

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF STATE FIRE
MARSHAL,

Petitioner,

vs.

Case No. 15-6182

PATRICK POINTU,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on June 3, 2016, by video teleconference in Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melissa E. Dembicer, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Patrick Pointu, pro se
(Address of Record)

STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Financial Services, Division of State Fire Marshal can revoke Respondent's certification as a firefighter because Respondent

failed to timely complete the requirements to maintain his Firefighter Certificate of Compliance prior to September 30, 2011, pursuant to section 633.352, Florida Statutes (2010).

PRELIMINARY STATEMENT

By correspondence dated July 2, 2015, the Department of Financial Services, Division of State Fire Marshal ("Department"), issued Patrick Pointu ("Respondent" or "Pointu") a Notice of Intent to Revoke Firefighter Certificate of Compliance ("Notice"). On or about July 18, 2015, Respondent disputed the Notice and submitted a request for a formal hearing.

On November 2, 2015, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge to conduct the hearing Respondent requested. The undersigned placed the matter in abeyance after the Department requested the case be stayed pending a legislative amendment, which directly impacted Respondent's certifications.

As noted above, the final hearing was held on June 3, 2016. At hearing, the Department moved to amend the Notice, which proposed to change the legal basis for Respondent's revocation to section 633.352, Florida Statutes (2010). The undersigned granted the unopposed motion.

During the hearing, Pointu testified on his own behalf. Respondent called no other witnesses, and submitted Exhibits 1 through 5 into evidence. The Department presented the testimony of Michael Tucker, interim chief for the Bureau of Fire Standards and Training, as a witness. The Department introduced three exhibits into evidence.

The proceedings were transcribed, and the parties availed themselves of the right to submit proposed recommended orders. The one-volume Transcript of the final hearing was filed with the Division of Administrative Hearings on July 19, 2016. Petitioner and Respondent timely filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with the responsibility for certifying firefighters in the State of Florida, pursuant to chapter 633, Florida Statutes.

2. On June 30, 2006, Respondent also obtained certification as a fire Instructor III.

3. On October 9, 2006, Pointu obtained his Firefighter II Certificate of Compliance ("certification").

4. On September 30, 2008, Respondent stopped volunteering with Lauderdale-By-The-Sea Volunteer Fire Department ("Lauderdale-By-The-Sea").

5. Prior to July 1, 2010, state certified fire instructors were able to maintain their firefighter certification as long as their fire instructor certification was current.

6. On July 1, 2010, the statutory requirements for firefighters changed. Section 633.352 was amended to require a certified firefighter be a full-time fire instructor or a full-time fire inspector to maintain certification.

7. The 2010 statutory change retained a three-year period for firefighters to complete the requirements to maintain certification.

8. It is undisputed that between September 30, 2008, and September 30, 2011, Pointu did not perform any of the necessary requirements to maintain his certification in section 633.352, such as retake the Minimum Standards Examination; maintain employment as a firefighter or volunteer firefighter; or work full time as an instructor or firesafety inspector.

9. On April 6, 2012, the Department distributed an informational bulletin titled "Firesafety Instructors & Maintenance of Firefighter Certification." The bulletin stated in bold "The 3-year period begins on July 1, 2010 for persons who held an active instructor certification and an active firefighter certification as of June 30th, 2010."

10. Question 7 of the bulletin also provided:

7. Is the Division of the State Fire Marshal attempting to amend the State Statute to reflect the previous language that does not require "full-time employment as a fire instructor"?

The Division has attempted to amend or reinstate this language, however, the Statute remains unchanged, and the Division may not be successful in amending the language to its previous form.

11. Pointu received the 2012 bulletin and determined that since he held an active instructor certification and active firefighter certification as of June 30, 2010, his firefighter certification period started July 1, 2010, and expired July 1, 2013.

12. On July 1, 2013, section 633.352 was revised amended and renumbered legislature as section 633.414. The statutory amendment also changed the three-year recertification cycle to a four-year cycle and removed the full-time instructor requirement.

13. Respondent used the 2013 statutory change to calculate his certification validation date until 2018.

14. In 2014, Pointu contacted the Department regarding his certification after being told by a county official that his certification was not valid. Thereafter, over an approximate two-year period, Respondent was informed various and conflicting

information regarding his certification status and expiration dates.

15. The Department does not have a statutory requirement to provide notice to certified individuals of requirements to maintain certification.

16. The Fire College Department of Insurance Continuing Education ("FCDICE") database monitors and manages all firefighters' certifications.

17. Department's interim chief, Michael Tucker ("Tucker"), made the final decision regarding Pointu's certification. Tucker reviewed FCDICE and did not find any records which demonstrated Pointu's renewal of certification prior to September 29, 2011.

18. Tucker correctly determined that the 2010 version of the statute applied to Pointu's certification because Respondent left his employment at Lauderdale-By-The-Sea on September 30, 2008, which made his three-year period for renewal deadline September 30, 2011, pursuant to section 633.352.

19. Tucker also established that Pointu did not fulfill the minimum requirements to renew his certification prior to September 30, 2011, because he did not become employed again, volunteer with a fire department, become a full-time fire inspector or a full-time instructor, or retake the practical portion of the examination.

20. After evaluating Respondent's certification history, Tucker concluded Respondent failed to meet the minimum firefighter requirements and therefore Pointu's certification is not valid and should be revoked.

21. At hearing, Tucker acknowledged that he was not familiar with the issuance of the April 6, 2012, bulletin, but, after reviewing it, he determined there were misstatements in the bulletin regarding requirements for certification because the Department did not have the authority to waive any statutes.

22. On June 3, 2011, Petitioner issued an amended Notice that it intended to revoke Pointu's certification for failure to renew his certification within three years of employment termination from an organized fire department pursuant to section 633.352.

23. Pointu contested the notice and requested a hearing.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over this matter pursuant to section 120.57(1), Florida Statutes (2016). Unless specifically stated otherwise herein, all references to Florida Statutes will be in the 2010 version.

25. Petitioner seeks to take disciplinary action and revoke Respondent's firefighter certification. A proceeding to impose discipline against a professional license is penal in

nature, and Petitioner bears the burden to prove the allegations in the amended Notice by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

26. Clear and convincing evidence:

[r]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

27. Section 633.352 sets forth the minimum standards required for Pointu to maintain his firefighters certification:

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 69A-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 firefighters who are certified and employed as full-time firesafety inspectors or firesafety instructors, regardless of the firefighter's employment status. The 3-year period begins on the date the certificate of compliance is

issued or upon termination of service with an organized fire department.

28. The amended Notice correctly charges Respondent with failing to meet the requirements of section 633.352. Pointu contends that the Department's April 6, 2012, bulletin dictates that his certification status is valid until July 1, 2013. The undersigned is not persuaded that the Department's bulletin is controlling in this matter for the bulletin can neither serve as authority nor vary the requirements from the express language of section 633.352. The record is also void of evidence to demonstrate how a bulletin issued in April 2012, prevented Respondent from completing the requirements of 2011. On such grounds, the undersigned rejects Respondent's estoppel argument.

29. To that end, the Department has met its burden and proven that Respondent failed to meet the minimum standards for certification pursuant to section 633.352 because it is undisputed that between September 30, 2008, and September 30, 2011, Respondent did not complete any of the necessary certification requirements such as retake the Minimum Standards Examination; have employment as a firefighter or volunteer firefighter; or work full time as an instructor or firesafety inspector. Accordingly, it is proper to revoke Respondent's certification that is not valid.

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 finding that Respondent, Patrick Pointu, violated section 633.252, Florida Statutes. It is further RECOMMENDED that Respondent's Firefighter Certificate of Compliance be revoked.

DONE AND ENTERED this 31st day of August, 2016, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
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this 31st day of August, 2016.

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.