retention Examination, a candidate must achieve a score of at least 70 percent on each part.

7. Petitioner applied for and took the Retention Examination that was given on May 16, 2007. He successfully completed the Fireground Skills part, but did not earn a passing

score on the SCBA, the Hose Operations, and the Ladder Operations parts.^{2/}

8. Petitioner applied for and took the September 13, 2007, Retention Examination re-test. During this re-test, Petitioner took only the SCBA, the Hose Operations, and the Ladder Operations parts, the ones that he had not successfully completed in May 2007.

9. Petitioner passed the Hose Operations part of the Retention Examination re-test, but did not successfully complete the SCBA and the Ladder Operations parts, because he did not complete those components within the maximum allotted time.

10. Each part of the Retention Examination has certain elements or skills that are graded. The SCBA and the Ladder Operations parts of the Retention Examination are each comprised of eleven skills or steps that the examinee must complete within the specified time. Ten of the 11 skills or steps for each part of the Retention Examination are assigned a point value of ten.^{3/} The other skill (the 11th skill or step) under each part is designated as a "mandatory step" for which the examinee is awarded a score of either "pass" or "fail".^{4/}

11. Under the scoring system described in paragraph 10, an examinee receives ten points for each of the ten skills he successfully completes and a passing score for the one skill designated as mandatory.

12. The SCBA and Ladder Operations parts of the Retention Examination have an established maximum time allotted for the examinee to complete a minimum of 70 percent of the skills. The time requirements are a mandatory criterion/requirement.

13. In order to successfully complete the Retention Examination, an individual must not only complete a minimum of 70 percent of the ten skills or steps for each part, but he must also successfully complete the two mandatory criteria for that part.

14. If an examinee completes a minimum of 70 percent of the skills in a particular part, but fails to do so within the maximum allotted time specified for that part, he has not met the mandatory time requirement and, thus, is not awarded any points for that part.

15. The Division established the minimum time requirements for completing the various parts of the practical examination for firefighters after consulting the NFPA standards and soliciting input from fire departments, fire chiefs, and other individuals in firefighter profession.

16. Among the factors that were considered in establishing the minimum time frames were the nature of fires (i.e., how quickly they spread) and the need for firefighters to perform their job duties both safely and quickly.

17. The Division uses these time requirements in testing the 3,500 to 3,800 firefighters a year that go through the testing process.

18. On the September 13, 2007, re-test, Petitioner exceeded the maximum time allotted for the SCBA and the Ladder Operations parts.

19. The maximum time allotted for completion of the SCBA part of the Retention Examination is one minute and 45 seconds. Petitioner's completion time on the September 2007 Retention Examination re-test was three minutes and ten seconds.

20. The maximum time allotted on the Ladder Operations part of the Retention Examination is two minutes and 45 seconds. Petitioner's completion time on the September 2007 Retention Examination re-test was three minutes and ten seconds.

21. Because Petitioner failed to complete a minimum of 70 percent of the skills in the SCBA and the Ladder Operations parts of the Retention Examination within the maximum time allotted, the Bureau properly awarded him no points. Therefore, Petitioner did not earn a passing score on the Retention Examination re-test.

22. As a result of Petitioner's failing to pass the Retention Examination, his Firefighter Certificate of Compliance No. 3381 expired as of September 13, 2007.

23. The Division's Bureau of Fire Standards and Training ("Bureau of Standards") employs field representatives to administer the Retention Examination to examinees in accordance with the applicable rules and procedures.

24. Philip D. Oxendine is and has been a field representative with the Bureau of Standards for four years. As a field representative, Mr. Oxendine administers and scores the minimum standards examination for firefighters, including the Retention Examination.

25. Prior to being employed as a field representative, Petitioner worked as a firefighter for 27 years, having retired as a lieutenant. He also has ten years of experience as an instructor in the fire science division of the then South Technical Institution in Palm Beach County, Florida.

26. Mr. Oxendine administered and scored the three parts of the Retention Examination re-test that Petitioner took on September 13, 2007, in accordance with the Division's procedures.

27. All examinees at the September 17, 2007, Retention Examination re-test location, were assigned a number. In an effort to avoid bias, throughout the testing process, examinees' assigned numbers were used instead of their names.

28. On the day of the Retention Examination re-test, Petitioner was assigned a number by which he was identified.

When Mr. Oxendine administered and scored Petitioner's re-test, he did not know Petitioner's name or anything about him.

29. Prior to Petitioner's starting the Retention Examination re-test, Mr. Oxendine took Petitioner and other examinees to each station and told them what they had to do at that station. Mr. Oxendine also told the examinees, including Petitioner, how each part of the Retention Examination would be graded.^{5/}

30. Mr. Oxendine's usual practice is to instruct examinees to touch the apparatus when they are ready for time to begin on a particular part of the examination. He also gives specific instructions to the examinees regarding how they should indicate that they have completed each part. Once an examinee touches the apparatus and says he is ready to begin, Mr. Oxendine starts the stop watch. Mr. Oxendine instructed the examinees to indicate that they had completed the SCBA part by standing up and clapping their hands. The examinees were told that the Ladder Operations part was considered completed when they were behind the ladder and holding it and when they announced that the ladder was ready to be climbed.

31. Mr. Oxendine used the procedures described in paragraph 30 in timing Petitioner on the three parts of the Retention Examination re-test.

32. Mr. Oxendine timed Petitioner's performance on each part of the Retention Examination re-test using a stop watch. This is the method that Mr. Oxendine was trained to use when timing the examinees' performances on the practical portion of the examination.

33. An individual is allowed to re-take the Retention Examination one time. If the person does not pass the re-test, he must repeat the Firefighter Minimum Recruit Training Program before he is eligible to re-take the Retention Examination. See § 633.352, Fla. Stat., and Fla. Admin. Code R. 69A-37.0527.

34. As noted above, Petitioner did not pass the SCBA and the Ladder Operations parts of the Retention Examination re-test. Therefore, before he is eligible to re-take that examination, he must repeat the Firefighter Minimum Recruit Training Program.

35. Petitioner failed to establish that he was entitled to a passing grade for his performance on the Retention Examination re-test.

36. The greater weight of the credible evidence established that Petitioner's performance on the Retention Examination re-test was appropriately and fairly graded.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

38. The Department has jurisdiction over firefighter training and certification in the State of Florida pursuant to Chapter 633, Florida Statutes.

39. Subsection 633.35(2), Florida Statutes, authorizes the Division to establish firefighting training and to issue certificates of compliance to individuals who meet the prescribed eligibility requirements and provides in relevant part:

(2) The [D]ivision shall issue a certificate of compliance to any person . . . who has successfully passed an examination as prescribed by the division.

40. Section 633.352, Florida Statutes, which establishes the process by which a certified firefighter who has not worked as a firefighter for a three-year period may retain his or her certification, provides in pertinent part:

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,^[6/] in order to maintain her or his certification as a firefighter . . . The 3-year period begins on the date the certificate of compliance is issued or upon termination of service with an organized fire department.

41. Pursuant to its rulemaking authority, the Division is authorized to promulgate rules for firefighter training, certification, and re-certification. See § 633.45(2)(a), Fla. Stat.

42. Florida Administrative Code Rule 69A-37.0527 provides in part:

(1) The re-take of the state certification examination for retention of certificate shall be know as the retention examination and is referenced in Section 633.352, F.S. . . .

* * *

(6) Any individual who does not obtain a passing score of 70% or more on the retention examination will be permitted one re-take examination.^[7/1] The retake must occur within 6 months of the original examination.

(7) Failure of the re-take examination will result in the individual's having to successfully complete Firefighter I and II training as defined in Rule 69A-37.055, F.A.C., before any additional testing can occur.

43. The general procedures for administering the State Firefighter Certification Examination set forth in Florida Administrative Code Rule 69A-37.062 provide that the individual practical examinations are timed. That section provides in relevant part:

(5) General Procedures

* * *

(c) 1. The individual practical examinations are timed separately but the participant shall be prepared to begin upon reporting for each segment.

2. If a participant delays, the examiner shall inform the participant that the time will begin. (Emphasis supplied.)

44. Florida Administrative Code Rule 69A-37.056 provides in pertinent part:

(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, F.S., 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.

* * *

(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.

(f) Failing the retake of the Firefighter II Certification Examination within the prescribed 6 month time period will result in the individual having to repeat the Firefighter II Course.

45. As an applicant for re-certification, Petitioner has the burden of proving entitlement to the recertification he seeks. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

46. To prevail, Petitioner must show by a preponderance of evidence that the Retention Examination and/or re-test was faulty or that the grading process was devoid of logic. Harac v. Department of Professional Regulation, Board of Architecture, 484 So. 2d 1333, 1338 (Fla. 3d DCA 1986); State ex rel. Glaser

v. Pepper, 155 So. 2d 383 (Fla. 1st DCA 1963); State ex rel. Topp v. Board of Electrical Examiners for Jacksonville Beach, 101 So. 2d 583 (Fla. 1st DCA 1958).

47. Petitioner failed to satisfy his burden.

48. Petitioner argues that the scoring method used by the Division violates provisions that establish a minimum of 70 percent as a passing score on the Retention Examination re-test. Petitioner contends that he should have been awarded credit for the SCBA and Ladder Operations parts of the Retention Examination re-test, even though he failed to complete those activities within the prescribed maximum allotted time. Next, Petitioner challenges the field's representative's use of a stop watch during Petitioner's re-test, indicating that this was not the most accurate method to time his performance. Finally, Petitioner asserts that the scoring of his re-test was adversely affected by bias.

49. Petitioner failed to establish that the mandatory time requirement for completing a minimum of 70 percent of the skills in the SCBA and the Ladder Operations parts of the Retention Examination re-test was devoid of logic and reason.

50. Petitioner failed to establish that either the stopwatch, or the field representative's use thereof, was in any way faulty or resulted in an incorrect completion time being recorded for Petitioner.

51. Petitioner failed to establish that the scoring of his test was based on any bias.

52. The undisputed evidence established that in order to pass the Retention Examination re-test, Petitioner was required to earn a minimum score of 70 percent on the SCBA and the Ladder Operations parts. The evidence also established that to receive credit for the skills in each part, examinees must complete the skills within the prescribed maximum time allotted.

53. It is undisputed that Petitioner did not complete a minimum of 70 percent of the skills in the SCBA and the Ladder Operations parts within the maximum time allotted. Therefore, he was properly awarded no credit for those parts.

54. Petitioner failed to establish a legal basis that he was entitled to a passing grade for his performance on the SCBA and Ladder Operations parts of the Retention Examination re-test.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order denying Petitioner's application to retain his certification as a firefighter in the State of Florida.

DONE AND ENTERED this 20th day of May, 2008, in
Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2008.

ENDNOTES

^{1/} All references are to 2007 Florida Statutes, unless otherwise indicated.

^{2/} Petitioner attributed his lack of success on three of the four parts to the almost 100-degree temperature the day he first took the Retention Examination.

^{3/} The ten performance skills that must be demonstrated in the Ladder Operations part of the Retention Examination included properly lifting and carrying a ladder for 50 feet and positioning it for raise; checking for overhead obstructions; properly lifting the ladder to a vertical position; maintaining extremities in a safe position during entire operation; and having the ladder properly heeled upon completion of the task. Performance skills which must be demonstrated in the SCBA part of the examination include fully opening cylinder valve and confirming alarm activation; checking cylinder gauge and announcing reading; positioning SCBA on back and tightening all straps; donning and securing face piece properly; and completing seal check and exhalation check.

^{4/} The "mandatory" skill for the Ladder Operations part is that examinees must maintain control of ladder during entire

operation. The "mandatory" skill for the SCBA part requires that examinees wear and activate the Personal Alert Safety System, or PASS, device and breathe from the regulator.

^{5/} Petitioner was aware of the grading criteria, including the time requirements, prior to the re-test because, in preparing for the re-test, he had used a "practice" score sheet from Hillsborough Community College that included the parts of the examination, the skills under that part, and the maximum allotted time for each part.

^{6/} This rule is now Florida Administrative Code Rule 69A-37.056.

^{7/} Florida Administrative Code Rule 69A-37.056(6) also provides that a minimum score of 70 percent be obtained to pass both the written and practical parts of the state examination.

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.

