

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID HALL,

Petitioner,

vs.

Case No. 15-6195

FLORIDA DEPARTMENT OF LAW
ENFORCEMENT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was held in this case by video teleconference on January 13, 2016, with sites in Tallahassee and Sebastian, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: David Hall, pro se
29 Slosson Lane
Geneva, New York 14456

For Respondent: Linton B. Eason, Esquire
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner David Hall's answer to question number 115 on the Florida State Officer Certification Examination should have been accepted as correct.

PRELIMINARY STATEMENT

Petitioner, David Hall, was an examinee who took the Florida State Officer Certification Examination (the "exam") on June 30, 2015. After being notified that he missed a passing score by one question, he challenged the incorrectness of his answer to question 115. On or about August 1, 2015, Petitioner was notified that his response to question 115 was rejected as incorrect. Petitioner timely filed a request for a formal administrative hearing.

At the final hearing held in this matter, Petitioner testified on his own behalf and did not call any other witnesses. Petitioner pre-filed a composite exhibit, but did not offer it into evidence during the final hearing. Respondent, Florida Department of Law Enforcement (the "Department" or "FDLE"), called two witnesses: Sgt. Steve Norville, Leon County Sheriff's Office; and Roy Gunnarsson, training and research manager for FDLE, accepted as an expert in psychometrics. FDLE's Exhibit 1 was admitted into evidence.

A transcript of the final hearing was ordered by the parties; the Transcript was filed at the Division of

Administrative Hearings on January 28, 2016. By rule, parties were allowed 10 days, i.e., up until February 7 to submit proposed recommended orders; February 7 fell on a Sunday, so proposed recommended orders were due on or before February 8. Petitioner filed an untitled document on January 19, which was accepted as his Proposed Recommended Order. FDLE timely submitted its Proposed Recommended Order on February 8. Each party's Proposed Recommended Order was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a former police officer from New York who wishes to relocate to Florida. He took the exam on June 30, 2015. According to his Petition for Formal Administrative Hearing, Petitioner missed passing the exam by one question. He made the decision to challenge the Department's determination as to the correct answer for exam question number 115.

2. That question and answer choices as set forth in the exam are as follows:

Q: In accordance with Chapter 810, F.S.,
how are burglaries classified?

- A. Intent of suspects
- B. Type of location entered
- C. Tools used in commission
- D. Number of persons involved

3. Petitioner chose Answer A. He reasoned that, according to the curriculum, burglary was distinguished from trespassing

by a single element, i.e., the intent of the offender. While acknowledging that the type of location was also a way to classify burglaries, he reasoned that either answer would be equally correct.

4. Petitioner cites to the Florida Basic Recruit Training Program book (the "Manual") utilized by the Florida Law Enforcement Academy (Volume 1, Version 2014.07), which was the primary curriculum material for persons taking the exam in June 2015. On page 337 of the Manual, the following statement appears:

Trespassing and burglary are similar, yet different, and can be confusing. Trespassing involves being somewhere that you do not own and without permission of the owner. The difference with burglary is that you are somewhere that you do not own and without permission of the owner; however, the intent of being there is different. The intent for being there is to commit another crime, such as theft.

5. Petitioner analogized a house guest versus an intruder to classify each crime, but his analysis addressed the elements of the crimes rather than how the crimes are classified.

6. The Department used experienced field training officers to help develop and verify the exam questions. The officers reviewed question 115 and found it to be valid, legitimate, and in accordance with the Manual. The proper and only fully correct answer to question 115 was B, type of location entered.

The basis for this answer appears in the Manual at page 336, which states in pertinent part:

Chapter 810, F.S. classifies burglaries according to the type of location entered, such as a dwelling, structure, or conveyance. Penalties are more severe for burglary of a dwelling than for a structure or conveyance. (Emphasis added).

7. The Department maintains that the clear language of question number 115--taken almost verbatim from the Manual--dictates a single answer, B. The question asks how the crime of burglary, which by its definition includes the offender's intent, is classified. That is, the question is concerned with how the crime will be classified (i.e., more or less severely) based upon where it occurred. The question does not ask for the elements of burglary, which would require the examinee to include intent. The question was not ambiguous.

8. Interestingly, Roy Gunnarsson, FDLE's training and research manager, an expert in psychometrics, a field of study and practice involving the measurement of human knowledge skills and abilities, determined that more examinees (165) answered the same way as Petitioner than answered correctly (164). But as the expert testified, testing is not governed by majority vote.

9. From the test results, it is clear that question number 115 was difficult, with most examinees failing to answer

correctly. That does not invalidate the question; it only verifies that the question was harder than others.

10. Because of Petitioner's challenge, Mr. Gunnarsson prepared an "Item Challenge Response," a review of the challenged question and its possible answers. After conducting an intensive review of the matter, he concluded that the question and answer were "accurate, located in the curriculum, and [he] denies the validity of the examinee's claim." His opinion was based upon the application of psychometrics to the test and on his experience and training.

11. Petitioner, who seemed to have extensive knowledge concerning law enforcement, argued his position quite well. Unfortunately, his arguments are not supported by the plain language appearing in the training manual.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless stated otherwise herein, all references to Florida Statutes shall be to the 2015 codification.

13. Petitioner, as the party asserting the affirmative of the issue, has the burden of proof. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The standard of proof for this case is a preponderance of the evidence. See Dep't of Banking & Fin.,

Div. of Servs. & Inv. Prot., Osborne Stern & Co., 670 So. 2d 932
(Fla. 1996).

14. Petitioner attempts to satisfy his burden in this case by explaining the elements of the crime of burglary.

15. Chapter 810, Florida Statutes, is entitled "Burglary and Trespass." Section 810.02 addresses burglary; sections 810.08, .09, .095, and .097 address the crime of trespass, depending on where the trespass occurred. Section 810.02 states in pertinent part:

(1)(b) For offenses committed after July 1, 2001, "burglary" means:

1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter, or

2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure or conveyance;

a. Surreptitiously, with the intent to commit an offense therein;

b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or

c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

16. Thus, there is the element of intent in the burglary statute. However, once burglary has been established as the crime at issue (as posed by the question in the exam), the

classification of what type of burglary has occurred is made simply by the type of location entered.

17. Petitioner failed to meet his burden of proof that answer A, intent of suspects, is the correct answer to question number 115 in the exam.

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 Law Enforcement denying Petitioner David Hall's challenge to question number 115 in the Florida State Officer Certification Examination.

DONE AND ENTERED this 11th day of February, 2016, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of February, 2016.

COPIES FURNISHED:

Linton B. Eason, Esquire
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489
(eServed)

David Joshua Hall
29 Slosson Lane
Geneva, New York 14456
(eServed)

Jason Jones, General Counsel
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489
(eServed)

Richard L. Swearingen, Commissioner
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489
(eServed)

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.