

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANTRON POPE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-6007
)	
FLORIDA DEPARTMENT OF FINANCIAL)	
SERVICES,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on February 12, 2010, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Antron Pope, pro se
2548 Centergate Drive, No. 307
Miramar, Florida 33025

For Respondent: Nicholas Ryan Thornton, Esquire
Florida Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUES

The issues are: (1) whether Petitioner passed the Practical Examination for Firefighter Retention test; and (2) whether Petitioner's application for firefighter recertification was properly denied.

PRELIMINARY STATEMENT

On or about September 25, 2009, Respondent, Department of Financial Services ("Department"), Division of State Fire Marshal ("Division"), notified Petitioner, Antron Rondell Pope ("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.117349 expired on September 24, 2009.

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 November 2, 2009, for assignment of an Administrative Law Judge to conduct the hearing. On February 3, 2010, the Division stipulated that the re-test results for Petitioner contained a computer error and Petitioner had worn and activated his Self Contained Breathing Apparatus ("SCBA") pass device.

At hearing, Petitioner testified on his own behalf. Petitioner's Exhibit A was received into evidence. The Division presented the testimony of Henry Sheffield and Dennis Hackett. The Division's Exhibits A through D were received into evidence.

At the request of the Division, the undersigned took official recognition of Florida Administrative Code Rules 69A-37.0527 and 69A-37.056.

The proceedings were transcribed and the transcript of the final hearing was filed with the Division of Administrative Hearings on March 1, 2010. Respondent timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Petitioner did not file a Proposed Recommended Order.

All citations are to Florida Statutes (2009) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner completed his minimum standards training and took the standardized state test in 2004 and Respondent issued him a Firefighter Certificate that year.

2. Florida law requires Petitioner to be employed by a fire agency within a three year period after passing the state examination to keep his minimum standards credentials active.

3. Petitioner is a full-time employee at American Medical Response. Because Petitioner has not been active as a

firefighter during the past three years, Petitioner made application to the Department to take the Retention Examination. The practical portion consists of four sections or "evolutions" including the SCBA,¹ the hose pull, the ladder operation, and the fire ground skills section.

4. To pass the four practical evolutions, an applicant must achieve a score of at least 70 percent on each component.

5. Each evolution of the practical exam has certain elements or skills that are graded. The SCBA portion of the test contains 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.

6. The SCBA portion of the Retention Examination also has an established maximum time allotted for the examinee to complete a minimum of 70 percent of the skills. The time limitation is a mandatory requirement.

7. 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, the examinee has not met the mandatory time requirement and, thus, is not awarded any points for that part.

8. Petitioner took the initial Retention Examination in May 2009. Petitioner did not pass the SCBA and fire ground skills components of the practical portion of the initial exam.

9. On September 24, 2009, Petitioner took the Retention Examination re-test for the SCBA and fire skills components. Petitioner passed the fire skills component.

10. The maximum time allotted for completion of the SCBA part of the Retention Examination is two minutes. Petitioner's completion time on the September 2009 Retention Examination re-test was two minutes and 30 seconds.

11. Because Petitioner failed to complete a minimum of 70 percent of skills in the SCBA portion of the Retention Examination within the maximum time allotted, the Bureau properly awarded him zero points. It is an automatic failure if an examinee does not complete the exam in time. Therefore, Petitioner did not earn a passing score on the Retention Examination re-test.

12. As a result of Petitioner's failing to pass the Retention Examination, his Firefighter Certificate of compliance expired.

13. The Division employs field representatives to administer the Retention Examination to examinees in accordance with the applicable rules and procedures.

14. Dennis Hackett is and has been a field representative with the Bureau of Fire Standards and Training for six years. As a field representative, Mr. Hackett administers and scores

the minimum standards examination for firefighters, including the Retention Examination.

15. Mr. Hackett has administered well over a thousand SCBA tests. Mr. Hackett was the examiner who tested Petitioner on the September 24, 2009, for re-test of the SCBA portion of the practical exam. Mr. Hackett timed Petitioner at two minutes and 30 seconds.

17. Petitioner testified that before taking the retest, he practiced the SCBA test and had completed it within the time limit.

18. Petitioner first learned SCBA skills in 2004 at the Coral Springs Fire Academy. At the academy, Petitioner took a three month, 450-hour course of fundamental firefighter skills.

19. On or about September 16, 2009, Petitioner took a refresher course in Ocala, Florida. The course was two days and taught the SCBA skills in a manner different from how Petitioner had been taught at Coral Springs Fire Academy.

20. Petitioner testified that the refresher course wasn't fair because he didn't have enough time to learn the new method. He asserted that the two day course was too short to learn the new method and techniques to compensate for errors.

21. Petitioner admitted that a minor hiccup slowed him down while taking the re-test on September 24, 2009. Petitioner said, "It's not like I can't do it because I could do it, it's

just I went over the time limit. I didn't have ample enough time to learn the new way of doing it or to overcome any minor obstacles."

22. In a memorandum dated September 25, 2009, the Department formally advised Petitioner that he had failed the SCBA portion of the Minimum Standards Practical Retention Retest. The memorandum also informed Petitioner that, "Because you did not pass the retest, your Firefighter Certificate of compliance #117349, has expired as of 09/24/2009. It will be necessary for you to repeat the firefighter Minimum Recruit Training Program and submit a new application before any additional testing can be allowed."

23. 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.

24. As noted above, Petitioner did not pass the SCBA portion 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.

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

26. 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

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

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

29. 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 [D]ivision.

30. 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:

Retention of firefighter certification.--
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, in order to maintain her or his certification as a firefighter; however, this requirement does not apply to state-certified instructors, as determined by the division. The 3-year period begins on the date the certificate of compliance is issued or upon termination of service with an organized fire department.

31. 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.

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

(1) The examination for retention of certificate referenced in Section 633.352, F.S., shall be known as the retention examination. Being active as a volunteer firefighter with an organized fire department means the individual has been actively involved for a continuous period of time of not less than 6 months during the 3 year period since certified or the certification was last renewed, or since termination from a fire department. Verification of being active shall be evidenced by documentation from the chief or ranking person of the volunteer fire department.

* * *

(6) Any individual who does not obtain a passing score of 70% or more on the

retention examination will be permitted one opportunity to repeat the examination. The examination must be repeated within 6 months of the original examination or the opportunity is forfeited.

(7) Failure to pass the examination within the timeframes set forth above will result in the individual's having to successfully complete Firefighter training as defined in Rule 69A-37.055, F.A.C., before a new application and additional testing can occur.

33. 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.

34. 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).

35. To prevail, 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).

36. Petitioner failed to satisfy his burden. Petitioner exceeded the maximum time to complete the SCBA portion of the exam. Petitioner's assertion that the refresher course did not provide enough time to learn the new method and how to

compensate for errors did not demonstrate that the retest was in any way faulty or resulted in an incorrect completion time being recorded for Petitioner.

37. 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.

38. Thus, as found above, the Petitioner failed to establish a legal basis that he was entitled to a passing grade for his performance on the SCBA portion of the Retention Examination re-test.

RECOMMENDATION

Upon consideration of the Findings of Fact and the Conclusions of Law reached, 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 25th day of March, 2010, in
Tallahassee, Leon County, Florida.

June C. McKinney

JUNE C. McKINNEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2010.

ENDNOTE

^{1/} SCBA is a mandatory fundamental skill that has to be mastered
by each firefighter so he/she does not die.

COPIES FURNISHED:

Antron Pope
2548 Centergate Drive, No. 307
Miramar, Florida 33025

Nicholas Ryan Thornton, Esquire
Department of Financial Services
208 East Gaines Street
Tallahassee, Florida 32399

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Benjamin Diamond, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

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.