

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ECONOMIC RESEARCH SERVICES, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NOS. 87-2621RX  
 ) 87-2623RX  
 CENTRAL FLORIDA COMMUNITY )  
 COLLEGE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in these consolidated cases in Tallahassee, Florida, on July 14, 1987, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. At the hearing the parties were represented as follows:

For Petitioner: Mr. H. C. "Hy" Jensen  
Economic Research Services  
2014 Northeast Ninth Street  
Ocala, Florida 32670

For Respondent: Brian D. Lambert, Esquire  
SAVAGE, KRIM, SIMONS,  
FULLER & ACKERMAN, P.A.  
121 Northwest Third Street  
Ocala, Florida 32670

BACKGROUND AND ISSUES

These are two consolidated rule challenge cases in which the Petitioner has challenged two of the Respondent's promulgated rules as being invalid exercises of delegated legislative authority. The Petition in Case No. 87-2621RX challenges Respondent's Rule 6Hx3:5-43, which deals with access to public records and obtaining copies of public records. The rule is challenged on the grounds that it has an inadequate economic impact statement, as well as on substantive grounds. The Petition in Case No. 87-2623RX challenges Respondent's Rule 6Hx3:7-26, which deals with competitive bidding. The rule is challenged on the grounds that it has an inadequate economic impact statement, as well as on other procedural grounds.

At the close of the hearing, the parties were granted ten (10) days within which to file proposed final orders. The Petitioner waived the right to file proposed final orders and elected to rely on documents previously filed. The Respondent filed proposed final orders in both cases. The substance of all of the findings of fact proposed by the Respondent has been included in the findings of fact which follow.

## FINDINGS OF FACT

Based on the stipulation of the parties, the exhibits received in evidence, and the testimony of the witnesses at the hearing, I make the following findings of fact.

### Stipulated findings concerning CFCC Rule 6Hx3:5-43

1. H. C. "Hy" Jensen, as the owner and operator of Economic Research Services, licensed to do business as a research and management consultant firm, has a substantial interest in the access to and the costs for reproduction of public records, documents, rules, orders, and subject matter indexes in the custody of the District Board of Trustees of Central Florida Community College.

2. The District Board of Trustees of Central Florida Community College (the Board) is an "agency" as defined by Sections 119.011(2) and 120.52(1), Florida Statutes, and, as such, is governed by and must comply with Chapters 119 and 120, Florida Statutes.

3. The Board initially adopted Rule 6Hx3:1-04, November 19, 1986, and renumbered it as Rule 6Hx3:5-43, June 10, 1987.

4. Rule 6Hx3:5-43 is the Board's statement of policy governing access to and fees charged for duplicating copies of public records.

5. Prior to the adoption, amendment, or repeal of any rule, the Board is required to prepare a detailed economic impact statement, as described in Section 120.54(2)(b), Florida Statutes.

6. The detailed economic impact statement is a public record as defined by Section 119.011(1), Florida Statutes, and, as such, must be made available for public inspection and examination immediately upon giving public notice of the Board's intent to adopt, amend, or repeal a rule.

7. The economic impact statement pertaining to Rule 6Hx3:1-04 (now 6Hx3:5-43) was not available for public inspection and examination as required by Section 119.07(1)(a), Florida Statutes, and Rule 28-3.027, Model Rules of Procedure, Florida Administrative Code.

8. The Board had not declared an emergency to justify its failure to prepare the required detailed economic impact statement.

9. Prior to the adoption, amendment, or repeal of any rule, the Board is required to give public notice of its intended action and include information specified by Section 120.54(1), Florida Statutes. In addition to other factors, the notice must include a summary of the estimate of economic impact on all persons affected by the rule.

10. Although it did not prepare the required detailed economic impact statement, the Board nevertheless published a public notice of its intent to adopt Rule 6Hx3:5-43. The published notice included an alleged summary of the economic impact statement.

11. The Board's public notice asserted the rule: "Will provide a nominal income to the college to help offset cost incurred in reproducing or collecting information for individuals or companies."

12. The Board's unnumbered second paragraph of Rule 6Hx3:5-43 exempts from public access all documents within employee personnel records by stating:

"The provisions of the above paragraph shall not apply to such matters as student records, personnel records and other matters exempt from the definition of public records or otherwise confidential under Florida Law."

Other findings concerning CFCC  
Rule 6Hx3: 5-43

13. On or about July 28, 1986, the Petitioner sent a letter to Mr. Max O. Curry, Dean of Administration for the Respondent, in reference to the Petitioner's computations as to the cost for reproduction of certain copies of records. The purpose of the letter was to assist the Respondent in formulating a rule as to the cost to charge the public for reproduction of records. Max O. Curry and Jan Harris considered the information in Petitioner's letter of July 28, 1986, prior to the promulgation of the challenged rule.

14. Prior to the adoption of the challenged rule, the Respondent did not technically comply with Section 120.54(2)(b), Florida Statutes, in that it did not prepare a detailed economic impact statement, although it did consider the economic impact of adopting this rule prior to the actual adoption and stated an estimate of that economic impact in the notice of meeting published on November 6, 1986.

15. The opening paragraph of Rule 6Hx3:5-43 states, in essence, that records of the Respondent are open to the public. The second paragraph of the rule reads as follows:

The provisions of the above paragraph shall not apply to such matters as student records, personnel records and other matters exempt from the definition of public records or otherwise confidential under Florida Law.

16. The fourth paragraph of Rule 6Hx3:5-43 reads as follows:

In the event that the College is required to provide a photographic copy, the person desiring the same shall pay to the College a charge for making such copy or copies, the amounts prescribed as follows:

1. 25 cents per page for nine (9) pages (copies) or less.
2. 10 cents per page for all pages (copies) beyond nine (9).
3. If the nature or volume of public records requested to be inspected, examined or copies (sic) pursuant to the Rule, is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by College

personnel, or both, the College shall charge an additional special service charge based upon the cost incurred for such extensive use of information technology resources and/or the labor cost of the personnel providing the service.

Stipulated findings concerning CFCC  
Rule 6Hx3:7-26

17. H. C. "Hy" Jensen, as owner and operator of Economic Research Services, licensed to do business as a research and management consultant firm, is a provider of contractual services as defined in Section 287.012(4)(a), Florida Statutes, and, as such, has substantial interest in the procurement policies of the District Board of Trustees of Central Florida Community College.

18. The District Board of Trustees of Central Florida Community College (the Board) is an "agency" as defined by Sections 119.011(2) and 120.52(1), Florida Statutes, and as such, is governed by and must comply with Chapters 119 and 120, Florida Statutes.

19. Rule 6Hx3:7-26 is the Board's statement of policy governing procurement of contractual services.

20. The Board amended rule 6Hx3:7-26 on June 10, 1987. Prior to this amendment, Rule 6Hx3:7-26, revised February 1, 1984, required a minimum of three formal written bids for any procurement of contractual services exceeding \$3,000.

21. During its meeting of June 10, 1987, the Board amended its proposed revision by inserting a provision into the rule which excludes all providers of contractual services from the competitive bidding process.

22. Prior to the adoption, amendment, or repeal of any rule, the Board is required to prepare detailed economic impact statement, as described in Section 120.54(2)(b), Florida Statutes.

23. The detailed economic impact statement is a public record as defined by Section 119.011(1), Florida Statutes, and, as such, must be made available for public inspection and examination immediately upon giving public notice of the Board's intent to adopt, amend, or repeal a rule.

24. Prior to its amendment of Rule 6Hx3:7-26 on June 10, 1987, the Board failed to prepare the detailed economic impact statement required by Section 120.54(2)(b), Florida Statutes.

25. Consequently, the economic impact statement pertaining to Rule 6Hx3:7-26 was not available for public inspection and examination as required by Section 119.07(1)(a), Florida Statutes, and Rule 28-3.027, Model Rules of Procedure, Florida Administrative Code.

26. The Board had not declared an emergency to justify its failure to prepare the required detailed economic impact statement.

27. Prior to the adoption, amendment, or repeal of any rule, the Board is required to give public notice of its intended action and include information specified by Section 120.54(1), Florida Statutes. In addition to other factors, the notice must include a summary of the estimate of economic impact on all persons affected by the rule.

28. Although it did not prepare the required detailed economic impact statement, the Board nevertheless published a public notice to amend Rule 6Hx3:7-26. The published notice included an alleged summary of the detailed economic impact statement asserting that the Board anticipated no economic impact by its amendment of this rule.

29. Additionally, the Board's published notice did not inform the public of its intent to amend the rule to exclude all providers of contractual services from the competitive bidding process.

Other findings concerning CFCC  
Rule 6Hx3:7-26

30. Rule 6Hx3:7-26 requires, among other things that the Respondent obtain a minimum of three written bids for purchases from \$3,501 to \$5,000, and that Respondent publicly advertise all purchases exceeding \$5,000, as well as obtain a minimum of three formal, written bids for such purchases. The rule also contains several specific exceptions to the three-bid requirement. The exception challenged by the Petitioner reads as follows:

Professional services, including, but not limited to, attorneys, auditors, management consultants, architects, engineers, and land surveyors. Services of architects, engineers, and land surveyors shall be selected and negotiated according to Section 287.055, Florida Statutes.

31. The exception quoted immediately above was added to the language of rule during the course of the public hearing on the rule amendments, which hearing was conducted by Respondent's District Board of Trustees on June 10, 1987. The addition of the language quoted immediately above was made on the advice of the Respondent's legal counsel, Gary C. Simons, which advice was communicated to the Trustees during the course of the public meeting on June 10, 1987.

32. Although the original proposed amendments to Rule 6Hx3:7-26 did not include the above-quoted exception challenged by Petitioner, the proposed rules of the college are subject to being changed or further amended as a result of input at public meetings and hearings, as the purpose of public meetings and hearings on proposed rules is to receive input prior to the final adoption of a rule. The public meeting on the subject rule was properly noticed in a local newspaper and the Petitioner attended and participated in the meeting. The published notice stated that the purpose and effect of the revised Rule 6Hx3:7-26 was to update the rule to include the latest limitations in bidding requirements found in State Board of Education rules.

33. Rule 6Hx3:7-26, as finally adopted by the Respondent, including the above-quoted exception language challenged by the Petitioner, is substantially similar to the State Board of Community College Rule 6A-14.0734 regarding

bidding requirements imposed on community colleges, and the specific complained of language quoted above is identical to State Board of Community College Rule 6A-14.0734(2)(g).

#### CONCLUSIONS OF LAW

34. Based on the foregoing findings of fact and on the applicable legal principles, I make the following conclusions of law.

35. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these consolidated cases. Sec. 120.56, Fla. Stat.

36. The parties have stipulated that the Petitioner's substantial interests are affected by both of the challenged rules and that he has standing to challenge the rules.

37. Section 119.07(1)(a), Florida Statutes, reads as follows in pertinent part:

The custodian shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law or, if a fee is not prescribed by law, upon payment of the actual cost of duplication of the record. The phrase "actual cost of duplication" means the cost of the material and supplies used to duplicate the record, but it does not include the labor cost or overhead cost associated with such duplication.

38. Section 119.07(1)(b), Florida Statutes, reads as follows, in pertinent part:

If the nature or volume of public records requested to be inspected, examined, or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.

39. The portion of Rule 6Hx3:5-43 which addresses extensive use of information technology resources or extensive clerical or supervisory assistance in providing records is, in essence, a paraphrase of the statutory provision quoted immediately above. It contains no provisions inconsistent with the statutory provision. Accordingly, there is no basis upon which to conclude that that portion of the rule is invalid.

40. The portion of Rule 6Hx3:5-43 which sets charges of 25 cents and 10 cents for the making of copies of public records in quite another matter. There is no persuasive competent substantial evidence in the record to support a conclusion that the rule-established charges of 25 cents for each of the first nine copies and 10 cents for each additional copy bears any rational relationship to the Respondent's "actual cost of duplication." Similarly, the evidence fails to show that the Respondent conducted any reliable study or inquiry to determine its "actual cost of duplication." Rather, the charges established in the rule appear to be arbitrary and capricious, and thus invalid.

41. The Petitioner has also challenged Rule 6Hx3:5-43 on the grounds that the second paragraph of the rule impermissibly limits access to all personnel files. Petitioner's contentions in this regard are not persuasive. While the second paragraph of the subject rule is not a model of clarity, in view of the provisions of Section 240.337, Florida Statutes, the language of the second paragraph of the rule is susceptible of interpretation and application in a manner consistent with the provisions of both Chapter 119, Florida Statutes, which allows access to most records, and Section 240.337, Florida Statutes, which limits access to certain personnel records. Thus, while the second paragraph would benefit from some further editorial revision, it cannot be said that it is invalid in its present form.

42. Because of the invalidity of the portion of Rule 6Hx3: 5-43 which sets charges for copies, there is no need to dwell upon the Petitioner's challenge to the rule's economic impact statement. Suffice it to say that a reliable study or inquiry to determine the Respondent's "actual cost of duplication" will in all probability generate the type of information from which an adequate economic impact statement can be formulated.

43. Turning now to the Petitioner's challenge to Rule 6HX3:7-26, a major basis for challenge to the rule is that language was added to it during the rule-making hearing, which language did not appear in the version of the proposed rule which was published prior to the rule-making hearing. In this regard, attention must be directed to Section 120.54(13)(b), Florida Statutes, which provides in pertinent part: "After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule. . . ." The quoted language clearly contemplates the making of changes on the basis of matters presented at the public hearing on the rule; the very purpose of the rule-making hearings being to afford the interested public an opportunity to try to persuade the agency to change the proposed rule. The challenged change being one which is supported by the record of the public hearing on the rule, there is no basis upon which to find that portion of the rule invalid.

44. The Petitioner also challenges Rule 6Hx3:7-26 on the grounds that it fails to contain a legally sufficient economic impact statement. There is no doubt that the economic impact statement of Rule 6Hx3:7-26 falls far short of the specific statutory requirements of Section 120.54(2)(b), Florida Statutes. But those deficiencies are not necessarily fatal to the validity of the rule. The consequences of a deficient economic impact statement were addressed as follows in Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983):

[T]he Florida Supreme Court has observed that  
"[t]he procedure envisioned by section

120.54(2)(a) does not . . . command adherence to form over substance." *Id.* Moreover, although section 120.54(2) was amended in 1978 to provide that an agency's failure to include within its rule an "adequate" statement of economic impact is grounds for invalidation of the rule, that provision does not require perfection but only "substantial compliance" with section 120.54(2)(a). *Id.* As the preparation of a statement of economic impact "is a procedural aspect of an agency's rulemaking authority," it is subject to the "statutory harmless error rule" of section 120.68(8), Florida Statutes, which provides for remand only where a material error in procedure in an administrative proceeding impairs the fairness of the proceedings or the correctness of the action taken. *Polk v. School Board of Polk County*, 373 So.2d 960, 962 (Fla. 2d DCA 1979); *School Board of Broward County v. Gramith*, 375 So.2d 340 (Fla. 1st DCA 1979); *Plantation Residents' Association, Inc. v. School Board of Broward County*, 424 So.2d 879, 881 (Fla. 1st DCA 1982). Thus, the absence or insufficiency of an economic impact statement is harmless error if it is established that the proposed action will have no economic impact, i.e. by its merely implementing already established procedures, or if it is shown that the agency fully considered the asserted economic factors and impact. *Division of Workers' Compensation v. McKee*, 413 So.2d 805, 806 (Fla. 1st DCA 1982); *Florida-Texas Freight, Inc. v. Hawkins*; *Polk v. School Board of Polk County*.

45. As noted in the stipulated facts, the published notice regarding Rule 6Hx3:7-26, which not containing the details required by the statute, did contain a statement asserting that Respondent anticipated no economic impact by its amendment of this rule. Accordingly, the situation here is similar to that in *Florida-Texas Freight, Inc. v. Hawkins*, 379 So.2d 944 (Fla. 1979), where the court stated:

The record in this cause does not require a remand to the Commission to file a detailed formal statement simply negating each of the seven factors outlined in section 120.54(2)(a) when a finding of no impact has been made. We find that petitioners were not denied a fair hearing in this cause, and certiorari therefore is denied.

46. And in *Cortese v. School Board of Palm Beach County*, 425 So.2d 554 (Fla. 4th DCA 1982), a case in which there was no economic impact statement at all, the court noted in a closing footnote:

We consider the absence of an economic impact statement to be harmless error. School Board of Broward County v. Gramith, 375 So.2d 340 (Fla. 1st DCA 1979); Polk v. School Board of Polk County, 373 So.2d 960 (Fla. 2d DCA 1979). There has been no showing that its absence either harmed the board's decision-making process or adversely affected its decision.

47. Applying the principles of the foregoing cases to the facts in this case leads to the conclusion that Rule 6Hx3:7-26 is not invalid by reason of the shortcomings in its economic impact statement. Those shortcomings did not impair the fairness of the proceedings or the correctness of the action taken.

Upon consideration of all of the foregoing, it is ORDERED:

1. That the portions of the fourth paragraph of Rule 6Hx3:5-43 which establish a charge of 25 cents each for the first nine copies and 10 cents each for additional copies are an invalid exercise of delegated legislative authority.

2. That the Petitioner has failed to establish the invalidity of any other portion of Rule 6Hx3:5-43 and, therefore, the remainder of the petition in Case No. 87-262IR is dismissed.

3. That the Petitioner has failed to establish the invalidity of Rule 6Hx3:7-26 and, therefore, the petition in Case No. 87-2623RX is dismissed in its entirety.

DONE AND ORDERED this 2nd day of October, 1987, at Tallahassee, Florida.

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MICHAEL M. PARRISH, Hearing Officer  
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Filed with the Clerk of the  
Division of Administrative Hearings  
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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 ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.