STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICKY RESCUE TRAINING ACADEMY, INC.,

Petitioner,

vs. Case No. 20-0441RP

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF STATE FIRE MARSHAL,

Respondent.
_____/

FINAL ORDER

On July 27 and 28, 2020, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted a duly noticed proposed rule challenge hearing pursuant to section 120.56, Florida Statutes (2020), by means of Zoom technology.

APPEARANCES

For Petitioner: Christina Harris Schwinn, Esquire
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For Respondent: Max Oliver McCann, Esquire
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STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether the proposed amendment to Florida Administrative Code Rule 69A-39.005(1)(b)2.d. is an

invalid exercise of legislatively granted authority in violation of section 120.52(8)(b), (c), (e), and (f), Florida Statutes (2020).

PRELIMINARY STATEMENT

On January 27, 2020, Petitioner, Ricky Rescue Training Academy, Inc. (Ricky Rescue), filed a Petition to Challenge Specific Changes to Proposed Rule 69A-39.005(1)(b)2.d. with the Division of Administrative Hearings (DOAH). Petitioner filed an Amended Petition to Challenge Specific Changes to Proposed Rule 69A-39.005(1)(b)2.d. (Amended Petition) the next day, and on January 29, 2020, the case was assigned to the undersigned. A telephonic scheduling conference was conducted on February 3, 2020, and as a result, a Notice of Hearing was issued scheduling the case for February 24, 2020. On February 13, 2020, Petitioner filed an Unopposed Motion for Continuance, based upon the need to receive and review responses to public records requests sent to the Department of Financial Services (the Department or Respondent) several weeks before the Amended Petition was filed, in order to prepare for hearing. The continuance was granted and the hearing was rescheduled for March 27, 2020.

On March 1, 2020, the Governor of the State of Florida issued Executive Order 20-51, directing the State Health Officer and Surgeon General to declare a public health emergency pursuant to section 381.00315, Florida Statutes, in connection with the pandemic associated with COVID-19. COVID-19 is a highly contagious respiratory illness that, at this time, has no vaccination. People were encouraged to stay home and limit interpersonal interaction, and practice "social distancing" (stay six feet apart) with people outside one's household. As a result, on March 16, 2020, the parties filed a Joint Motion for Continuance, citing the uncertainty caused by the pandemic, and asking that the case be continued for 45 days. Ultimately, the case was rescheduled for hearing to be conducted by Zoom technology on July 27

and 28, 2020, and proceeded as scheduled. The parties filed a Joint Prehearing Statement that included stipulated facts that have been incorporated into the Findings of Fact below.

At hearing, Jeromy VanderMuelen, Chadwick Ketron, Susan Schell, Ryan Russell, Robert Morgan, Matthew Trent, and Joseph Pasquariello testified on behalf of Petitioner, and Petitioner's Exhibits 1 through 54 were admitted into evidence. It is noted that during Petitioner's case in chief, Respondent only objected to Petitioner's Exhibits 13, 19, 20, and 21 in the event that Respondent's Exhibit F was not admitted, so ruling with respect to these exhibits was deferred. Respondent's Exhibit F was admitted over objection. Inasmuch as Respondent's objection to these four exhibits was conditional, they have been admitted.

Mark Harper, Anthony Apfelbeck, Michael Tucker, Cheryl Edwards, and David Abernathy testified on behalf of the Department, and Respondent's Exhibits C through H and J through W were admitted into evidence.

The Transcript of the proceedings was filed with the Division on August 14, 2020. That same day, Petitioner filed a Motion for Extension of Time to File Petitioner's Proposed Order, which stated good cause and was unopposed. An Order was entered granting the motion and extending the time for the filing of proposed final orders until September 25, 2020. Both parties' post-hearing submissions were timely filed, and have been carefully considered in the preparation of this Final Order.

All references to Florida Statutes are to the current codification, unless otherwise indicated.

FINDINGS OF FACT

The Parties

1. Respondent, Department of Financial Services, Division of State Fire Marshal, is headed by the Chief Financial Officer of the state, who serves as the Chief Fire Marshal pursuant to section 603.104(1), Florida Statutes. The State Fire Marshal is charged with the responsibility to minimize the loss of life and property in Florida due to fire, and to adopt rules, which must "be in substantial conformity with generally accepted standards of firesafety; must take into consideration the direct supervision of children in nonresidential child care facilities; and must balance and temper the need of the State Fire Marshal to protect all Floridians from fire hazards with the social and economic inconveniences that may be caused or created by the rules." § 633.104(1), Fla. Stat.

2. Petitioner is a Florida corporation authorized by the Department to offer fire certification training courses in both online and blended learning formats. A blended learning course is one that has both online and in-person components. The blended learning courses Petitioner currently offers have 37 hours of online learning and eight hours of in-person instruction to address those portions of the course that may need "hands on" instruction.

3. Section 633.216, Florida Statutes, requires Respondent to certify fire safety inspectors, and to provide by rule for the development of a fire safety inspector training program of at least 200 hours. The program developed by Department rule must be administered by education or training providers approved by the Department for the purpose of providing basic certification training for fire safety inspectors. § 633.216(2), (8), Fla. Stat.

Current Certification Requirements

4. Section 633.406 identifies several certifications in the fire safety arena that may be awarded by the Division of State Fire Marshal: firefighter, for those meeting the requirements in section 633.408(4); fire safety inspector,

for those meeting the requirements in section 633.216(2); special certification, for those meeting the requirements in section 633.408(6); forestry certification, for those meeting the requirements of section 590.02(1)(e); fire service instructor, for those who demonstrate general or specialized knowledge, skills, and abilities in firefighting and meet the qualifications established by rule; certificate of competency, for those meeting certain requirements with special qualifications for particular aspects of firefighting service; and volunteer fire fighter certifications.

5. In order to become a fire safety officer, an applicant must take the courses outlined in rule 69A-39.005, and pass an examination with a score of 70% or higher. The five courses as listed in the current version of rule 69A-39.005 are Fire Inspection Practices; Private Protection Systems; Blue Print Reading and Plans Examinations (also known as Construction Documents and Plans Review); Codes and Standards; and Characteristics of Building Construction.

The Rulemaking Process

6. On November 5, 2015, the Department held the first of a series of rule workshops and "listening sessions" as it began the process for making changes in the certification program for fire safety inspectors.[1] These workshops and listening sessions were held on November 5, 2015; July 10, 2016; November 10, 2016; January 17, 2017; August 8, 2018; November 8, 2018; and October 29, 2019. As described by Mark Harper, who is now the assistant superintendent of the Bureau of Fire Standards and Training at the Florida State Fire College, the Bureau conducted the first few listening sessions to hear the industry's view on what changes were needed, followed by drafting proposed rule language and conduct of rule workshops.

[1] Curiously, neither party introduced the notices for any of these workshops or listening sessions, so how notice was provided to interested persons wanting to give input on possible changes cannot be determined.

7. The first workshop/listening session was conducted on November 5, 2015, in Palm Beach Gardens, and was moderated by Mark Harper. At this workshop, a variety of comments were received regarding the quality of the existing program and the quality of the fire safety inspectors being certified. Those comments included the need for more field training and more hours of instruction; suggested use of a "task book" in training; the view that classes should be taught by more experienced inspectors, not just people who have passed the classes; and the need for more practical training. The view was expressed by at least one attendee that the quality and method of delivery needed to be examined, and that Codes and Standards and Construction Documents and Plans Review should not be taught online.

8. In December 2015, Tony Apfelbeck, the Fire Marshal for Altamonte Springs, provided to Mr. Harper proposed draft revisions to chapter 69A-39, which included increasing the number of training hours to 315 hours (as opposed to the 200 hours required by section 633.216), and requiring use of a task book, as well as other changes. The draft did not include any language regarding course methodology in terms of classroom, online, or blended format classes.

9. At the next workshop, held July 10, 2016, a draft proposal was provided to the audience, but it is not clear whether the draft provided is the one Mr. Apfelbeck suggested or something else. Concerns were expressed regarding the implementation of the use of a task book, and at least one speaker speaking against the suggested changes opined that the changes suggested in the draft would cost more money. Another commented that increasing the hours may not help the issue. Instead, there should be a greater emphasis on the quality of the educational delivery, and that instruction needed to be tied more closely to field work. Late in the workshop, comments were made regarding online and classroom delivery, and it was suggested that some classes should not be held online.

10. While the drafts that were provided at the various workshops are not in the record, at some point, language was added that would require two of the five courses for fire safety certification, i.e., Codes and Standards and Construction Documents and Plans Review, be taught in a traditional classroom setting only.

11. The subject of online classes was discussed more thoroughly at the next workshop held November 10, 2016. During this workshop, there were comments both in favor of and against the use of online classes. While the speakers cannot always be identified from the recordings of the workshops, some attendees stated that some of the online providers were doing a really good job, and the concern was raised that if online classes were eliminated, it might be an exchange of convenience for quality.[2] At least one person expressed the opinion that the speaker was not a fan of online classes, and Mr. Harper suggested that blended learning might be a way to meet some of the concerns expressed, and that the method of delivery would be up to the institution. Others who participated in the workshop spoke highly of blended classes.

12. The remaining workshops also had discussions regarding the online class change, as well as other changes in the proposed rule. Opinions were voiced on both sides of the issue. The primary source of comments seeking a traditional classroom setting only were fire marshals at various municipalities around the state concerned about the need for "hands-on" training and the current lack of preparation encountered with new staff.

13. On July 10, 2019, the Department filed a Notice of Proposed Rules for rules 69A-39.003, 39.005, and 39.009. The proposed rule amendments included the following amendment to rule 69A-39.005(1)(b)2.d.:

> d. The courses "Codes and Standards" and "Construction Documents and Plans Review"

[2] The identity of the speakers is not important, and the comments are not relayed for the truth of the statements made. They are listed simply to show that the Department heard several viewpoints during these listening sessions.

> required under this paragraph (1)(b) will only be approved by the Bureau when taught in a traditional classroom delivery method.

14. No definition for "traditional classroom delivery method" is provided.

15. On January 15, 2020, Respondent conducted a public hearing on the proposed rule. As was the case with the workshops, people voiced both support and opposition to the proposal to require a traditional classroom setting for the Codes and Standards and Construction Documents and Plans Review courses. Counsel for Petitioner appeared and spoke against the proposed language to eliminate online and blended learning for the two classes, and asked whether any type of data existed to support the change in the rule, or whether any type of study had been conducted to gauge the need for the change. Respondent's representative stated that the proposed language was based upon "extensive testimony" from employers requesting the change. Counsel also asked that Respondent consider defining what is meant by traditional classroom delivery. No such definition has been added to the rule.

16. The Notice of Proposed Rule does not include a Statement of Estimated Regulatory Costs. Instead, it states:

> The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the Agency.
>
> The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of regulatory costs or if no SERC is required, the information expressly relied upon and described herein: The Department's economic analysis of the potential impact of the proposed rule amendments determined that there will be no adverse economic impact or increased

> regulatory costs that would require legislative ratification.
>
> Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so within 21 days of this Notice.

17. Petitioner addressed the increased costs under the proposed rule during at least one of the workshops. There is no evidence, however, that Petitioner submitted, in writing, a proposal for a lower cost regulatory alternative within 21 days of the Notice of Proposed Rule.

18. On January 27, 2020, Petitioner filed its Petition to Challenge Specific Changes to Proposed Rule 69A-39.005(1)(b)2.d. The Petition is timely filed.

Current Online Providers and Course Review Process

19. As of April 10, 2020, there are approximately 20 organizations approved by the Bureau of Fire Standards and Training that offer distance learning delivery for courses in programs leading to a certification pursuant to rule 69A-37.605. Of those providers, two are approved to teach Codes and Standards and three are approved to teach Construction Documents and Plans Review.

20. In addition, as of June 1, 2020, there are 13 state colleges and/or universities in Florida also approved to provide distance learning. Of those, ten are approved to offer Codes and Standards, and ten are approved to offer Construction Documents and Plans Review.

21. Petitioner has been approved to teach these two courses in a blended format since at least 2015. It also has articulation agreements with some educational institutions, including Waldorf University in Iowa, and Columbia Southern University in Alabama.

22. The Department previously sought to take action against Ricky Rescue related to the type of courses taught, although the statutory basis for taking action against Ricky Rescue is not part of the evidence presented in this proceeding. The Consent Order entered to resolve the prior proceeding expressly provides, "Respondents agree that they will not offer any on-line courses until such time as they obtain approval from the Bureau, which will not be unreasonably withheld."

23. In order to be approved to teach any of the courses for certification in an online or blended format, a provider is required to go through an extensive review process. Initially, Respondent used a Quality Matters Higher Education Rubric to evaluate the courses a provider sought to offer. Course approvals initially took anywhere from four months to a year and a half to meet the standards and be approved. Respondent no longer uses the Quality Matters rubric, because it has transitioned to the accreditation process used by the Southern Association of Colleges and Schools. With this change, the length of time for class approvals has shortened considerably.

24. Susan Schell used to be the Department's Training Programs Manager and was in charge of the review and approval of classes for online learning. She has since moved on to another position within the Department. Ms. Schell would take the submitted course herself, view the different videos and discussion boards, and work through some of the projects, as well as review some of the case discussions and questions. Ricky Rescue's courses that she reviewed met all of the state requirements to be approved.

25. According to Ms. Schell, classes taught in the traditional format did not go through the same review process.

26. Ricky Rescue's accreditation verification from AdvancED Southern Association of Colleges and Schools Council on Accreditation and School Improvement indicated that Ricky Rescue's accreditation was confirmed on March 31, 2017, for a five-year term expiring June 30, 2022. There is no credible dispute regarding whether Ricky Rescue complies with the

requirements for offering its courses in a blended format. The report of the external review team prepared by AdvancED Education, Inc., noted that the school's website is exemplary and stated in its conclusions:

> Once a month, students attend a day on site blended learning instruction where students can collaborate and complete and present projects. Given that the owners are brother fire fighters, there is a genuine feeling of camaraderie and collegiality.
>
> It is apparent to the Team that the Ricky Rescue Training Academy is an ideal institutional opportunity to obtain classes for firefighter training and certification classes. … The school has embraced the continuous improvement model to insure that they continue to deliver high quality online educational programs with rigor, relevance, and fidelity.

Two Different Views

27. Petitioner and Respondent approached the proposed rule amendment, both at the workshops and public hearing conducted by the Department and at the hearing in this proceeding, from different perspectives. Ricky Rescue focused on the needs and opinions of students seeking to take the courses. Its witnesses testified that the blended courses had significant substantive content; that the in-person component gave the necessary opportunity for completion of group projects and hands-on instruction or field trips; and that the ability to complete the course at any time during a 30-day period was essential in terms of both costs and scheduling for the student, and completing the classes while managing job and family responsibilities.

28. For example, Ryan Russell has worked for over ten years in the fire service and is a battalion chief for the Haines City Fire Department. He has a variety of certifications and oversaw the training division for his department. Mr. Ryan has taken five courses from Ricky Rescue, and speaks highly of them. Mr. Ryan agrees that there are some advantages to traditional

classroom settings, because they provide more opportunities for engagement, but that ultimately, a class is only as good as the instructor.

29. Similarly, Robert Morgan is also a battalion chief at another fire department, and took Documents and Plans Review from Ricky Rescue. Mr. Morgan believed that the online blended course is just as good as a traditional classroom setting, and believes that in the blended setting, a student has to work harder than just sitting at the back of the classroom. Both men spoke of the convenience and accessibility that online learning provides that a traditional classroom does not.

30. Matthew Trent also testified in favor of the availability of online and blended courses. Mr. Trent has a master's degree in public administration and is a Ph.D. student in public policy administration. He is also a certified state firefighter II; pump operator; Fire Officer I, II, III, and IV; fire inspector I and II; fire investigator I; and fire life safety educator I. About half of Mr. Trent's certifications have been based on classes taken online, and all of his classes for his masters' and doctoral degrees have been online. Mr. Trent felt both courses at issue could be taught in an online format, and stated that both as a student and as an instructor, it is up to the student to choose the delivery method by which they want to learn. If not for online learning, he would not have been able to accomplish nearly as much in his professional life, because distance learning gives the student the ability to work around other responsibilities.

31. The Department, on the other hand, was influenced more heavily by (and sought information from) the fire safety officials across the state who employ fire safety inspectors. Many of those officials spoke at the public workshops and some testified at hearing. The major concern voiced by these officials was that new fire safety inspectors certified by the state were not really prepared to do their job. Although most acknowledged that some on the job training would always be necessary to deal with local codes and ordinances that are not part of the state curriculum, they felt that new

inspectors did not have a good grasp of the concepts necessary to be effective, especially with respect to the skills taught in the classes at issue in this case.

32. For example, Anthony Apfelbeck is the Director of the Building and Fire Safety Department for the City of Altamonte Springs. He has worked in that department for approximately 20 years and served as Fire Marshal for a significant portion of his tenure there, and served in other cities as well. Mr. Apfelbeck has an impressive array of certifications and currently supervises approximately eight fire safety inspectors. He attended almost all of the workshops and was an active participant.

33. Mr. Apfelbeck testified that he concurred with the State Fire Marshal's Association that both classes should be offered only in a traditional classroom environment. He stated that there is a limited period of time to get someone trained and certified as a fire safety inspector, and he has seen some of the deficiencies in the current training. In his view, requiring these two classes to be given in a traditional classroom environment allows the instructor to keep the student engaged, and to get into critical thinking with probing questions and real-life examples. Instructors can have interactions with students that address issues the students may be having in the students' jurisdictions, and read the body language of the students to gauge involvement. He also spoke of the ability to develop relationships with other individuals in the class and develop a peer group within that body. Mr. Apfelback has used the virtual environment extensively during the COVID-19 pandemic, and does not feel that it has the spontaneity and free-flow of information that a traditional classroom affords.

34. Mr. Apfelbeck has not taken any of Ricky Rescue's classes, and does not know what it has done to make sure its students get 200 hours of education. Likewise, he is not aware of the review Ricky Rescue went through to get its courses approved. He stated, correctly, that the rule is not written specifically about Ricky Rescue's programs. It is written for all educational programs that are provided pursuant to this rule.

35. Michael Tucker is the assistant superintendent for the State Fire Marshal's Office. His experience includes serving as battalion chief for the Reedy Creek Improvement District (i.e., Disney) for 13 years, and serving as the Chief of the Fire Department for the Villages for 13 years. He has taught fire safety classes both in the classroom setting and online. While at Reedy Creek, he was the training officer responsible for providing training to fire inspectors, firefighters, paramedics, and EMTs.

36. Mr. Tucker believes that the two classes addressed in the proposed rule are very intricate classes with a lot of detail. He believes that the traditional environment gives more opportunity for students to get hands-on instruction and have more interaction with the instructor. He acknowledged that there is a possibility that fees could increase under the proposed rule, but thinks that the increased cost is outweighed by the value that employers would get when they hire people trained in a classroom setting.

37. Cheryl Edwards is the Fire Marshal for the City of Lakeland, and her views regarding traditional versus online learning are similar to those already expressed. She believes that the traditional classroom environment promotes collaborative learning and enhances critical thinking skills, through live discussions, and the need to think on your feet. She also felt that in person, an instructor is better able to gauge students' learning styles and provide activities and modalities for all to learn, regardless of learning style. Ms. Edwards believes that the traditional classroom setting allows for more "teachable moments," and guided practice before a student has to put that knowledge into use.

38. Finally, David Abernathy is the Fire Chief of the City of Satellite Beach and has worked with the City for 35 years. Mr. Abernathy has an impressive list of certifications and has taught all five of the courses necessary for fire safety inspector certification, but has never taught them in an online or blended learning format. Mr. Abernathy believes that for these

two courses there is a benefit to the traditional classroom setting. He believes that both classes need a hands-on approach to be the most effective.

39. Mr. Abernathy also believes that requiring these two courses to be taught in a traditional classroom setting will cost more, but as an employer is more willing to pay for it than for online classes.

40. Mark Harper testified that during the workshops, the Department wanted to hear from everyone, because all would be impacted by the changes. However, he believes that there is a heavier weight of responsibility on employers as opposed to students, because they are the ones trying to fill positions, and they are the ones having to deal with additional costs occasioned by failures in training. As a practical matter, employers are more cognizant of the potential liability jurisdictions face when a fire safety inspector, who looks at everything from mom and pop businesses to industrial sites with large containers of hazardous materials, is not adequately trained.

41. The decision to go forward with the proposed rule amendment requiring a traditional classroom delivery method with respect to Codes and Standards and Construction Documents and Plans Review is based on the feedback received through the workshop process. It is not based on data.

42. The Department does not track how students who took certification classes online or in a blended format score on the certification examination as opposed to students who took the same classes in a traditional setting. It would be difficult to collect that type of data, because there is no requirement that a student take all five courses the same way.

43. In preparation for the hearing in this case, the Department conducted a survey of employers regarding their views on traditional versus distance learning. The Florida Fire Marshals and Inspectors Association distributed the survey to its members, and of the 358 addressees, 114 responded. There was no evidence to indicate that the Department attempted to survey people taking the classes.

44. The questions asked in the survey were quite limited, and frankly, provide no guidance because they provide only two alternatives, and do not address blended learning formats at all. There are three questions, and they are as follows, with the responses in parentheses:

> 1. Is there is current need to increase the proficiency of newly certified Firesafety Inspectors in Florida?
> Yes (59.65%)
> No (16.67%)
> Neutral opinion (12.68%)
>
> 2. When a prospective Firesafety Inspector attends a Codes and Standards class, which class setting would produce a more proficient inspector?
> Traditional classroom delivery method (71.17%)
> Online (distance learning) delivery method (9.91%)
> Neutral opinion (18.92%)
>
> 3. When a prospective Firesafety Inspector attends a Construction Documents and Plans Review Class, which class setting would produce a more proficient instructor?
> Traditional classroom (76.32%)
> Online (7.02%)
> Neutral opinion (16.67%)

45. Questions two and three assume that one format must be better than the other, rather than allowing for the possibility of equivalency. Had there been some recognition of a blended learning format, the answers might be different.

46. The survey was informative in terms of the comments that were provided by the respondents. Similar to the views expressed at the workshops, there were strong opinions both in favor of limiting the classes to the traditional setting, and strong opinions advocating for the option of online learning.

47. Petitioner presented information related to the increased costs that will be incurred should the rule go in effect. Those costs include the need for space rental for five-day periods in order to teach in multiple locations; the costs related to conversion of the material to a classroom setting versus online; and the need to pay instructors for more days each time the course is taught. It does not appear from the evidence presented that Ricky Rescue would experience increased costs of $200,000 in one year. However, Ricky Rescue is just one provider, and section 120.54 speaks in terms of an increase in costs in the aggregate, meaning as a whole. It is not known whether the other approved providers who teach these two courses will continue to do so should the rule be amended to require a classroom setting. It is also unknown what types of costs would be borne by state colleges and universities in order to recast the courses for traditional classroom settings.

48. Finally, the litigants to this proceeding were well aware that this rule was being developed and was noticed as a proposed rule before the world began to deal with the COVID-19 pandemic. It is open to speculation whether some of the impetus to require a traditional classroom setting would have changed in light of the changes society has had to make over the last six months. Department employees were questioned regarding the Fire College's response to the pandemic, and both Mark Harper and Michael Tucker testified about the precautions being taken on the campus to insure safety, such as taking temperatures, having students complete a questionnaire regarding possible exposure, limiting the number of students per class, and spacing people six feet apart to maintain effective social distancing.

49. Mr. Tucker testified that they would be ready to postpone some classes until they could be taught safely in person. When asked whether Respondent would consider postponing the effective date of the proposed rule, he indicated "that would be something we would have to take into consideration, and again, the feedback from our constituents, but if it became necessary, then we would consider it."

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.67, 120.569, and 120.57(2).

51. The parties do not dispute that Petitioner has standing to participate in this case. Any person who is substantially affected by a proposed rule may seek an administrative determination regarding the validity of the rule and whether it is an invalid exercise of delegated legislative authority. § 120.56(1)(a), Fla. Stat. Ricky Rescue is substantially affected by the proposed rule because it will change the method by which it can offer fire safety training courses in this state.

52. A person challenging a proposed rule must state with particularity the reasons that it contends the proposed rule is invalid. § 120.56(1)(e), Fla. Stat. Petitioner has the burden to prove by a preponderance of the evidence that it would be substantially affected by the proposed rule, and the Department has the burden of proving by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority. § 120.56(2)(a), Fla. Stat. A preponderance of the evidence is defined as the "greater weight of the evidence, … or evidence that more likely than not tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).

53. Petitioner has met its burden of demonstrating that it would be substantially affected by the proposed rule. To continue offering Construction Documents and Plans Review and Codes and Standards classes, Ricky Rescue will have to change its business model in some respects, and will have to expend additional money for space and staffing requirements, as well as for modifications of the course to adapt it to a traditional format.

54. When a substantially affected person seeks a determination regarding the validity of a proposed rule, the proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

55. Section 120.52(8) defines "invalid exercise of delegated legislative authority." It provides:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is

> reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

56. In its Petition, Petitioner contends that the proposed rule's requirement that Construction Documents and Plans Review and Codes and Standards classes be taught in a traditional format exceeds the Department's grant of rulemaking authority in violation of section 120.52(8)(b); that the move to traditional classroom presentation for these classes modifies the specific provisions of the law implemented, in violation of section 120.52(8)(c); that the proposed rule is arbitrary and capricious, in violation of section 120.52(8)(e); and that the amendment imposes regulatory costs on the regulated entities affected by the rule that could be reduced by the adoption of less costly alternatives, in violation of section 120.52(8)(f).

Section 120.52(8)(b): Whether the Proposed Rule Exceeds Statutory Authority

57. Petitioner contends that the Department has exceeded its rulemaking authority because the Department is seeking to regulate the methods through which a provider may deliver an approved course or training program without rulemaking authority to do so.

58. One of the more recent cases interpreting the standards related to rulemaking authority is *United Faculty of Florida v. Florida State Board of Education*, 157 So. 3d 514, 516-517 (Fla. 1st DCA 2015). In that case, the State Board of Education adopted a rule that established standards and

criteria for continuing contracts with full-time faculty members employed by Florida College System institutions. The First District stated:

> A rule is invalid under section 120.52(8)(b) if the agency "exceed[s] its grant of rulemaking authority." A grant of rulemaking authority is the "statutory language that explicitly authorizes or requires an agency to adopt [a rule]." § 120.52(17), Fla. Stat. The scope of an agency's rulemaking authority is constrained by section 120.536(1) and the so-called "flush-left paragraph" in section 120.52(8), which provide that an agency may only adopt rules to "implement or interpret the specific powers and duties granted by the [agency's] enabling statute"; that an agency may not adopt rules to "implement statutory provisions setting forth general legislative intent or policy" or simply because the rule "is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious or is within the agency's class of powers and duties"; and that "[s]tatutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute."
>
> Section 120.536(1) and the flush-left paragraph in section 120.52(8) require a close examination of the statutes cited by the agency as authority for the rule at issue to determine whether those statutes explicitly grant the agency authority to adopt the rule. As this court famously stated in [*Southwest Florida Water Management District v.*] *Save the Manatee Club,*[*Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000)], the question is "whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not." 773 So. 2d at 599 (emphasis in original). *Accord Bd. of Trs. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 700 (Fla. 1st DCA 2001) ("[A]gencies have rulemaking authority

> only where the legislature has enacted a specific statute, and authorized the agency to implement it. . . ."); *see also Fla. Elections Comm'n v. Blair*, 52 So. 3d 9, 12-13 (Fla. 1st DCA 2010) (explaining that the definition of "rulemaking authority" in section 120.52(17) does not further restrict agency rulemaking authority beyond what is contained in the flush-left paragraph in section 120.52(8), as construed by this court in *Save the Manatee Club* and subsequent cases.

59. The First District ultimately upheld the rule in *United Faculty of Florida*, stating that "it is not necessary under *Save the Manatee Club* and its progeny for the statutes to delineate every aspect of tenure that the Board is authorized to address by rule; instead, all that is necessary is for the statutes to specifically authorize the Board to adopt rules for college faculty contracts and tenure, which the statutes clearly do." *Id.* At 517-518 (footnote omitted).

60. In this case, proposed rule 69A-39.005 lists as its rulemaking authority sections 633.104; 633.216; and 633.406. It lists sections 633.216 and 633.406 as the laws implemented. Section 633.104 provides in pertinent part:

> (1) The Chief Financial Officer is designated as "State Fire Marshal." The State Fire Marshal has authority to adopt rules pursuant to ss. 12.536 and 120.54 to implement this chapter. Rules must be in substantial conformity with generally accepted standards of firesafety; must take into consideration the direct supervision of children in nonresidential child care facilities; and must balance and temper the need of the State Fire Marshal to protect all Floridians from fire hazards with the social and economic inconveniences that may be caused or created by the rules. The department shall adopt the Florida Fire Prevention Code.
>
> (2) Subject to the limitations of subsection (1), it is the intent of the Legislature that the State Fire Marshal shall have the responsibility to minimize

> the loss of life and property in this state due to fire. The State Fire Marshal shall enforce all laws and provisions of this chapter, and any rules adopted pursuant thereto, relating to:
>
> * * *
>
> (c)2. The training and licensing of persons engaged in the business of servicing, repairing, recharging, testing, marking, inspecting, installing, maintaining, and tagging fire extinguishers, preengineered systems, and individually designed fire protection systems; …

61. Section 633.216 provides in pertinent part:

> (2) Except as provided in s. 633.312(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 meet the requirements of s. 633.412(1)-(4), and:
>
> (a) Have satisfactorily completed the firesafety inspector certification examination as prescribed by division rule; and
>
> (b)1. Have satisfactorily completed, as determined by division rule, a firesafety inspector training program of at least 200 hours established by the department and administered by education or training providers approved by the department for the purpose of providing basic certification training for firesafety inspectors; or
>
> (b)2. Have received training in another state which is determined by the division to be at least equivalent to that required by the department for approved firesafety inspector education and training programs in this state.
>
> * * *

> (9) The department shall provide by rule for the certification of firesafety inspectors and fire code administrators.

62. Section 633.406 simply lists the classes of certification, and requires a fire safety inspector to meet the requirements of section 633.216(2).

63. Petitioner contends that the proposed rule exceeds the statutory authority quoted above because nothing in the statutes it implements specifies that the Department can dictate the methodology used to provide fire safety training. However, the authority to establish a fire safety inspector training program in section 633.216 is broad enough to encompass both content and methodology. Section 633.216(2) provides the authority to establish a training program and specifies a minimum for the number of hours. It leaves the shape of the training program, including both content and delivery, to the Department. Moreover, if one were to accept Petitioner's argument, the Department would be unable to specify course content without specific reference to the subject areas in the law implemented. As with *United Faculty of Florida*, it is not necessary for the Legislature to delineate every aspect of the training program it directs the Department to develop. It is enough that it requires the development of the program.

64. Petitioner relies on *Department of Financial Services v. Peter R. Brown Construction, Inc.,* 108 So. 3d 723 (Fla. 1st DCA 2013), to support its argument that the Department has no authority to determine the methodology used for the training program it is charged with establishing. In *Brown Construction*, the Legislature granted to the Department the authority to establish procedures for approval of expenditures. It did not grant the authority to establish what expenditures could be approved by means of those procedures. Spending authority and approval process are two very different things. The same cannot be said here.

Section 120.52(8)(c): Whether the Proposed Rule Modifies the Statute

65. Petitioners also contend that the proposed rule is invalid pursuant to section 120.52(8)(c) because it enlarges, modifies, or contravenes the specific provisions of the law implemented. As noted by the First District in *Day Cruise Association*, while section 120.52(8) (b) and (c) are "interrelated, two different issues are involved." 794 So. 2d at 701.

66. Petitioner's argument is to some degree a reiteration of the argument that the Department has exceeded its authority. It adds that while the Department is required to establish the program, the Legislature did not grant to the Department the authority to dictate to providers how the program will be administered.

67. Section 633.216(2) requires the training providers to be approved before they can administer the training program the Department establishes. It is not unreasonable to require a provider to commit to using the methodology specified by the Department before the provider is allowed to administer the training program. Indeed, Ricky Rescue has been submitting classes for approval, both in terms of content and methodology, since at least 2015. The Consent Order to which they agreed specified that they would "not offer any on-line courses until such time as they obtain approval from the Bureau, which shall not be unreasonably withheld."

68. Petitioner also contends that the specification of traditional classroom delivery for the two courses in the proposed rule modifies the statute because sections 633.216 and 633.406 do not grant to the Department the authority to regulate education and training providers. Section 633.216 does, however, grant to the Department the authority to approve providers. Petitioner cites and attempts to distinguish *Association of Florida Community Developers v. Department of Environmental Protection*, 943 So. 2d 989 (Fla. 1st DCA 2006), in which the court found that where the implementing statute provided the Department of Environmental Protection a broad grant of authority to reserve water in order to protect fish and wildlife or to protect the public

health and safety, the broad grant of authority adequately covered the examples in the proposed rule. Here, the Department is charged with the broad grant of authority to minimize the loss of life and property in this state due to fire. Requiring that some aspects of the training for fire safety inspectors charged with enforcing these very important fire safety regulations to be taught in a traditional classroom setting is within this broad grant. The proposed rule's specification of a teaching methodology is not a modification of the statutory framework the proposed rule implements.

Section 120.52(8)(e): Whether the Proposed Rule is Arbitrary and Capricious

69. Section 120.52(8)(e) also declares that a rule is an invalid exercise of delegated legislative authority when it is arbitrary and capricious. The statute recognizes the long-standing definitions of the terms, stating that a rule is arbitrary if it "is not supported by logic or the necessary facts." A rule is capricious "if it is adopted without thought or reason or is irrational." *See Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632, 634 (Fla. 1st DCA 1992).

70. The proposed rule is also not arbitrary and capricious. While one may disagree with the ultimate position taken by the Department, it is a position taken after listening sessions and workshops held around the state over a four-to-five-year period. Several officials within the fire safety industry both participated in the workshops and testified at hearing that they were concerned about the education received in an online setting, and felt that Construction Document and Plans Review, as well as Codes and Standards, were classes that were better presented in person as opposed to online. While section 120.52(8)(e) requires that a rule be supported by necessary facts, it does not require that it be supported by scientific data. The testimony of individuals who are experienced in the field and supervising new fire safety inspectors, and in several cases have experience teaching the classes, can provide the necessary factual framework for amendments to the rule.

71. The classroom requirement is one that drew significant discussion and firmly held beliefs on both sides of the issue. The Department may learn that this change in the delivery method does not have the predicted effect of helping to produce more prepared fire safety inspectors, and, if so, it has the flexibility to respond to that information. As long as the rule is the product of a thoughtful, open process where different viewpoints are considered, the statutory authority for this rule is broad enough for the Department to fashion a program it believes, in good faith, to best serve the public. Where reasonable people can disagree, and did so here, the proposed rule is not arbitrary or capricious.

Section 120.52(8)(f); Whether the Proposed Rule Represents the Least Costly Regulatory Alternative

72. Petitioner also contends that the proposed rule is an invalid exercise of delegated legislative authority because it imposes regulatory costs that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

73. This particular challenge is foreclosed by the failure to comply with the requirements of section 120.541, which provides in pertinent part:

> (1)(a) Within 21 days after publication of the notice required under s. 120.54(3)(a), a substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule if the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule. …
>
> * * *
>
> g) A rule that is challenged pursuant to s. 120.52(8)(f) may not be declared invalid unless:

> 1. The issue is raised in an administrative proceeding within 1 year after the effective date of the rule;
>
> 2. The challenge is to the agency's rejection of a lower cost regulatory alternative offered under paragraph (a) or s. 120.54(3)(b)2.b.; and
>
> 3. The substantial interests of the person challenging the rule are materially affected by the rejection.

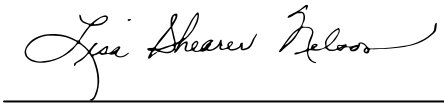
74. As noted in the Findings of Fact, no evidence was presented to establish that Petitioner filed a good faith written proposal within 21 days of the Notice of Proposed Rule of a lower cost regulatory alternative. The failure to provide such a written good faith proposal is fatal to Petitioner's claim.

75. While it is found that the proposed rule is not a invalid exercise of delegated legislative authority, the undersigned is not unsympathetic to the current challenge presented for those individuals who may need to take the classes at issue but cannot do so in person in the health environment created by COVID-19. During the hearing, Mr. Tucker was asked whether it would consider postponing implementation of the rule, and Mr. Tucker indicated that it was something that could be considered. It is suggested that the Department give serious consideration to doing so.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that proposed rule 69A-39.005 is not an invalid exercise of delegated legislative authority, and the Amended Petition to Invalidate Proposed Rule 69A-39.005 is dismissed.

DONE AND ORDERED this 23rd day of October, 2020, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.