

Cause No.: 05-04V

Name: Kerry O'Haver

Administrative Law Judge: William K. Teeguarden

Date: December 30, 2005

Board Action: Adopts option B and denies the Variance.

FINDINGS OF FACT

1. The Board is an agency within the meaning of IC 4-21.5.
2. IC 4-21.5, IC 22-14, and 655 IAC apply to this proceeding.
3. The Board is the State Agency responsible for setting Fire Fighting Training Standards and granting Variances thereto. IC 22-14-2-7.
4. At all times relevant to this proceeding, O'Haver was Captain in a Fire Department in Hancock County, Indiana.
5. O'Haver requested a Variance from the Board to substitute an associate's degree in Applied Science with a minor in Fire Science from Ivy Tech for the requirements for Fire Officer 3 in 655 IAC 1-2.1-10.
6. The Board is empowered to grant such a Variance and has granted a number of similar Variances in the past.
7. Unfortunately for O'Haver, during late spring and summer of 2005, the Board began discussing some of the prior variance practices and ultimately decided to deny applications like O'Haver's if there was a state administered test available. In other words, the Board now requires persons who have previously been able to substitute other educational courses for taking an Agency approved course and test to "test out".
8. O'Haver has an associate degree in Fire Science from Ivy Tech and is currently certified as both a Fire Officer 2 and an Instructor 2/3.
9. Had O'Haver filed his request for a waiver to use his degree to obtain Fire Officer 3 certification in lieu of testing a month or two earlier, it would have been granted.
10. O'Haver got caught in the midst of a change in an internal policy and had no way of knowing this was happening.
11. This is one of the few matters under administrative review where there is no legally right or wrong answer.
12. Whether or not the Variance is granted is purely within the sound discretion of the Board.
13. The Board is only required to follow statutes and rules; it is free to change its internal policies at any time.
14. Therefore, a decision to deny the Variance is perfectly legal.
15. On the other hand, if the Board should choose to look at the timing of filing of the Variance and decide that there is no reason a person filing on that date would have any reason to believe a policy change was coming, a decision to grant the Variance would be perfectly legal and would not be a precedent for any other such applicant who filed at a later time.

16. The appropriate path to take in this matter is solely within the sound discretion of the Board.

NONFINAL ORDER

Being duly advised, the Board now orders:

- A. The Variance request filed by Kerry O'Haver to receive Fire Officer 3 Certification is hereby granted, or
- B. The Variance request filed by Kerry O'Haver to receive Fire Officer 3 certification is hereby denied.