



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

OCT 12 2010

Docketed by 

IN THE MATTER OF:

CASE : 109050-10-FM

MELANIE EVANS

FINAL ORDER

THIS CAUSE came on before Alex Sink, as Chief Financial Officer, for consideration of and final agency action on the Recommended Order, submitted on July 29, 2010 by Administrative Law Judge (ALJ), Errol H. Powell, pursuant to a formal hearing conducted on May 3, 2010 by video teleconference in Lauderdale Lakes and Tallahassee, Florida, under the authority of and pursuant to Section 120.57(1), Florida Statutes. No exceptions were filed.

The ALJ failed to specify which, "more persuasive evidence" supported the Petitioner's contention that her Field Examiner, who has five years experience as a Field Examiner, started the time early during Petitioner's testing on the Ladder portion of the Firefighter Minimum Standards Practical Examination, and how this early start was the reason Petitioner's failed to meet the time requirement of the Ladder portion by a full thirty seconds.

The Recommended Order (a copy of which is attached as Exhibit A), the exhibits admitted into evidence, the record testimony, and applicable law were all considered during the promulgation of the Final Order.

CONCLUSION

Therefore, after a complete review of the record and being otherwise fully apprised in all material premises,

IT IS HEREBY ORDERED AND ADJUDGED that the Findings of Fact made by the ALJ are adopted as the Department's Findings of Fact, and that the Conclusions of Law reached by the ALJ, are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that Petitioner is granted a single re-test on the Ladder Operation section of the Firefighter Minimum Standards Practical Examination at the Florida State Fire College in Ocala, Florida.

DONE and ORDERED this 12th day of October, 2010.



John E. Hale
for BEN DIAMOND
General Counsel

COPIES FURNISHED TO:

Robert J. Slotkin, Esquire
600 South Andrews Avenue, Suite 600
Fort Lauderdale, Florida 33309
Attorney for Petitioner

Nic Thornton, Esquire
Department of Financial services
200 East Gaines Street
Tallahassee, Florida 32399
Attorneys for Department

Errol H. Powell
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee parkway
Tallahassee, Florida 32399-3060
Administrative Law Judge

Julie Jones, Agency Clerk
Department of Financial Services
200 East Gaines street
Tallahassee, Florida 32399-0390
Agency Clerk

RECEIVED
DEPT OF FINANCIAL SERVICES
DIV OF LEGAL SERVICES

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS 10 JUL 30 PM 3:50

MELANIE EVANS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-1127
)	
DEPARTMENT OF FINANCIAL)	
SERVICES,)	
)	
Respondent.)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 3, 2010, by video teleconference with connecting sites in Lauderdale Lakes and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert J. Slotkin, Esquire
600 South Andrews Avenue, Suite 600
Fort Lauderdale, Florida 33309

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

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner's application for certification should be approved as a result of



her successfully completing the Firefighter Minimum Standards MIN. STD. PRACTICAL RETEST retest.

PRELIMINARY STATEMENT

Melanie Evans took the Firefighter Minimum Standards MIN. STD. PRACTICAL RETEST retest. By letter dated January 29, 2010, she was notified by the Department of Financial Services (Department) that she had not successfully completed the Firefighter Minimum Standards MIN. STD. PRACTICAL RETEST retest, that she was only permitted to have one retake, and that, therefore, she would be required to repeat the Minimum Standards Course. Ms. Evans challenged the Department's decision and requested a hearing. On March 4, 2010, this matter was referred to the Division of Administrative Hearings.

~~At hearing, Ms. Evans represented herself.~~ She testified in her own behalf, presented the testimony of three witnesses, and entered two exhibits (Petitioner's Exhibits numbered 1 (a DVD) and 2) into evidence. The Department presented the testimony of two witnesses (both experts in firefighting and firefighter's training) and entered five exhibits (Respondent's Exhibits numbered A, B, C, D, and E) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed

on May 14, 2010. On the same date that the Transcript was filed, Ms. Evans filed her post-hearing submission. Before the due date of the parties' post-hearing submissions, Ms. Evans requested the withdrawal of her post-hearing submission, which was granted; and requested an extension of time to file a post-hearing submission, indicating that she was obtaining the services of counsel to prepare and file her post-hearing submission, which was also granted. Additionally, before the due date of the parties' post-hearing submissions, the Department timely filed an amended post-hearing submission. Ms. Evans timely filed her post-hearing submission within the extended time-period. The parties' post-hearing submissions were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. Evans is a candidate for certification as a firefighter in the State of Florida.
2. Ms. Evans attended the Coral Springs Fire Academy (Fire Academy), as a student, from July 11, 2009, through January 9, 2010. During her training at the Fire Academy, she was chosen as the squad leader.
3. A candidate for the certification examination must pass a written and practical examination, with a minimum score of 70 on both the written and practical parts. Pertinent hereto, a candidate must pass the Firefighter Minimum Standards Practical.

Examination (Practical Examination) in order to become certified as a firefighter. The Practical Examination consists of four components: the Self Contained Breathing Apparatus (SCBA); the Hose Operation (a/k/a Hose Evolution); the Ladder Operation (a/k/a Ladder Evolution); and the Fireground Skills.

4. The Practical Examination is replicated at the Fire Academy, and students at the Fire Academy must pass the four components. The Fire Academy adopted the State standards for passing the Practical Examination, except that at the Fire Academy the standards for the Ladder Evolution are more strict.

5. Also, pertinent hereto, for the Ladder Evolution, the State's passing score is 70, but the Fire Academy's passing score is 80; and the maximum time allowed by the State to successfully complete the Ladder Evolution is two minutes and 20 seconds, but the Fire Academy's maximum time is two minutes and 10 seconds.

6. Additionally, pertinent hereto, for the Ladder Evolution, the State's established testing protocol is to permit a candidate to perform a safety inspection of the ladder prior to beginning the timing of the Ladder Evolution, and the timing begins after the candidate touches the ladder again. Consequently, State testing protocol dictates that, during the safety inspection, no timing occurs, but, when the candidate

touches the ladder again, the timing begins. The Fire Academy uses this same protocol at testing for the Ladder Evolution.

7. The time limit placed on the Ladder Evolution is designed to replicate actual fire fighting conditions, producing a certain degree of stress upon candidates.

8. At the Fire Academy, Ms. Evans successfully completed the Ladder Evolution on November 11, 2009, receiving a score of 80 and a time of two minutes and three seconds. Again, on January 5, 2010, she successfully completed the Ladder Evolution with a score of 100 and a time of one minute and 53 seconds.

9. Ms. Evans graduated from the Fire Academy and was eligible to sit for the certification examination.

10. On January 10, 2010, Ms. Evans took the Ladder Evolution part of the State Practical Examination in Coral Springs, Florida. A wind gust caused her to lose control of the ladder. She received a score of zero, due to losing control, and, therefore, did not successfully complete the Ladder Evolution.

11. Ms. Evans took a re-test of the Ladder Evolution part of the State Practical Examination on January 28, 2010, in Ocala, Florida. She completed the Ladder Evolution in two minutes and 50 seconds, which was beyond the maximum allowed time of two minutes and 20 seconds. She received a score of

zero and, therefore, failed to successfully complete the Ladder Evolution on the re-test.

12. Ms. Evans contends that, on January 28, 2010, the State's Field Representative began the time during her safety inspection of the ladder. The more persuasive evidence supports this contention. As a result, a finding of fact is made that, on January 28, 2010, the State's Field Representative began the timing of Ms. Evans' Ladder Evolution during her safety inspection, which was contrary to the State's testing protocol.

13. The evidence fails to demonstrate what Ms. Evans' time on the Ladder Evolution would have been had the timing begun in compliance with the State's established testing protocol.

CONCLUSIONS OF LAW

14. 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 (2010).

15. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2010).

16. The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Ms. Evans has the ultimate burden of proof

to show by a preponderance of the evidence that she successfully completed the Firefighter Minimum Standards MIN. STD. PRACTICAL RETEST retest, and that, therefore, her application for certification should be approved. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); J. W. C. Company, Inc., supra.; § 120.57(1)(j), Fla. Stat. (2010).

17. Section 633.35, Florida Statutes, provides in pertinent part:

(1) The division [Division of State Fire Marshal of the Department] 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 [Division of State Fire Marshal of the Department] 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 [Division of State Fire Marshal of the Department], and who possesses the qualifications for employment in s. 633.34, except s. 633.34(5). . . .
(emphasis added)

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

To be recognized for certification as a firefighter by the Bureau, training shall be obtained under the conditions specified herein. Satisfactory completion of the

prescribed training, instruction, and standards in accordance with these specifications shall be certified by a designated instructor or member of the Bureau staff.

* * *

(6) Each subject area within the Minimum Standards Course will be tested to validate the acquisition and application of relevant knowledge and skill. All subject area and final tests, both written and practical, given during the Minimum Standards Course shall require maintenance of a percentage score of not less than 70% on each subject listed in the Minimum Standards Course. 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%. Students not in compliance with the minimum score requirement shall be dropped from the course.

* * *

(b) State examinations, consisting of a written and a practical part, shall be administered by a Field Representative of the Bureau, or designee, and shall encompass all components of the Minimum Standards Course. The applicant must attain a score of 70 percent on both the written and practical examinations to receive a certificate of compliance.

19. The burden of proof is on Ms. Evans to show by a preponderance of evidence that the scoring of the Ladder Evolution of the Practical Examination on the re-test was arbitrary or capricious, or that the scoring process was devoid of logic and reason. Harac v. Department of Professional Regulation, Board of Architecture, 484 So. 2d 1333 (Fla. 3d DCA

1986); State ex rel. Glasser 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).

20. Ms. Evans has met her burden of proof. The evidence demonstrates that the Field Representative on the re-test failed to follow the established State protocol for scoring the Ladder Evolution. The Field Representative started timing the Ladder Evolution during Ms. Evans' safety inspection, which was contrary to the State's protocol. Hence, the evidence demonstrates that the scoring of Ms. Evans' Ladder Evolution was arbitrary or capricious.

21. The evidence, however, fails to demonstrate what Ms. Evans' time on the Ladder Evolution would have been had the timing began in compliance with the State's established testing protocol. Consequently, the evidence fails to demonstrate that, had the Field Representative followed the State's protocol, Ms. Evans would have successfully completed the Ladder Evolution within the allowed time.

22. Florida Administrative Code Rule 69A-37.056(6) provides, among other things, for a one-time re-retest. However, because the scoring of Ms. Evans' Ladder Evolution was arbitrary or capricious, she should receive another re-test.

23. Further, Florida Administrative Code Rule 69A-37.056(6) requires, among other things, for the Practical

Examination to be administered by a Field Representative or designee. As a result, Ms. Evans should be again re-tested on the Ladder Evolution component of the Practical Examination by a Field Representative or designee.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services enter a final order directing the re-testing of Melanie Evans on the Ladder Operation (a/k/a Ladder Evolution) of the Firefighter Minimum Standards Practical Examination.

DONE AND ENTERED this 29th day of July, 2010, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
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 29th day of July, 2010.

COPIES FURNISHED:

Robert J. Slotkin, Esquire
600 South Andrews Avenue, Suite 600
Fort Lauderdale, Florida 33309

Nic Thornton, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

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

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

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.

