

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CATALINA WILLIAMS,

Petitioner,

vs.

Case No. 13-1643

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF STATE FIRE  
MARSHAL,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on October 17, 2013, in St. Augustine, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Department of Financial Services, Division of State Fire Marshal (the Department), properly administered and graded the Firefighter Minimum Standards practical examination taken by Petitioner, Catalina Williams (hereinafter Williams).

PRELIMINARY STATEMENT

By letter dated April 4, 2013, Williams was notified by the Department that she had not passed the firefighter minimum standards examination (hereinafter referred to as the State certification exam) she had taken on February 7, 2013. Williams timely filed a request for formal administrative hearing to contest the Department's decision. Subsequently, Williams filed a rule challenge petition, claiming that the process utilized to grade her firefighter exam was in fact an unadopted rule. The parties did not agree to consolidation of the rule challenge (DOAH Case No. 13-3689RU) with the instant proceeding and the Administrative Law Judge allowed the cases to remain separate. A formal hearing in the above-styled case was held at the date and time set forth above. The parties thereafter agreed to have Case No. 13-3689RU placed in abeyance pending entry of a Recommended Order in this case.

At the final hearing in this matter, Williams presented the testimony of five witnesses: Richard Rochford, safety programs

manager for the Department; Fred Lanier, retired fire chief; Thomas Johnson (via deposition transcript excerpts); Ken Harper (via deposition transcript excerpts); and Catalina Williams. Petitioner's Exhibits 1, 5, 8, and 9 were admitted into evidence. The Department called Dennis Hackett, Richard Rochford, and Catalina Williams. One exhibit was accepted into evidence from the Department.

The parties advised that a transcript of the final hearing would be ordered. By rule the parties have ten days from the date the transcript is filed to file proposed recommended orders (PROs). The transcript was filed at DOAH on November 4, 2013, making the PROs due on November 14, 2013. Each of the parties filed its PRO and each was duly considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department is the state agency charged with the responsibility for testing, monitoring and certifying firefighters. The Department conducts certification examinations at the Florida State Fire College in Ocala, Florida, and some thirty-plus other sites around the State. Those sites are located on college campuses, training facilities, fire stations, and other locales. The test at issue in this proceeding was administered at the Fire College site.

2. Catalina Williams is an Hispanic woman who desires to become a certified firefighter. Her interest in firefighting began when she worked as a photographer covering fire-related events for a magazine and thought it would be exciting and interesting to be on "the front line." Williams has also served as a caregiver, giving her experience in providing assistance to others, and is a certified lifeguard. In order to accomplish her goal of becoming a firefighter, Williams entered into schooling to learn the trade.

3. Williams first attended First Coast Technological College (First Coast) in 2009. She completed the Firefighter Minimum Basic Standards Course (Firefighter I) that year. In 2010, she enrolled at the school for the summer semester to begin training in the advanced (Firefighter II) curriculum. That school term was shorter and more compressed than a regular semester. Despite her best efforts, Williams did not successfully complete the Firefighter II course. Rochford was one of her instructors during her first unsuccessful enrollment at First Coast.

4. In 2012, Williams entered First Coast again. At that time, she was working as a paid volunteer firefighter for Volusia County. The county paid her tuition costs at First Coast when Williams entered the school for the Firefighter II course work. The second time, Williams was able to successfully complete the

course material and pass her final examination. Passing the final examination was a prerequisite to taking the State certification exam.

5. While attending First Coast, Williams took hundreds of practice exams, especially on the practical portions of the tests. She took exams as part of her classes, took exams voluntarily with someone timing her, and took exams just to practice.

#### The State Certification Exam

6. There are four primary segments of the State certification exam:

- A written examination of 100 multiple choice questions;
- A hose evolution involving a self-contained breathing apparatus (SCBA) and personal protection equipment (PPE);
- A ladder/search and rescue evolution; and
- A skills portion, involving ropes and knots, two fire ground skills, and a short test on the emergency response guide (ERG).

7. The ladder/search and rescue evolution is a practical portion of the exam; it is the singular portion of the test at issue in this proceeding and will be referred to as the ladder evolution. The ladder evolution portion consists of the following tasks and assignments: The candidate inspects ladders hanging on a simulated fire truck. He or she then takes a 24-foot ladder from the truck and extends it against the wall of

a building up to the second floor. Once that ladder is properly hoisted, the candidate confirms that a ladder guard (another candidate acting as a spotter) has control of the ladder. The candidate then initiates radio contact and then walks quickly around the building to another ladder that is already in place. He/she must ascend the ladder to the second floor, test the floor inside the building to make sure it is safe, and enter the building through a window. Upon entry the candidate must find a "victim" (a 125-pound mannequin) on the lower floor, secure the victim in an approved manner, and then exit the building with the mannequin. Upon exit, the candidate must safely deposit the victim on the ground and provide notice by way of radio contact that he/she and the victim are outside the building. The radio transmission is something along the lines of: "PAR 2 [Personnel Accountability Reporting, two people]. Firefighter No. "X" and victim have safely exited the building." The entire ladder evolution sequence must be done within four minutes and 30 seconds although, as will be discussed below, there are differences of opinion as to when the timed portion of the evolution ends.

8. It is necessary for candidates taking the test to pass each of the four sections. Failure of any one portion would result in failure overall. Should a candidate fail the examination, they must reschedule their retest within six months

of the failed test. All retest examinations are administered at the Fire College.

9. On test day, there may be dozens of applicants taking the test at the same time. The procedure dictates that candidates arrive at the test facility in time to process paperwork prior to the 7:30 a.m., test commencement. Candidates must first provide identification to an instructor and be assigned a candidate number. They then fill out paperwork, including a waiver should any injuries occur during testing. Candidates will have their gear inspected to make sure it is in compliance with State standards.

10. Prior to commencement of testing, one of the instructors or examiners will read a document called the "Minimum Standards Pre-Exam Orientation" (the Orientation) to the candidates. During the reading of the Orientation, which may take 45 minutes to an hour or more, candidates are allowed and encouraged to ask questions. Unless a question is asked, the Orientation will be read verbatim, word for word, with no additional comment. After the Orientation is read, candidates are walked through the facility so they can familiarize themselves with the test site. Once the test commences, candidates are not allowed to ask any questions.

### Williams' Test Experience

11. In October 2012, after successful completion of the Firefighter II course at First Coast, Williams applied for and was approved to take the State certification examination. The exam was conducted at First Coast on the school's training grounds. The test was conducted by certified employees of the Department. Williams did not pass the examination. One of her shortcomings in that test was a failure in the ladder evolution. Her timed completion of that evolution was in excess of the required time of four minutes and 30 seconds.

12. Williams had been confident she would pass the certification exam because it was similar to the final exam she had passed at First Coast during her schooling. She believes she failed because she was too nervous when she took the exam when it was administered as the actual State certification test.

13. After failing the exam, Williams then applied for a retest which would be held at the Fire College on February 7, 2013. That re-test is the focus of the instant proceeding.

14. On the morning of the retest, Williams arrived well in advance of the 7:30 a.m., start time. As she inspected her gear in anticipation of the start of the exam, she found that the SCBA regulator she was supposed to use did not properly fit the face mask on her helmet. There were extra regulators behind one of the tables being used to process applicants for that day's test.



Examiner Harper was sitting at that table and was providing paperwork to applicants who had already signed in at the first processing station. Williams went to Harper's table and was allowed to obtain a new regulator. Inasmuch as she was already at Harper's table getting her replacement regulator before going to the first processing station, Williams went ahead and filled out the paperwork Harper was providing to candidates at his processing station. That is, she filled out the paperwork before actually checking in at the first station.

15. Williams then went to the first check-in table which was manned by Examiner Rochford. She provided her identification to Rochford and was assigned candidate number 37. Rochford then told Williams to go to Harper's table to fill out the paperwork at that station. Williams told Rochford she had already done so and walked away. (At that point, Williams remembers Rochford yelling at her, asking whether she understood his order and telling her in a harsh manner to obey him. Rochford does not remember talking to Williams at all. Neither version of this alleged confrontation is persuasive. Inasmuch as the conversation was not verified one way or another by a third person -- although there were probably a number of other people around, it will not be considered to have happened for purposes of this Recommended Order.)

16. The Orientation was then read to the candidates. The various portions of the test were addressed in the Orientation. The ladder evolution contained the following language, which Rochford read verbatim to the candidates without anything added or deleted: "Time starts when you touch anything. Time ends when the candidate and victim fully exit the building." There is no evidence that any of the candidates asked a question concerning this part of the Orientation.

17. Rochford's timing policy regarding the ladder evolution differs from what he read to the candidates. He takes the position that time stops when the candidate exits the building with the victim, places the victim on the ground in an appropriate manner, and issues a verbal statement into the radio indicating that the firefighter and victim are out of the building. By his own admission, Rochford could not speak to how other examiners handle this timing issue. Harper, who was Williams' assigned examiner on the test, also seemed to require candidates to lay the victim down and make radio contact before stopping the time. Neither Rochford nor Harper satisfactorily explained why their timing policy was different from what was stated in the orientation.

18. The testimony concerning the correct way of timing the evolution was, at best, confusing. The following statements from

the record provide contradictory and disparate opinions by various examiners:

Rochford: "As soon as they lay the mannequin on the ground [and] announce they have exited the building . . . the time stops." Tr. p. 45, lines 9-18

"The mannequin's feet have got to be outside the plane from the door opening. That's when the time stops." Id. Lines 23-25.

"Until they talk on the radio is - - when they finish talking on the radio is when the time would stop." Tr. p. 255, lines 7-9.

Johnson: "At that point, they'll use one of the prescribed methods for rescue to take the victim and themselves past the threshold out to the fresh air. At that point, the time stops." Tr. p. 111, lines 11-14

"I read [the Orientation] word for word." Tr. p. 114, line 23

"On the ladder rescue evolution . . . we [examiners] all stop when they pass the threshold."

Harper: "Then they're told to lay the victim down, make radio contact you're out of the building. Time stops." Tr. p. 138, lines 7-8

"After they make radio contact." Tr. p. 147, line 3

"[Orientation] says time starts when they touch anything, time ends when the candidate and the victim fully exit the building." Tr. P. 148, lines 15-17

Hackett: "It stops when the victim comes out of the building." Tr. p. 222, lines 7-8

[If the victim was thrown out of the building by the firefighter] "I think they would stop the clock." Id., lines 9-11

"It is part of the timed part that they have to designate that they're out of the building safely and lay down the victim." Tr. pp. 222, line 24 through 223, line 1

Question to Hackett: "If [Williams] is coming out and she dropped the victim and picked up -- and presumably picked it up or whatever and then radioed, would that add time?" Answer: "No." Tr. p. 246, lines 5-10

19. Williams was timed by Harper when she took the ladder evolution portion of the exam. According to Harper's (deposition) testimony, he subscribes to the version of timing that requires the victim to be laid down on the ground and the firefighter to make radio contact. Using that version of timing, Williams received a time of four minutes and 35 seconds for the entire ladder evolution portion of the test.

20. In March, the Department mailed out notices to all the candidates that had tested on February 7. Notices of failure were sent by registered mail, return receipt requested. Williams' letter was returned to the Department as unclaimed.

21. Williams at some point in time found out from Chief McElroy, head of the Fire Academy, that she had purportedly failed the exam. She began calling examiner Harper in March seeking to find out what portion of the exam she had not successfully completed. She had at least two telephone conversations with Harper in March 2013.

22. On April 4, 2013, the Department re-sent the failure letter to Williams, again by certified mail. This time, the

letter was claimed by Williams and she became officially aware that she had not passed the exam.

23. The basis given for Williams' failure was that she did not complete the ladder evolution within the prescribed time parameters. She was timed at four minutes and 35 seconds, just five seconds beyond the allowable limit. It is her contention that she exited the building with the victim within the four minute/30 second time frame. The basis for her belief is that she has done the test so many times that she knows when she is behind schedule. During the test she did not stumble, drop any equipment, or have any other problem that would have added to her time. So, she concludes, she must have completed the evolution timely. Her personal feelings on the matter, without further corroboration or support, are not persuasive.

24. Harper did not testify at final hearing. The transcript of his deposition taken in this case was admitted into evidence. In that transcript, Harper talks about his policy regarding timing of the evolution. His policy is the same as Rochford's and is discussed above. He does not specifically say if he employed that policy when timing Williams during her test on February 7, 2013. He does not explain the difference between the Orientation statement about timing and his personal policy.

25. The most persuasive evidence at final hearing established that it would have taken ten to 15 seconds after

exiting the building to lay the victim down and make radio contact. The radio contact itself would have taken about four seconds. If Harper had stopped his timing when Williams and the victim broke the threshold of the building, her time would have likely been less than four minutes and 30 seconds. If he used his personal timing policy, then the time of four minutes/35 seconds was probably accurate.

26. Harper deducted points from Williams' score because of other minor mistakes. The totality of those points would not have caused Williams to fail the test. It was the ladder evolution time that caused the failure.

27. In fact, Williams successfully completed all portions of the re-test except for the timing issue in the ladder evolution portion.

#### CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over this matter pursuant to section 120.57(1), Florida Statutes. Unless specifically stated otherwise herein, all references to Florida Statutes will be to the 2013 version.

29. Section 633.128, Florida Statutes, sets forth the powers and duties of the Division of State Fire Marshal. That statute requires the Department to establish, by rule, uniform minimum standards for the training of firefighters. Pursuant to that statute (or its predecessor, section 633.45), the Department

created Florida Administrative Code Rule 69A-37.062, entitled Procedures for State Firefighter Certification Examination Day (the "Rule").

30. The Rule sets forth the process and procedure to be followed by candidates for certification. The Rule addresses the testing facility, the equipment to be used, clothing to be worn, and many general procedures for the examination. Candidates are even told, via rule, what time to appear at the testing site. The only references to "timing" in the Rule is in section (5)(c), which states:

1. The individual practical examinations are timed separately but the participant shall be prepared to begin upon reporting for each segment.

2. If a participant delays, the examiner shall inform the participant that the time will begin.

31. In these kinds of cases, the Petitioner has the burden of proof. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). Williams must prove by a preponderance of the evidence that she did pass the practical examination or that the Department improperly graded or scored her exam. See Dep't of Banking & Finance Div. of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

32. The hearing is "a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily." Beverly Enterprises-Florida, Inc. v. Dep't of Health & Rehab. Servs., 573 So. 2d 19, 23 (Fla. 1st DCA 1990). It was therefore necessary to take evidence as to the totality of the testing procedure.

33. The evidence concerning the primary issue in this case is scant. The dispute revolves around the question of when the examiner should have stopped the clock during the ladder evolution portion of the exam. No textbook or treatise on firefighting exam standards was offered into evidence to establish the proper standard for timing an exam. The testimony by various examiners was conflicting and confusing. If Harper properly stopped the clock when Williams finished her radio contact upon exiting the building, then Williams has no credible evidence to refute her time of four minutes and 35 seconds. Conversely, if Harper should have stopped the clock when Williams exited the building with the victim, then the time of four minutes and 35 seconds is suspect. Her time would have been 10 or 15 seconds less than what Harper recorded.

34. There is no written rule which addresses the issue of when an examiner should stop the clock during a ladder evolution. The Orientation states that it will be when the candidate and victim "fully exit the building" and the Orientation is the only



written statement offered by the Department to support its testing process.

35. Based upon the facts alone, the evidence is that Williams more likely than not exited the building with the victim within the prescribed time frame of four minutes and 30 seconds. However, the Department relied upon an unadopted rule, i.e., oral comments by examiners that a candidate will have completed the ladder evolution only upon depositing the victim on the ground and making radio contact. That unwritten rule, which is contrary to the Orientation which was read to all candidates, cannot be relied upon to base the Department's action vis-à-vis candidate Williams (or any similarly situated candidate). See § 120.57(1)(e)1, Fla. Stat., which states:

An agency or an administrative law judge may not base agency action that determines the substantial interest of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule. This subparagraph does not preclude application of adopted rules and applicable provisions of law to the facts.

36. The evidence shows that procedures imposed on Williams and other candidates during the State certification examination satisfy the statutory definition of a rule. The timing process employed by examiners was "an agency statement of general applicability that . . . describes the procedure or practice requirements of an agency . . . ." § 120.52(15), Fla. Stat. The

procedures are generally applicable, implement statutory requirements, and do not fall within any exception to the definition of a rule.

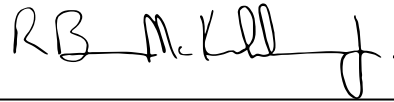
37. In this case, the Department relied upon an unadopted rule when scoring the ladder evolution of Williams' State Firefighter Certification exam. It therefore cannot base an agency action on the score given to Williams. Thus, the most persuasive evidence is that Williams' reported time of four minutes and 35 seconds is off by ten to 15 seconds. That means Williams' time would be four minutes and 20 or 25 seconds, within the prescribed timeframe for completion of the ladder evolution.

#### RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of State Fire Marshal, rescinding the failing score on the State Firefighter Certification Examination for Catalina Williams and certifying her as a Firefighter.

DONE AND ENTERED this 19th day of November, 2013, in  
Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of November, 2013.

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.