

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTIE BEVERLY,)
)
 Petitioner,)
)
 vs.) Case No. 12-0006
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, DIVISION OF STATE)
 FIRE MARSHAL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 12, 2012, via video teleconference with sites in Sarasota and Tallahassee, Florida, before duly-designated Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Christie Beverly, pro se
4207 Donnington Drive
Parrish, Florida 34219

For Respondent: Linje E. Rivers, Esquire
Department of Financial Services
200 East Gaines Street, 6th Floor
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues are whether Petitioner, Christie Beverly, should be certified as a firefighter or, in the alternative, whether

Petitioner should be allowed to re-take the Firefighter Minimum Standards Practical Examination.

PRELIMINARY STATEMENT

In a letter dated October 18, 2011, Respondent, Department of Financial Services, Division of State Fire Marshal (Department), denied Petitioner's application to be certified as a firefighter because she failed to receive a passing score on the "Firefighter Minimum Standards Practical Retest." Petitioner disputed the Department's determination and filed a timely request for a formal administrative proceeding.^{1/}

On January 3, 2012, the Department referred this case to the Division. On January 19, a Notice of Hearing was issued, scheduling the hearing for February 23. An Amended Notice of Hearing by Video Teleconference was issued on February 17, re-scheduling the case to March 12. The undersigned was assigned the case, and it proceeded to hearing on March 12, 2012.

At hearing, Petitioner testified on her own behalf and presented the testimony of Eric J. Steves, Jeff A. Durling, and Larry W. Schwartz, Jr. Petitioner offered her composite Exhibit 1, which was admitted into evidence. The Department presented the testimony of Dennis Hackett and Thomas M. Johnson and offered Exhibits A through D, all of which were admitted into evidence.

The one-volume Transcript was filed on March 26, 2012. The Department requested to file its proposed recommended order (PRO) 14 days from the filing of the Transcript. The request was granted, and both parties timely filed their PROs. Each PRO has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a candidate for certification as a firefighter in the State of Florida.
2. The Department is the state agency responsible for testing all candidates for certification as a firefighter, for conducting such tests, and for issuing a certification upon the successful completion of the minimum requirements by a candidate. One such examination administered by the Department is the Firefighter Minimum Standards Written and Practical Examination (firefighter examination).
3. Petitioner successfully completed her firefighting training at the Manatee Technical Institute (MTI).
4. Jeff Durling is an adjunct instructor at MTI, whose main purpose is to get candidates prepared for the state firefighter examination. During his particular MTI course, Mr. Durling's students were taught the three main types of hose pulls: flat, triple layer, and minuteman.
5. Larry W. Schwartz, Jr., is the fire science coordinator of MTI. He oversees MTI's operations and is directly involved in

its curriculum. Although Mr. Schwartz is familiar with the double minuteman hose pull, MTI has not taught it in the past because that particular pull has not been tested.

6. The firefighter examination has a written portion, as well as four practical evolutions or components (self-contained breathing apparatus, hose operation, ladder operation, and fireground skills).^{2/} In order to be certified, a candidate has to achieve a score of at least 70 percent on each component.

7. On Tuesday, June 14, 2011, at the MTI campus, Petitioner successfully completed all portions of the firefighter examination, except the hose component of the practical examination. Petitioner conceded that she exceeded the maximum time allowed to complete the hose component by eight seconds.

8. At some point, Petitioner was notified that she did not receive a passing score on the hose component in the June 2011 firefighter practical examination. Petitioner was advised she could take the Firefighter Minimum Standards Practical Retest (retest) within six months of the June 2011 firefighter examination. Petitioner was required to successfully complete the retest or she would be required to re-take the firefighter course before she could take the test again.

9. On Friday, September 23, 2011, Petitioner presented for her retest at the Florida State Fire College (Fire College) in Ocala, Florida. Petitioner arrived by 7:30 a.m. for her retest.

There were over 40^{3/} candidates present to take either an original firefighter practical test or a retest. The retest course was not ready at 7:30 a.m.

10. On September 23, 2011, Eric Steves was also a retest candidate at the Fire College. Mr. Steves observed that the retest course was not set up when he arrived at 7:30 a.m. Further, he observed that the retest course was slightly different than the original practical test course in June 2011. There was no walk-through of the retest course prior to starting it, because the retest course was set up after the other candidates took their test and bad weather was approaching. Although Mr. Steves did not pass his retest, his testimony is credible as he has no vested interest in the outcome of this proceeding.

11. Dennis Hackett is the standards supervisor with the Department's Bureau of Fire Standards and Training (Bureau). Mr. Hackett has administered and scored the minimum standard firefighter examination for candidates, including the retest examination. The majority of the candidates were given another practical test, not the retest administered to Petitioner. Mr. Hackett confirmed that the retest course was not ready at 7:30 a.m. on September 23, 2011. The Fire College was capable and did have the equipment to set up two different hose load courses. It is apparent that the Fire College adheres to a

strict protocol in the administration of the firefighter testing; yet, it was not adhered to on September 23, 2011.

12. There was a change to the practical testing component of the firefighter examination being implemented. The majority of the candidates on September 23, 2011, took a different practical test than the retest administered to Petitioner and Mr. Steves.

13. Thomas M. Johnson has been a field representative for the Department's Bureau for seven years. As a field representative, Mr. Johnson has administered and scored numerous firefighting examinations and retest examinations.

14. Mr. Johnson testified that Petitioner's retest course "would be set up when we were done with the rest of the students." He further testified that the retest course "would be set up when we were done with the other students who were taking the new evolutions." Although Mr. Johnson testified that Petitioner's retest was administered in a uniform manner, the credible evidence supports the position that the retest was not conducted following the strict protocol of the Fire College. For Petitioner's retest, the course barrels were held in place by field instructors. Petitioner questioned Mr. Johnson regarding their participation, asking: "Is that standard practice?" Mr. Johnson's response of "It was that day," lends credence that it was not standard practice or part of the uniform retest

protocol. Further, Mr. Johnson's testimony that Petitioner was "in a hurry" to complete her retest is illogical. Petitioner waited for 40 or more candidates to test before her, and then she had to wait for the retest course to be assembled before she could attempt the course.

15. There was a great deal of discussion about the type of hose pull required during the retest examination. There was no clear definition of a minuteman hose load or a double minuteman hose load.^{4/} Whether or not the hose pull was a minuteman or a double minuteman is irrelevant as the retest course was not prepared or set up by 7:30 a.m. as required by the Department's own rule.

16. Mr. Johnson scored Petitioner on the retest examination. The score sheet used on the practical retest examination portion reflected three types of Hose Advancements: Flat Load, Triple Layer Load, and Minuteman Load. (An option to pull a double minuteman load is not printed anywhere on the score sheet.) Further review of the Department's score sheet reveals that someone wrote "4 LR"^{5/} out beyond the phrase: "Hose Advancement (1¾") ~ ~ Maximum Time 1:25." This phrase, "4 LR," is purported to mean that Mr. Johnson:

asked her [Petitioner] to pull the left-side pre-connect, knock down the cone on the left first and then the cone on the right. And the reason it's above the minuteman is

because that's the load she pulled, but it was not a minuteman.

This "4 LR" phrase is well above the blank line found beside the words "Minuteman Load." The undersigned does not accept the "4 LR" phrase as an indication that the "double minuteman" hose pull was the retest examination option. Further, the score sheet also has blanks to be filled in by the scorer following the phrase: "Your target sequence is RT/Left ___ or Left/RT ___." However, the scorer did not fill in either blank. At the bottom of the page, there is an empty blank following "Candidate #," making it uncertain to whom this score sheet applies. On the score sheet, there is a written time of "2:39," the word "Fail" is circled, and there is a zero beside the "Score." The score sheet appears to be incomplete at best.

17. Mr. Johnson was asked to confirm whether or not a double minuteman load was listed on the score sheet, and he confirmed that the phrase "double minuteman" load was not on the score sheet. The words "double minuteman" do not appear on the score sheet, nor is the type of hose load identified. It is impossible to determine what hose load Petitioner was directed to pull during her retest.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2011).^{6/}

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

20. Petitioner is a candidate for certification as a firefighter 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. Fla. Dep't. of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981) (party asserting the affirmative of issue in administrative hearing has burden of proof). Petitioner must prove that the Department improperly denied her application for certification as a firefighter. Her proof must establish facts by a preponderance of the evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); § 120.57(1)(j), Fla. Stat.

21. Section 633.35 provides the statutory framework for firefighting training and certification. In pertinent part it reads:

(1) The division 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. Nothing herein shall require a public employer to pay the cost of such training.

(2) The division 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. . . .

* * *

(4) A person who fails an examination given under this section may retake the examination once within 6 months after the original examination date. An applicant who does not retake the examination within such time must take the Minimum Standards Course, pursuant to subsection (1), before being reexamined. The division may establish reasonable preregistration deadlines for such reexaminations.

22. The Department has adopted rules governing the testing of firefighters. Florida Administrative Code Rule 69A-37.062 establishes standards to be followed in the testing or retesting of applicants. The rule provides, in pertinent part:

(2) Preparation for Examination.

(a)1. Training center staff shall have the apparatus and all equipment necessary for testing ready not later than 0730 hours on the morning of the state examination.

* * *

(b) Training center staff shall have the participants present and prepared for testing not later than 0730 hours on the morning of the state examination.

(c) In the event of extreme or hazardous weather conditions that have the potential to compromise the effectiveness of the examination or expose the participants to injury, the examiner shall have full authority to postpone the examination to another date to be determined by the Bureau.

(3) Examination Sequence.

(a)1. Each participant shall be prepared to take any segment of the examination at any time during any day set for testing.

2. The weather and number of participants will be considerations that can alter the examination sequence.

(b) The examiner is permitted to administer the examination in any sequence the examiner deems necessary.

* * *

(6) Makeup Examinations.

(a) Retests of written examinations are given quarterly at Regional Testing sites.

(b) Retests of practical examinations or retests of written and practical examinations are given quarterly at the campus of the Florida State Fire College.

(c) The retest of the Minimum Standards State Certification Examination must be taken within 6 months of the initial examination date. (emphasis added).

23. The Department has also adopted rules governing the training and certification of firefighters. Rule 69A-37.056 sets forth the testing parameters for firefighter candidates.^{7/}

Subsection (6) of that rule states in pertinent part:

(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.

(c) The state practical examination will be administered at the local training facility. Whenever possible, the Bureau will schedule the state examination date at the convenience of the training facility. . . .

24. Petitioner must prove that the retest was arbitrary, capricious, or not set up in accordance with the Department's rules. Petitioner did so. The testimony from Petitioner, Mr. Steves, and the Department's own witnesses prove, by a preponderance of the evidence, that the retest course was not set up in accordance with the Department's rules, even though the Department had the ability and equipment to do so. Thus, the

course was not ready at 0730 hours as required by the Department's own rule.

25. There is no language in the Department's rule that allows a candidate to waive a Department rule. Further, the overall conditions for the retest appear to be outside the standard protocol for a retest to be adequately conducted. Hence, Petitioner was deprived of taking her retest in accordance with the Department's rule.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of State Fire Marshal, enter a final order granting Petitioner's request to retest on the hose component of the practical portion of the firefighter examination and that Petitioner should be tested as if she were taking the retest within the six-month window for the retest.

DONE AND ENTERED this 30th day of April, 2012, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2012.

ENDNOTES

- ^{1/} Petitioner testified that she got the Department's notice on November 28, 2011.
- ^{2/} There are three timed components to the practical examination. However, the practical examination results score sheet has four specific components that are graded.
- ^{3/} No one disputed that there were over 40 people present to take either the test or retest on September 23, 2011.
- ^{4/} There is no definition of a minuteman or double minuteman hose load in either chapter 633, Florida Statutes (2011), or Florida Administrative Code Chapter 69A.
- ^{5/} Mr. Johnson testified about the score sheet by pointing and stating "up at the top of the minute man load, there is an arrow with a slash, and then LR."
- ^{6/} All references to Florida Statutes are to the 2011 version, unless otherwise indicated.
- ^{7/} The Department cited rule 69A-37.0527(7) for the premise that if a candidate for certification fails to complete the examination within the applicable time limits, the candidate must successfully complete the firefighter training course again, before applying. However, this specific rule (69A-37.0527) details the retention of a certification and is not applicable to the case at bar. This case deals with the first-time certification of a candidate.

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.