

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID A. KENNEDY,)
)
 Petitioner,)
)
 vs.) Case No. 11-5287
)
 DEPARTMENT OF)
 FINANCIAL SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on December 14, 2011, via video teleconference with sites in Daytona Beach and Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David A. Kennedy
2615 Auburn Avenue
New Smyrna Beach, Florida 32168

For Respondent: Linje E. Rivers, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Respondent properly denied Petitioner's application for certification as a firesafety inspector.

PRELIMINARY STATEMENT

In a letter dated October 11, 2011, Respondent, Department of Financial Services (Department) denied Petitioner David A. Kennedy's application for certification as a firesafety inspector because he failed the both the initial and retake examinations of the State Firesafety Inspector Examination. Petitioner disputed the Department's determination and filed a timely request for a formal administrative proceeding.

Respondent referred this case to the Division of Administrative Hearings on or about October 13, 2011. A Notice of Hearing dated October 26, 2011, was issued scheduling the hearing for November 28, 2011.

On November 18, 2011, Respondent filed an unopposed Motion to Continue. The motion was granted and the hearing was rescheduled for December 14, 2011. The case was heard as scheduled.

At hearing, Petitioner testified on his own behalf and presented the testimony of Marshall Shoop and Martin Roberts. Petitioner's Exhibit A was admitted into evidence. Respondent presented the testimony of one witness, Carl Thompson. Respondent's Exhibits A through D were admitted into evidence.

A one-volume Transcript of the proceeding was filed on January 4, 2012. Petitioner timely filed a post-hearing submission and Respondent timely filed a Proposed Recommended

Order, which have been considered in the preparation of this Recommended Order.^{1/}

All citations are to Florida Statutes (2011) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is an applicant for certification as a firesafety inspector.

2. In order to be certified, Petitioner was required to successfully complete the Firesafety Inspector Training Course and pass a firesafety inspector certification examination.

3. Petitioner successfully completed his required coursework at the Florida State Fire College and Daytona State College.

4. To pass the written examination, an applicant must achieve a score of at least 70 percent.

5. Petitioner took the exam the first time and did not receive a passing score. After a month or so, Petitioner took a "retest." He received a score of 68 on the retest, which is below the minimum passing score of 70.

6. By letter dated October 11, 2011, Respondent notified Petitioner that he did not receive a passing grade on the retest. The notice also informed Petitioner that because he failed both the initial and retake examinations, it would be necessary for him to repeat the Inspection Training Program

before any additional testing can be allowed. The notice further informed Petitioner that if he enrolled in another training program, he would have to submit a new application.

7. Petitioner submitted a letter which was received by the Department on September 27, 2011, in which he raised concerns about the quality of instruction he received at Florida State Fire College. Petitioner asserted that in two classes he took, the instructors had not taught the class before. He also asserted that the books used for class were not always the books used for testing, and that he believed that some of the state inspector test questions were irrelevant to how or what he would need to know in performing an actual inspection. Attached to this letter were five questions which had been marked as being answered incorrectly on the examination.

8. Petitioner's letter and attachments were treated as a request for administrative hearing, which was forwarded to the Division of Administrative Hearings, which resulted in this proceeding.

9. Marshall Shoop took classes with Petitioner at the Florida State Fire College. It was also Mr. Shoop's understanding that at least one instructor had never taught the class before.

10. Karl Thompson is the Standard Supervisor for the Bureau of Fire Standards and Training. At hearing, Mr. Thompson reviewed each question offered by Petitioner and the answer Petitioner thought to be correct. Mr. Thompson concluded that Petitioner answered each of the five questions incorrectly.

11. Mr. Thompson explained that the firesafety test is a secure document and, pursuant to a contract with a third party, persons who take the test and later review their incorrect answers are not allowed to write down the questions or copy anything from the test. The test must remain secure so that it is not compromised. The test questions and answers are not in evidence.

12. Petitioner has been shadowing a part-time fire inspector for the City of Flagler Beach. Martin Roberts is the Fire Chief for the City of Flagler Beach. Chief Roberts would feel comfortable with Petitioner taking on the role of fire inspector despite Petitioner's grades on the fire safety inspector certification examination.

13. While attending Daytona State College, Petitioner earned an "A" in a building construction course and a "B+" in a course in "construction codes and materials rating."

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1).

15. Petitioner is an applicant for certification as a firesafety inspector in the State of Florida. Accordingly, as the party asserting the affirmative of an issue before this administrative tribunal, Petitioner has the burden of proof. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner must establish facts by a preponderance of the evidence that the Department improperly denied his application for certification as a firesafety inspector. Dep't of Banking & Fin. v. Osborne Stern Co., 670 So. 2d 932 (Fla. 1996); § 120.57 (1)(j), Fla. Stat.

16. Section 633.081 reads in pertinent part as follows:

633.081 Inspection of buildings and equipment; orders; firesafety inspection training requirements; certification; disciplinary action. --

* * *

(2) Except as provided in s. 633.082(2), every firesafety inspection conducted pursuant to state or local firesafety requirements shall be by a person certified as having met the inspection training requirements set by the State Fire marshal. Such person shall:

* * *

(f) Have satisfactorily completed the firesafety inspector certification examination as prescribed by the department.

. . .

17. Florida Administrative Code Rule 69A-39.007 reads in pertinent part as follows:

Procedures for Certification Examination.

In order for an individual to receive Firesafety Inspector Certification or Special State Firesafety Inspector Certification from the Division, a score of 70 must be achieved on a certification examination administered by the Division. To be eligible for the examination, the following procedures must be adhered to:

* * *

(4) Upon completion of the certification examination, the applicant will be notified in writing of the result. A minimum score of 70 percent of the maximum total score is required for passing.

(a) If the applicant passes the examination, the certificate will be issued and mailed directly to the address on the application form.

(b) If the applicant fails the examination he or she must contact the Bureau of Fire Standards and Training and request to be scheduled for the next available examination. If after retaking the examination the applicant has not achieved the minimum passing score, he or she will be required to retake the entire training program before another examination will be administered.

18. In this case, Petitioner seeks to receive points or credit for questions which he believes should have been marked as correct. That is beyond any remedy which I have the authority to grant.

19. Alternatively, Petitioner must prove that the exam was graded incorrectly. Petitioner is at a huge disadvantage in that he was not permitted, for good reasons which preserve the security of the test, to copy or record the test itself. The evidence is simply insufficient to prove that his test was graded inaccurately. And, while he raises interesting concerns as to whether the courses adequately prepare the applicants for the test, Petitioner has not met his burden of proving that he should be entitled to another retest without retaking the courses as required for in Florida Administrative Code Rule 69A-39.007(4)(b). Administrative law judges presiding in section 120.57(1) proceedings "will deem controlling duly promulgated administrative rules never challenged under section 120.56." Clemons v. State Risk Mgmt. Trust Fund, 870 So. 2d 881, 884 (Fla. 1st DCA 2004) (Benton, J. concurring).

RECOMMENDATION

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

RECOMMENDED:

That the Department enter a final order denying Petitioner's application for certification as a Firesafety Inspector, and permitting Petitioner to repeat the required coursework before retaking the Firesafety Inspector certification examination.

DONE AND ENTERED this 16th day of February, 2012, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2012.

ENDNOTE

^{1/} Petitioner attached portions of documents that are not in evidence. These are being treated as late-filed exhibits and have not been considered in the preparation of this Recommended Order. See § 120.57(1)(f), Fla. Stat.

COPIES FURNISHED:

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Department of Financial Services
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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.