STATE OF FLORIDA
BUILDING CODE ADMINISTRATORS AND INSPECTORS BOARD

JAY DOUGLAS ABEL,

Petitioner,

DOAH Case No. 09-3176

vs.

FLORIDA BUILDING CODE
ADMINISTRATORS AND INSPECTORS
BOARD,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the Building Code Administrators and Inspectors Board ("Board"), pursuant to Sections 120.569 and 120.57(1), *Florida Statutes*, on February 11, 2010, in Saint Augustine, Florida for the purpose of considering the Administrative Law Judge's Recommended Order, a copy of which is attached hereto as Exhibit "A."[1] The Petitioner was present and represented by Darren J. Elkind, Esquire. The Board, in its role as Respondent in this proceeding, was represented by Timothy E. Dennis, Assistant Attorney General. The Board, in its role as the Agency Head in this proceeding, was represented by Elizabeth Duffy, Assistant General Counsel.

Respondent timely filed exceptions to the Recommended Order, a copy of which are attached hereto as Exhibit "B." Each party was given an opportunity to address the Board in support of or against the Recommended Order and the Respondent's exceptions. The Board has considered each party's arguments in support of and against these exceptions and the Recommended Order.

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1 Board member Robert McCormick recused himself from participating in the consideration of the Recommended Order in this proceeding, as he was a witness for the Board in the underlying administrative hearing.

Upon review and consideration of the Recommended Order and after a review of the complete record in this proceeding, the Board arrives at the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved, adopted, and incorporated herein by reference, with the following stipulated exception.[2]

2. On page 8, in Paragraph 15 of the Recommended Order, the Administrative Law Judge states that, "Dennis Franklin is a member of the Board and the [application] review committee." This finding is erroneous. As described in Respondent's Exceptions, although Mr. Franklin was a member of the Board at the time of his deposition and the administrative hearing, he was not a current member of the application review committee, but, rather, a former member. There is no competent substantial evidence in the record of the proceeding to support the ALJ's statement that Mr. Franklin is a present member of the application review committee.

3. Accordingly, the first sentence of Paragraph 15 is amended to state, "Dennis Franklin is a member of the Board and a former member of the review committee."[3]

4. All findings of fact, other than the stipulated exception set forth herein, are supported by competent substantial evidence in the record.

CONCLUSIONS OF LAW

5. The Board has jurisdiction of this matter pursuant to Sections 120.569, 120.57(1), and Part XII, Chapter 468, *Florida Statutes*.

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2 Petitioner's counsel stipulated to this exception at the Board's February 11 consideration of this Final Order.
3 At the time of consideration of this Final Order, Mr. Franklin was no longer a member of the Board.

6. The Board, in its final order, may reject or modify the conclusions of law over which it has substantive jurisdiction:

> . . . The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

§ 120.57(1)(l), Fla. Stat. (2009). Thus, when rejecting or modifying such conclusion of law, the Board must state with particularity its reasons for rejecting or modifying such conclusion of law, and make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. *Id.*

7. The Board finds that the Respondent's exceptions to Paragraphs 28, 29, and 30 are persuasive for the reasons set forth in Respondent's written exceptions. The Board finds that the Respondent's proposed conclusions of law are as or more reasonable than those which are rejected or modified. Accordingly, Paragraphs 28, 29, and 30 are modified as set forth herein.

8. Paragraph 28 of the Recommended Order is substituted with the following:

> Respondent acknowledges Harden, asserts that it has initiated rulemaking regarding the committee procedure, and further asserts that Harden should not apply to the instant case because the Board acted on Petitioner's applications just days after the Harden opinion was issued and prior to the expiration of time for filing a motion for rehearing, citing as authority Vale v. McDonough, 958 So. 2d 966 (Fla. 1st DCA 2007). Vale is distinguishable from this case. In Vale, the court dealt with whether to retroactively apply a finding of invalidity of an existing rule, relied upon by the agency and the public, concerning refunding copying costs incurred by a prisoner.[3/] This argument is unpersuasive.

Nonetheless, the Respondent has presented compelling argument in favor of the Board's use of an application review committee. The Harden opinion notwithstanding, the Board finds that its application review committee process is sufficiently authorized in the Florida Statutes, including, but not limited to, Section 455.207(3), which states that "a quorum shall be necessary for the conduct of official business by the board **or any committee thereof**." (Emphasis supplied). This same section also states, "**[t]he membership of committees of the board**, except as otherwise authorized pursuant to this chapter or the applicable practice act, shall be composed of current members of the board," and "[t]he vote of a majority of the members of the quorum shall be necessary for any **official action** by the board **or committee**." *Id.* (emphasis supplied). Moreover, Section 455.213(2), *Florida Statutes*, states that the "department shall issue a license to any person certified by the appropriate board, **or its designee**." Thus, Florida law clearly contemplates that a regulatory board may assign its certification, *i.e.*, application review, duties to a "designee" such as the Application Review Committee to handle large application dockets. The Board's procedure, in fact, goes further than required by Section 455.213(2), because the Application Review Committee's recommendations go back before the Board for ratification, where any member may pull any application for review by the full Board.

Further justification for the Board's practice may be found in the history of the Chapter 120, *Florida Statutes*, the "Administrative Procedure Act" ("APA"). Prior to 1996, the APA required each agency to adopt by rule "a description of its organization stating the general course and method of its operations...." § 120.53(1)(a), Fla. Stat. (1995). However, in 1996 there was a major re-write of the APA which, among other things, deleted the requirements that agencies adopt rules of organization and operations and, in lieu thereof, required that Uniform Rules of Procedure be adopted by every agency that set forth "a method by which each agency head shall provide a description of the agency's organization and general course of its operations." Ch. 96-159, § 10, at 160, Laws of Fla., codified at § 120.54(5)(b)(5), Fla. Stat.

In addition, the 1996 legislation drastically changed from a concept of *Model* Rules of Procedure which an agency could vary from simply by adopting its own specific rule of procedure on the subject matter covered by the Model Rules. In lieu of that, the *Uniform* Rules of Procedure were designated as "the rules of procedure for each agency subject to this chapter unless the Administrative Commission grants an exception to the agency...." §120.54(5), Fla. Stat.

The first Uniform Rule, Rule 28-101.001, *Florida Administrative Code*, states that:

(1) The agency head shall maintain a current Statement of Agency Organization and Operation. The statement shall describe the organization of the agency and outline the general course of the agency's operations. The purpose of the statement is:
(a) To inform the public, in a complete and concise manner, of the nature of the agency's business, operations, delegation of authority, internal organization and other related matters;
(b) To provide assistance to the public when dealing with the agency; and
(c) To expedite the processing of agency matters on behalf of the public.

The Uniform Rules of Procedure are mandatory to agencies. Agencies wanting to deviate from the Uniform Rules of Procedure must seek exceptions by filing a petition with the Administration Commission. §120.54 (5)(a)(2), Fla. Stat.

Therefore, in light of the changes that were made to the APA in 1996 which deleted previous language requiring an agency to adopt by rule a description of its organization and, instead, created the Uniform Rules of Procedure, which only required the agency maintain a Statement of Agency Organization and Operation, the Respondent finds that it is not required to engage in rulemaking in order to create an organizational structure which included the use of committees.

Arguably, the Board's attempt to adopt such rules will require it to file a petition with the Administration Commission to obtain permission to create such a rule because it would fall outside the Uniform Rules of Procedure. § 120.54 (5)(a)(2), Fla. Stat.

9. Paragraph 29 of the Recommended Order is substituted with the following:

Petitioner argues that the Board's "rule of thumb" requiring five years of full-time experience in each of the fields in which certification is sought, is inconsistent with Florida Administrative Code Rule 61G19-6.0035. This contention is rejected. It is well settled Florida law that an agency's construction of its governing statutes and rules will be upheld unless such interpretation is **clearly** erroneous. *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1985); *Pershing Industries, Inc. v. Dep't of Banking and Fin.*, 591 So. 2d 991, 992 (Fla. 1st DCA 1991). If an agency's interpretation is one of several permissible interpretations, it **must** be upheld despite the existence of reasonable alternatives. *Pershing Industries, Inc.*, 591 So. 2d at 992; *see also Morris v. Division of Retirement*, 696 So. 2d 380, 383-84 (Fla. 1st DCA 1977).

As stated by the Florida Supreme Court in *Astral Liquors v. Dep't of Bus. Regulation*, 463 So. 2d 1130, 1132 (Fla. 1985):

> Discretionary authority is necessary for agencies involved in the issuance of licenses and the determination of fitness of applicants for license. This discretionary authority is particularly necessary where an agency regulates "occupations which are practiced by privilege rather than by right and which are potentially injurious to the public welfare." As we explained in *North Broward Hospital District v. Mizell*, 148 So. 2d 1 (Fla. 1962), in certain areas it is impracticable to lay down a definite comprehensive rule.

(citations omitted). The Board has for some time interpreted the statutory requirement that an applicant demonstrate "five (5) years of experience," logically and reasonably to mean that an applicant must demonstrate an equivalent of five years' "full time" experience. *See Owings v. Building Code Administrators and Inspectors Bd.*, DOAH Case No. 09-1335, Final Order at ¶ 28 (requirement for "four (4) years of roofing experience" reasonably interpreted by the Board to mean "full-time experience").[4] This requirement is premised on the reasoning that one who is engaged in an occupation or field full-time will gain more experience and in-depth knowledge than one who is engaged in such activities part-time. This is particularly important in fields where the public health, safety, and welfare may be placed at risk as the result of an unqualified person performing such activities. This Board is tasked with protecting the public health and safety of the state. *See* § 468.601, Fla. Stat. (2009).

Furthermore, this interpretation is not inconsistent with the language of Rule 61G19-6.0035(1)(c), *Florida Administrative Code*, which states:

Each applicant for certification as an inspector or plans examiner shall demonstrate that he or she has at least one (1) year of hands-on experience in the category of certification sought, with the exception of 1 and 2 family dwelling inspector. For 1 and 2 family dwelling inspector certification, refer to the specific requirements in Rule 61G19-6.017, F.A.C.

The rule plainly requires one (1) year of "hands on" experience in the category of certification sought, with the exception of 1 and 2 family dwelling inpsector. This requirement is different from the Board's interpretation of the Section 468.609(2)(c)1, which prescribes "five year's combined experience." Although the term "hands on" is not defined, its vernacular meaning usually is associated with actual field work, as opposed to administrative, supervisory, or

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4 The Board requires the equivalent to five years' full time experience, which is not the same as requiring five years' full time employment in a trade, to the exclusion of any other trade. As an example, a person who worked for a general contractor for two years but could demonstrate that 50% of such work during that time was done in the electrical trade, would be able to count one year of electrical trade experience.

management functions. Such requirement would be particularly important when an applicant seeks licensure utilizing education as part of the required qualifications, which is permitted by statute.

A reasonable and logical reading of the the rule in *pari materia* with the staute may be made, *i.e.*, that an applicant for certification as a standard inspector or plans examiner must be able to demonstrate five years' full-time experience, and that one year of such experience was "hands on" experience, in the field for which certification is sought. Even if this interpretation is somehow problematic, so long as it not clearly erroneous it should be upheld. *See Morris v. Division of Retirement*, 696 So. 2d 380, 384 (Fla. 1st DCA 1997).

The rationale set forth herein is more reasonable than the conclusion set forth by the Administrative Law Judge, which, if taken to its logical conclusion, would permit one who had demonstrated five years of experience in **any** construction trade, to apply for licensure in any standard inspector or plans examiner category, so long as the applicant could demonstrate a single year of "hands-on" experience in the licensure category sought. Such conclusion is inadequate to protect the health, safety and welfare of the public, and must be rejected.

10. Paragraph 30 of the Recommended Order is substituted with the following:

The preponderance of the evidence, based upon the interpretation of Section 468.609(2)(c)1, *Florida Statutes*, and Rule 61G19-6.0035(1)(c), *Florida Administrative Code*, as set forth herein, establishes that the Petitioner has not demonstrated the requisite experience to be certified as either a standard electrical or plumbing inspector.

MISCELLANEOUS EXCEPTIONS

11. Respondent's exceptions point out that there is a miscellaneous citation error on page 9, Paragraph 21, of the Recommended Order. Petitioner's counsel stipulated to this correction at the Board's consideration of the Final Order in this proceeding. In Paragraph 21 the Administrative Law Judge states in part that

> [b]y its nature, a de novo proceeding is one intended to formulate agency action, not one to review action taken earlier or preliminarily. Beverly Enterprises-Florida, Inc. v. Department of Health & Rehabilitative Services, 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

The correct citation this portion of Paragraph 21 should be to the case of *Beverly Enterprises-Florida, Inc. v. Department of Health & Rehabilitative Services,* 573 So. 2d 19, 23 (Fla. 1st DCA 1990).[5]

12. Accordingly, the last sentence of the conclusion of law contained in Paragraph 21 is modified to state:

> By its nature, a de novo proceeding is one intended to formulate agency action, not one to review action taken earlier or preliminarily. Beverly Enterprises-Florida, Inc. v. Department of Health & Rehabilitative Services, 573 So. 2d 19, 23 (Fla. 1st DCA 1990).

RECOMMENDATION

13. In light of the Board's adoption of Respondent's exceptions and the substitution of the conclusions of law, as set forth herein, the Board does not adopt the Administrative Law Judge's recommendation, and instead determines that the applications for licensure should be denied.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Petitioner's applications for standard certification as an electrical inspector and standard certification as a mechanical inspector are **DENIED**.

This Final Order shall take effect upon being filed with the Clerk of the Department of Business and Professional Regulation.

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5 The numerical citation 432 So. 2d 1359 refers to the case of *Capeletti Brothers v. State Department of General Services*, an older case which stands for the same proposition.

DONE AND ORDERED this 16th day of March, 2010.

BUILDING CODE ADMINISTRATORS
AND INSPECTORS BOARD

Robyn Barneau, Executive Director
for Chairperson, Building Code
Administrators and Inspectors Board

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via certified United States Mail to Jay Douglas Abel, 1785 Torrington Circle, Longwood, FL 32750, and Darren J. Elkind, Esquire, Paul & Elkind, P.A., 505 Deltona Boulevard, Suite 105, Deltona, Florida 32725, and by interoffice delivery to Timothy E. Dennis, Assistant Attorney General, Administrative Law Section, PL 01, The Capitol, Tallahassee, FL 32399-1050, and Barbara J. Staros, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, 32399-3060 this 16th day of March, 2010.

Brandon M. Nichols

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 A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATON, 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 THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.