STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MURPHY'S TOWING AND LYONS AUTO BODY, INC.,	)	
Petitioners,	)	
vs.	)	DOAH CASE NO. 87-4975RX
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,	)	
Respondent.	)	

FINAL ORDER

This rule challenge was originally consolidated with two Administrative Complaints (DOAH Case Nos. 87-3962 and 87-4011) filed by the Department of Highway Safety and Motor Vehicles (DHSMV) against Murphy's Towing and Lyons Auto Body, Inc., respectively. The disposition of the Administrative Complaints is the subject of a separate order.

Upon due notice, formal hearing was conducted February 16, 1988, in West Palm Beach, Florida, by Ella Jane P. Davis, the duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: R. W. Evans, Esquire,
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ISSUES

Section 321.051, Florida Statutes authorizes the creation of a system for utilizing qualified wrecker operators to remove wrecked, disabled, or abandoned vehicles. The Department of Highway Safety and Motor Vehicles has created a rotation system in which wrecker operators within designated zones are called on a rotating basis to respond to Florida Highway Patrol (FHP) calls.

This rule challenge attacks the "place of business" rule as promulgated in Rule 15B-9.003(2), Florida Administrative Code and the non-rule policy interpreting the "place of business" requirement of the duly promulgated rule, on the basis that they are invalid exercises of delegated legislative authority

and are arbitrary, capricious, and violative of constitutional equal protection with respect to these Petitioners, Murphy's and Lyons. With regard to the non-rule policy, it is also attacked because it has not been adopted pursuant to Section 120.54, Florida Statutes.

BACKGROUND AND PROCEDURE

The parties stipulated that there would be a unified record; that is, all evidence and testimony would be applicable to the Administrative Complaint proceeding and to the rule challenge proceeding. Oral testimony was received from Lt. Col. Carmody, FHP; Lt. Wessels, FHP; Howard Kauff, Harold Murphy, and Donald Lyons. DHSMV's Exhibits 2-9 were admitted. DHSMV withdrew its proposed Exhibit 1. Murphy's and Lyons' Exhibits 1-4 were admitted in evidence.

A transcript of proceedings was provided and the parties have submitted proposed findings of fact and conclusions of law, the proposed findings of fact of which have been ruled upon in the appendix hereto pursuant to Section 120.59(2), Florida Statutes.

FINDINGS OF FACT

1. The parties do not dispute that DHSMV's grant of authority stems from Section 321.051, Florida Statutes (1987) which in its entirety provides as follows:

> 321.051 A wrecker operator system for removal of wrecked, disabled, or abandoned vehicles.--The Division of Florida Highway Patrol of the Department of Highway Safety and Motor Vehicles is authorized to establish within areas designated by the Patrol a system utilizing qualified, reputable wrecker operators for removal of wrecked or disabled vehicles from an accident scene or for removal of abandoned vehicles, in the event that the owner or operator is incapacitated or unavailable or leaves the procurement of wrecker service to the officer at the scene. All reputable wrecker operators shall be eligible for use in the system provided their equipment and drivers meet recognized safety qualifications and mechanical standards set by rules of the Division of Florida Highway Patrol for the size of vehicle it is designed to handle.

2. Duly promulgated Rule 15B-9.003(2), Florida Administrative Code, which has been challenged in this proceeding, provide:

> To be eligible for approval to tow in a particular zone, the wrecker operator's place of business must be located in that zone, except that if there are no qualified operators in a particular zone, the Division Director or his designee may designate qualified out of zone wrecker operators to be called in that zone.

Some other subparagraphs of Rule 15B-9.003 which were duly promulgated and which have not been challenged in this proceeding are:

> (8) ... Wrecker operators shall have one day and one night telephone number ...
> (9) Wrecker operators shall be on call twenty-four hours a day, seven days a week.
> (10) Out-of-zone wrecker requests are permitted in the event of an emergency or the absence of a wrecker of proper classification within the accident or removal zone.

The "specific authority" listed in the Florida Administrative Code for this rule is Section 321.051, Florida Statutes. The "law implemented" is Sections 321.051 and 321.05(1), Florida Statutes.

3. Duly promulgated and also unchallenged Rule 15B-9.004, Florida Administrative Code provides in pertinent part:

> (1) The wrecker operator shall respond to all requests for service made through the Florida Highway Patrol duty officer within a reasonable time under the existing conditions and circumstances. If response cannot be made within a reasonable time, the wrecker operator shall notify the Florida Highway Patrol duty officer representative of the estimated time of delay and reasons therefore and the duty officer, if he determines that the delay is unreasonable, may cancel the request for service and use the services of another participating wrecker operator.
> * * *
> (4) When a vehicle is released at the scene by the investigating trooper or representative of the division, the wrecker operator shall tow to any location the owner requests within the limits of the zone.

The "specific authority" listed in the Florida Administrative Code for this rule is Section 321.051, Florida Statutes. The "law implemented" is Section 321.051 and 321.05(1), Florida Statutes.

4. The non-rule policy complained of has been reduced to writing by the Florida Highway Patrol (FHP) in the Administrative Complaints against these Petitioners, and interprets the term "place of business" as provided by challenged Rule 15B-9.003(2), Florida Administrative Code to mean:

> A business establishment which meets the following criteria:
> i. There must be a sign on the building that identifies it to the general public as a wrecker establishment;
> ii. There must be office space;
> iii. They must have personnel on duty at least from 9:00 a.m. to 4:00 p.m., Monday-

Friday.
iv. There must be a phone at the place of business;
v. Tow trucks must be stationed at the place of business;
vi. The tow trucks must have the zone address and phone numbers on them.

5. Petitioners are both engaged in the business of removing wrecked, disabled, stolen or abandoned motor vehicles on Florida highways. Pursuant to Section 321.051, Florida Statutes, Petitioners are eligible for, and participate in, the system established by the DHSMV for utilizing qualified, reputable wrecker operators for removal of wrecked or disabled vehicles from accident scenes or the removal of abandoned vehicles when the owner or operator is incapacitated, unavailable, or leaves the procurement of wrecker service to the officer at the scene (hereafter referred to as "FHP wrecker rotation system").

6. Petitioners are each charged in an Administrative Complaint indicating that the Respondent intends to remove Petitioners from the FHP wrecker rotation system for alleged failure, among other offenses, to comply with the "place of business" requirement of Rule 15B-9.003(2), Florida Administrative Code, and the unpromulgated "policy" interpreting the term, "place of business" as used in that rule. Petitioners received such notice by hand delivery of the respective Administrative Complaints dated July 22, 1987, bearing case numbers 87-02-FHP and 87-04-FHP now, DOAH Case Nos. 87-3962 and 87-4011, respectively. Those Administrative Complaints are the subject of the Section 120.57(1), Florida Statutes hearing consolidated with this rule challenge.

7. The FHP wrecker rotation system includes designated zones and qualified wrecker operators within those zones. When a wrecker is needed to respond to an accident or to a motorist, FHP calls the wrecker at the top of the list and then rotates this wrecker down to the bottom of the list. By rotating each wrecker on the rotation list following dispatch by FHP, each participating wrecker service is afforded an equal opportunity to service a call. See unchallenged Rule 15B-9.003(3), Florida Administrative Code.

8. Presently, FHP maintains more than two hundred zones statewide. The purpose of the zone system is to provide adequate service levels to the motoring public. The wrecker's response time to a accident scene or to a motorist in need is a primary consideration of FHP. Actual designation of a zone's boundaries is left up to each respective local FHP troop commander, subject to Division Review. See unchallenged Rule 15B-9.003(1), Florida Administrative Code. Designations are within county borders and do not overlap county borders. FHP has designated the size of a zone according to the types of roadways, the number of businesses, and also the weather conditions to anticipate response times within the zones.

9. In Palm Beach County, FHP designated six zones; twenty-two wrecker businesses have qualified to participate as rotation wreckers. These wrecker companies vary according to their size and operation; qualified wrecker operators include companies with as few as one or two wreckers to as many as thirty trucks. Murphy's Towing, Lyons' Auto Body, and Kauff's Towing are among those currently operating in Palm Beach County in one or more zones of the FHP wrecker rotation system.

10. Petitioner Murphy's Towing has participated in the wrecker FHP rotation system for eight years. Murphy's Towing maintains approximately thirty

trucks and operates in four zones in Palm Beach County. It maintains storage areas in each zone. As a result of its fleet of wreckers, Murphy's is able to use a roving patrol operation. When a call is received by Murphy's Towing from FHP, a central dispatcher operating 24 hours per day assigns a Murphy's truck which is patrolling in an assigned zone to respond to the call. In individual instances, this system may actually cut or increase response time within zones from what it might be if a truck were dispatched each time from a stationary place of business within the zone. Presently, wrecker services in Palm Beach County will dispatch the closest vehicle, regardless of the address of the wrecker truck or the location of the wrecker, even across zone lines.

11. Petitioner Lyons' Auto Body, Inc., has participated in the FHP wrecker rotation system for twenty years. Lyons' Auto Body, Inc. maintains seventeen trucks and operates in three zones in Palm Beach County. Lyons' Auto Body, Inc. also uses a central dispatch operation similar to that employed by Murphy's Towing.

12. Until FHP promulgated rules which took effect January 22, 1986, including the challenged Rule 15B-9.003(2), Florida Administrative Code, the general operation of the wrecker rotation system was governed by written guidelines and policies established by the local troop commanders, but these written guidelines apparently never embraced the term "place of business" nor defined it. (TR-67-69,102).

13. However, by unwritten policy, troop commanders were responsible for enforcing the location of a wrecker company's actual place of business and storage lot within the zone in which he operated. For thirty-two years, Lt. Col. Carmody, now Deputy Director of FHP, understood the unwritten policy to be that a place of business was required for each zone in which an operator operated, i.e., was listed for rotation. Palm Beach County FHP had represented orally to Mr. Kauff for at least nineteen years that he must have a place of business in each zone in which he operated and that "place of business" meant the facility where the wreckers were dispatched, personnel were assigned, phone calls were received, and vehicles were stored after towing. Murphy's and Lyons' principals deny ever receiving such oral information from FHP prior to the current litigation.

14. As Deputy Director of the Florida Highway Patrol, Lt. Col. John W. Carmody is responsible for all field operations and for determining the policy for the patrol. In addition, Lt. Col. Carmody supervises the troops and reviews reports with regard to the wrecker rotation system that come to his attention. In 1982, Lt. Col. Carmody was assigned responsibility by the Director of the Florida Highway Patrol to promulgate rules for administering the FHP wrecker rotation system. Among other rules, he was responsible for drafting Rule 15B-9.003(2). In so doing, he participated in public hearings, researched other Florida rules currently in force and criteria from other states. At formal hearing, Lt. Col. Carmody demonstrated no analogies or similarities between the challenged rule or the acknowledged non-rule policy and any other agency's or jurisdiction's rules or statutes, but neither did Petitioners, who bear the burden of proof, demonstrate any dissimilarity. The relationship of the challenged rule and policy to other FHP rules also promulgated January 22, 1986, is noted throughout this Order.

15. The unwritten place of business policy was carried forward into the administrative rules promulgated January 22, 1986. The purpose of Rule 15B-9.003(2) was to assure timely response by wrecker operators to telephone calls from FHP in the interest of the safety and convenience of the public. As the

author of the rule, Lt. Col. Carmody was primarily concerned with providing for a reasonable response time to the scene of an accident, reducing traffic disruption at the accident scene, and allowing owners to recover their vehicles or personal property within the zone without undue delay. In addition, it was felt that requiring the business to be located within the zone it served would facilitate the inspection of wreckers by FHP. In promulgating the rule, Lt. Col. Carmody retained the place of business requirement due to the agency's favorable experience with its use in implementing the zone system over thirty-two years.

16. At the time of the promulgation of Rule 15-9.003(2), Florida Administrative Code, in January, 1986, "place of business," as the term is used in that rule, was not defined under Chapter 321, Florida Statutes or Chapter 15-9, Florida Administrative Code. Because Lt. Col. Carmody believed "place of business" was already defined by common sense and thirty-two years of common FHP interpretation so as to already include a sign, office space, personnel on location in the zone, wreckers on location in the zone, and zone addresses and phone numbers painted on each wrecker, Lt. Col. Carmody did not feel that it was necessary to promulgate an additional rule defining "place of business." Instead, Lt. Col. Carmody gave his "common sense" definition over the phone when occasional inquiries were made.

17. In February of 1986, Lt. Ernest Wessels, newly promoted to the post of District Lieutenant of FHP Troop L, Palm Beach County, and newly in charge of Troop L's wrecker rotation system, became aware that several wrecker services on the local list had failed to letter their vehicles with zone address and phone number and that some were operating in multiple zones. In March, 1986, he met with those he thought were all the wreckers and advised them of the requirement that signs be posted on their trucks; however it is not clear that Murphy's or Lyons had any representative at that meeting or whether the sign requirement discussed had to do with the wrecker rotation system or had to do with the Section 715.07(2)(a)7, Florida Statutes, sign requirement for trucks towing from private property (TR-173). Through the chain of command, Wessels requested by a May 16, 1986 memorandum, a definition of "place of business" and instructions on how to deal with specific presumed offenders against the new "place of business" rule, 15B-9.003(2). One presumed offender indicated in that correspondence is Murphy's. Contrary to Lt. Col. Carmody's assumption in 1986 and his testimony at formal hearing, this correspondence does not indicate that any firm agency policy was known throughout FHP at that time as to how the term "place of business", as used in the new rule, was to be defined or interpreted. Otherwise, Lt. Wessels would not have had to ask for clarification. Carmody never saw Wessels' correspondence but sent oral instructions on how to deal with one business about which Wessels had inquired. That business was not owned by either Lyons or Murphy's. At that time, no specific overall criteria were set forth by Lt. Col. Carmody either orally or in writing with regard to defining "place of business" as used in the rule.

18. By letter dated January 19, 1987, Howard Kauff, Chairman of the Board of Palm Beach Services, Inc., d/b/a, Kauff's Towing in three FHP zones in Palm Beach County requested of FHP the definition of "place of business." His letter set out six criteria stating what he understood to be the definition of "place of business."

19. Lt. Col. Carmody responded to Howard Kauff by memorandum dated February 5, 1987. Carmody sent a copy of that memorandum to Inspector William A. Clark, Bureau Chief in charge of Troop L and to Major William R. Driggers, Troop Commander, Troop L, for the purpose of enforcing Rule 15B-9.003(2) and

correcting alleged violations, but he intended for the six criteria identified in his memorandum to have statewide effect. The six non-rule policy criteria incidental to Rule 15B-9.003(2), which were identified by Lt. Col. Carmody in his memorandum to Howard Kauff, and circulated to all of Troop L, are set out in Finding of Fact 4 supra. The non-rule policy in Carmody's memorandum, which for the first time interprets, in writing, the term, "place of business" as used in the rule, virtually adopts the criteria suggested in Mr. Kauff's letter, with only two exceptions. Some of Kauff's suggestions were similar also to Lt. Wessels' earlier suggestions, specifically, name and address on a building, a building manned during normal business hours, and not including lease storage.

20. Lt. Col. Carmody did not disseminate a similar memorandum to all troop commanders throughout the State of Florida until January 8, 1988. He did circulate such a memorandum on that date, but only after his deposition had been taken in the instant case and its companion Administrative Complaint cases. At the time Lt. Col. Carmody corresponded with Howard Kauff on February 5, 1987, Palm Beach County was the only area, to his knowledge, which had experienced problems with the "place of business" interpretation because of the use of multiple zone wreckers. Lt. Col. Carmody had no knowledge of similar problems in any other area of the state at that time. Testimony of Carmody and Wessels at formal hearing confirmed this to also currently be the case. Specifically, there is affirmative evidence that FHP has experienced no similar use of wreckers in multiple zones in the Fort Myers area and no requests for interpretation of the rule from that area of the state or any other. Carmody's January 8, 1988 memorandum was intended to insure uniform application of the six "place of business" criteria which Carmody had previously assumed where generally known and applied throughout FHP. The January 8, 1988 statewide memorandum contained some further refinements and embellishments of the language contained in the earlier memorandum to Kauff and Troop L in Palm Beach County, but the only substantive changes were that for the fifth criterion, the wrecker operator was required to "maintain at least one tow truck at the place of business" and for the sixth criterion, the zone address and phone numbers must be "clearly visible to the public." The 1988 memorandum also contained the further directive that:

> I recommend that you correspond with each wrecker operator to give the wrecker service notice that the above criteria must be met for the wrecker to comply with the requirements of Rule 15B-9.003(2). Subsequent inspections by FHP personnel of wrecker service shall require compliance with these criteria. Violations shall be noted and the wrecker service given an opportunity to correct any deficiency. If the wrecker operator fails to correct any violation after notice by FHP personnel, Order to Show Cause should be issued to the wrecker service advising that noncompliance will result in the removal of the wrecker service from the rotation list. Following the issuance of the Order to Show Cause, the Office of General Counsel should be

> advised to take action to remove the wrecker service from the rotation list if the wrecker service has failed to comply with the place of business criteria. [Emphasis supplied, Exhibit P-4.]

The non-rule policy appears then to have evolved at least by that point in time to clearly include written warnings prior to enforcing the criteria at a subsequent inspection. The parties have, however, stipulated that as to the six enumerated criteria, the language employed in February 1987, not January 1988, is the non-rule policy FHP is enforcing and intends to enforce. Other evidence suggests that it was always the Patrol's practice that warnings precede an Order to Show Cause.

21. No studies or any other form of field research was conducted as to the necessity or propriety of the non-rule policy. Prior to Lt. Col. Carmody's response to Mr. Kauff's letter, no written document existed requiring the six "place of business" criteria of the non-rule policy. The non-rule policy is admittedly not related to reputability, mechanical standards, or safety qualifications set by the FHP for the size of the vehicle the wrecker is intended to handle. However, the agency's primary purpose behind the place of business non-rule policy, as is its purpose for the published "place of business" rule itself, is to insure prompt response time, which Lt. Col. Carmody and Lt. Wessels view as impacting on overall traffic safety. Specifically, the concerns of FHP are that without a sign on the place of business, the wrecker operator is difficult to locate. Lt. Wessels' personal experience in being unable to locate certain operators during his subsequent investigation in preparation for the Administrative Complaint proceedings demonstrates this concern is valid. (See Finding of Fact 26) A sign assists the public in locating the wrecker service for retrieval of towed vehicles or personal property. It assists in accident investigation and reconstruction by providing quick access to the towed vehicle by insurance investigators/appraisers and by FHP. The office space requirement, the requirement of a telephone on the premises, and the requirement of the presence of office personnel during reasonably specified business hours encourages wrecker services to serve the public by receiving phone calls, permitting payment of towing bills or securing the release of vehicles or personal property, and assists in dispatching wreckers in timely response to FHP rotation calls made by telephone. It was established that in Palm Beach County, at least, FHP rotation calls are, in fact, made by telephone. It is noted that these foregoing criteria relating to telephone contact are also consistent with unchallenged Rule 15B-9.003(8) and (9) and that the hours of 9:00 a.m. to 4:00 p.m. are considerably less for office personnel than the 24 hours per day "on call" status specified in Subparagraph (9). These foregoing requirements help to insure a reasonable response time, as does the requirement that the wrecker be stationed at the place of business within the zone. The requirement that the wrecker be stationed at the place of business within the zone also facilitates timely inspections of each vehicle by the FHP. Painting the name, address, and telephone number on each truck fosters accountability of the wrecker operators, insures the reasonable response time due to their presence within the zone, and it may be inferred from all other evidence that it discourages vehicle equipment from being moved from truck to truck. It is further noted that the truck sign requirement is also consistent with Section 715.07(2)(a)7, Florida Statutes, regulating the towing of vehicles from private property.

22. From FHP's perspective, a reasonable response time is a public safety qualification, although it is admittedly not a qualification geared to the size of the vehicles to be towed.

23. Petitioners assert that Rule 15B-9.004(1), providing that an operator will lose a call if a reasonable response time is not evident, is sufficient to ensure reasonable response by wrecker operators and renders both the challenged rule and non-rule policy redundant and unnecessary because Rule 15B-9.007(1) provides for removal from the wrecker rotation list for failure to comply with any other rule. FHP maintains that although FHP is encountering only sporadic problems in Palm Beach County with wrecker response time under the current operation of Rule 15B-9.003(2), without a place of business requirement, wreckers would be encouraged to race from one zone to another to avoid violating Rule 15B-9.004, and the public would thereby be endangered by traffic hazards created by wreckers hurriedly responding to a call. Wrecker services are reluctant to turn down a rotation call. Murphy's, for instance, charges up to twice as much for an FHP list tow as for other tows. If a wrecker does not respond to a call from FHP, substantial revenues may be lost. Lt. Col. Carmody and Lt. Wessels opined that absence of an enforceable "place of business" rule would largely obliterate the statutory areas/zones concept altogether. See Section 321.051, Florida Statutes, supra.

24. Eliminating the place of business requirement would cause significant operational problems for FHP. Timely response by wreckers could not be effectively enforced on the authority of Rule 15B-9.004 alone. If a wrecker were sent from one zone into another and the wrecker were delayed, an excuse given to the Patrol, such as weather or traffic congestion could never be verified. Eliminating the place of business requirement would allow wreckers to cross zones so that timely response would have to be judged on a case by case basis. In view of the difficulty of judging the reasonableness of each response by a wrecker and problems incurred in locating the business for the purpose of inspecting the wreckers or releasing the vehicle or personal property to the motorist, eliminating the place of business requirement would create what Lt. Col. Carmody described as "an administrative nightmare for FHP." It is found that this is a fair assessment of the situation, despite Lt. Wessels' testimony that he knew of no specific facts showing that the public has yet been adversely affected in response time or retrieval of vehicles by the method in which Murphy's and Lyons' operate their businesses.

25. Upon receiving Lt. Col. Carmody's response of February 5, 1987, Howard Kauff wrote Captain Hardin of Troop L, asking for removal of several wrecker operators, among them, Murphy's and Lyons, whom Kauff had identified as allegedly failing to comply with the six "place of business" criteria specified by Lt. Col. Carmody.

26. Lt. Wessels subsequently conducted an investigation to determine if any of the wrecker services identified by Howard Kauff were in fact in violation of Rule 15B-9.003(2), as interpreted by Lt. Col. Carmody's memorandum of February 5, 1987. For varied reasons, including being unable to locate some satellite business addresses, Lt. Wessels concluded that eight companies did not comply with the criteria and recommended their removal from the appropriate rotation list. Petitioners Murphy's Towing and Lyons Auto Body, Inc. were included in the eight wrecker services identified by Lt. Wessels.

27. Following Lt. Wessels' investigation, FHP issued to the eight wrecker companies Orders to Show Cause why they should not be removed from the appropriate rotation list. Three of the wrecker services complied with the

"place of business" requirement. Wessels recommended that the remaining five, which included both Petitioners Murphy's and Lyons be removed. Pursuant to Wessels' recommendations, the Department issued Administrative Complaints against the five wrecker operators. Three wrecker operators were removed from the respective lists--two voluntarily and one by Order of the DHSMV.

28. Murphy's has participated in the wrecker rotation system for eight years without any complaint, citation, or criticism for untimely response. Its main place of business and wreckers have been inspected each of the years immediately prior to service of the Order to Show Cause without any FHP comment on its failure to comply with the "place of business" rule or non-rule policy, despite Lt. Wessels' being aware of Murphy's multi-zone operation as early as May 16, 1986. The July 22, 1987, Administrative Complaints against the Petitioners enunciate only the non-rule policy as it had evolved up to February 5, 1987 and as set out in Finding of Fact 4 supra., not as it had evolved as of the January 8, 1988 statewide memorandum described in Finding of Fact 20 supra. Lyons has participated in the wrecker rotation system for twenty years without any FHP concerns over untimely response. Its history of successful yearly inspections and no FHP comment concerning the "place of business" rule and non-rule policy has been identical to Murphy's for the last three years immediately preceding the Order to Show Cause.

29. Murphy's and Lyons are two of Kauff's largest competitors. Of the ten multi-zone wrecker operators in Palm Beach County, only Mr. Kauff and one other met the criteria suggested by Kauff's letter and enforced by non-rule policy prior to the Orders to Show Cause. See Finding of Fact 27.

30. In January, 1988, FHP learned that Kauff's Towing did not maintain office personnel at its business location in Lake Worth, Zone 4 from 9:00 a.m. to 4:00 p.m., Monday through Friday. Kauff was verbally advised by FHP of the noncompliance. This notice was followed by written confirmation on January 20, 1988 and February 10, 1988. In response to this notice by FHP, Howard Kauff directed his terminal manager to provide personnel at the location during the required time period. Kauff was advised that noncompliance with the criteria would result in removal of Kauff's from the rotation list in Zone 4, Palm Beach County.

31. At formal hearing, Lt. Col. Carmody stated that his memoranda did not address whether outside or inside storage must be available in a zone. In his opinion, FHP could not regulate that aspect due to prior Attorney General Opinion 85-60. (See the Conclusions of Law supra.) He opined that a wrecker operator using a central dispatch may be sufficient although the criteria he seeks to enforce requires a phone at each place of business. Lt. Wessels essentially concurred. Lt. Wessels was unsure how response time would be adversely affected if a truck were maintained in the assigned zone but there was not a building located in the assigned zone or if a tow truck were not physically located at the building location designated as a place of business in the zone but was either patrolling in the zone or parked elsewhere in the zone. Lt. Wessels was unable to testify whether ownership or rental of a building by an operator had significance with regard to the "place of business" rule or the six non-rule policy criteria. Lt. Wessels would accept, within the six criteria, an operator's use of a storage lot maintained by the lot's owner who was not an employee of the wrecker operator. However, it was not demonstrated that Lt. Wessels is in a policy making position for the agency, and his testimony as to the foregoing matters at best demonstrates some further confusion as to how the six interpretative non-rule policy criteria are to be applied on a case by case basis. It does not demonstrate that those six

criteria have been applied to Petitioners in any unequal fashion, merely that application of the six criteria is best made on a case by case basis.

32. In the course of discovery, Respondent agency denied the following Request for Admission, "2. Admit that the interpretation of the place of business requirement has not been equally applied to all wrecker operators in the State of Florida." The evidence as a whole does not demonstrate such unequal application of the promulgated rule or the non-rule policy to Petitioners in this cause, so as to invalidate either the rule or the non-rule policy upon that ground. Apparently, as of the date of formal hearing, both rule and non-rule policy are being applied evenhandedly in Palm Beach County where violations have been documented. The testimony of Lt. Col. Carmody and Lt. Wessels demonstrates that no reports of violation have been made from other counties. Petitioners did nothing to refute this testimony nor did they provide any evidence of multiple zone operators in other counties or zones outside of Palm Beach County who were systematically permitted to evade the rule and/or non-rule policy.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to Section 120.56, Florida Statutes.

34. Petitioners have standing to bring this rule challenge.

35. Their Petition challenged a duly promulgated rule, Rule 15B-9.003(2), Florida Administrative Code, which provides:

> To be eligible for approval to tow in particular zone, the wrecker operator's place of business must be located in that zone, except that if there are no qualified operators in a particular zone, the division director or his designee may designate qualified out-of-zone wrecker operators to be called in that zone.

Petitioners challenged this rule as an invalid exercise of delegated legislative authority. They also challenged the rule as arbitrarily and capriciously applied.

36. The Petition further challenges an unpromulgated rule or policy of the DHSMV interpreting the place of business requirement of Rule 15B-9.003(2). This policy consists of six criteria to constitute a place of business, as follows:

> 1. There must be a sign on the building that identifies it to the general public as a wrecker establishment.
> 2. There must be office space.
> 3. The office must have personnel on duty at least from 9 a.m. to 4 p.m. Monday through Friday.
> 4. There must be a phone at the place of business.
> 5. Tow trucks must be stationed at the place of business.

6. Tow trucks must have the zone address and phone numbers on them.

37. Petitioners also challenge this policy as an unpromulgated rule which constitutes an invalid exercise of delegated legislative authority. Petitioners contend that the policy is applied in an arbitrary and capricious manner.

38. Petitioners' challenge is restricted to the foregoing rule and six policy criteria as items specifically identified within the four corners of their Petition, which was not amended. Any challenge to rules 15B-9.003(3) [call allocation system], 15B-9.003(8) [one day and night phone number], 15B-9.003(9) [wreckers on call 24 hours a day], and 15B-9.004(4) [vehicles to be towed within the zone] is hereby rejected as not having been raised in the pleadings or by proper amendment. See, Rule 22I-6.004, Florida Administrative Code.

39. With regard to the constitutional issues raised by the Petitioners, these were not argued in the post hearing proposals and it is noted that Hearing Officers of the Division of Administrative Hearings have no authority to dispose of such issues. See, Cook v. Parole and Probation Commission, 415 So.2d 845 (Fla. 1st DCA 1982).

40. For the reasons set forth in the foregoing findings of fact, Petitioners are not entitled to attorney's fees, costs, and sanctions associated with an improper denial of a Request for Admission.

41. The statute on which DHSMV bases its authority for the challenged rule and non-rule policy criteria is Section 321.051, Florida Statutes, which provides:

> The Division of Florida Highway Patrol of the Department of Highway Safety and Motor Vehicles is authorized to establish within areas designated by the patrol a system utilizing qualified, reputable, wrecker operators for removal of wrecker or disabled vehicles from an accident scene or for removal of abandoned vehicles, in the event or operator is incapacitated or unavailable or leaves the procurement of wrecker service to the officer at the scene. All reputable wrecker operators shall be eligible for use in the system provided their equipment and drivers meet recognized safety qualifications and mechanical standards set by rules of the Division of Florida Highway Patrol for the size of vehicle it is designed to handle. [Emphasis Supplied.]

42. This statute was enacted by Chapter 80-402, Laws of Florida, with an effective date of July 10, 1980. The Title to this law states as follows:

> An act relating to maintenance of an approved wrecker system of call allocations: creating section 321.051, Florida Statutes; providing authority to

> the Florida Highway Patrol for maintenance of such lists for call to accident scenes or removal of abandoned vehicles when owner or operator incapacitated, unavailable or leaves the decision to officers; providing guidelines for entry and retention on the system of call allocation; providing an effective date.

While the title to an act cannot be relied upon to add to or expand the operation of the act, it still may give valuable clues as to legislative intent and how the statute should be construed. See Parker v. State, 406 So.2d 1089 (Fla. 1982), Cook v. Blazer Financial Services, Inc., 332 So.2d 677 (Fla. 1st DCA 1976), State v. Yeats, 77 So. 202 (Fla. 1917). Determining legislative intent is of utmost importance in these cases and statutory construction is more than diagramming sentences.

43. Respondent relies on Chapter 321's general delegation to the Patrol to implement a call allocation system within areas (geographic boundaries by zones) as grounds to uphold the rule and non-rule policy. DHSMV-FHP also relies upon the language within Section 321.051, Florida Statutes, authorizing the FHP to "establish within areas designated by the Patrol a system ..." and Section 321.14 which provides as follows:

> Construction.--This chapter shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety.

Therefore, DHSMV-FHP further urges that Section 321.051 should be liberally construed to provide for the safety of the motoring public; that is, if the statute is capable of different interpretations, the construction which reasonably promotes public safety should be utilized.

44. In General Telephone of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984), the Supreme Court set forth the standard for review in rule challenge cases:

> We adopt as the proper standard of review one set forth by the First District Court of Appeal upon review of similar rule-making:
>
> Where the empowering provision of a statute states simply that an agency may 'make such rules and regulations as may be necessary to carry out the provisions of this act,' the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not

> arbitrary or capricious. Agrico Chemical Comany v. State, Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978); cert. den. 376 So.2d 74 (Fla. 1979); Florida Beverage Corp. v. Wynne, 306 So.2d 200 (Fla. 1st DCA 1975).

45. Additional standards applicable to the review of this case are set forth in Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984) as follows:

> The well recognized general is that agencies are to be accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties. Florida Commission on Human Relations v. Human Development Center, 413 So.2d 1251 (Fla. 1st DCA 1982). An agencies construction of the statutory it administers is entitled to great weight and is not to be overturned unless clearly erroneous. [Emphasis by Court]. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); Barker v. Board of Medical Examiners, 428 So.2d 720 (Fla. 1st DCA 1983). Where, as here, the agency's interpretation of a statute has been promulgated in rulemaking proceedings, the validity of such rule must be upheld if it is reasonably related to the purposes of the legislation interpreted and it is not arbitrary and capricious. The burden is upon Petitioner in a rule challenge to show by a preponderance of the evidence that the rule or its requirements are arbitrary and capricious. Agrico Chemical Company v. State, Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978); Florida Beverage Corp. v. Wynne, 306 So.2d 200 Fla. 1st DCA 1975). Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations. Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983) (Ervin, C.J. dissenting); Department of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982); Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238 (Fla. 1st DCA 1981).

46. What constitutes arbitrary or capricious action is explained in Agrico Chemical Company v. State, Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978).

> A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Competent substantial evidence has been described as such evidence as a reasonable person would accept as adequate to support a conclusion.
>
> The requirement that a challenger has the burden of demonstrating agency action to be arbitrary or capricious or an abuse of administrative discretion is a stringent one indeed. However, the degree of such required proof is by preponderance of the evidence.

47. As to Rule 15B-9.003(2), Florida Administrative Code, which was adopted pursuant to Section 120.54, Florida Statutes, and which has been in effect since January, 1986, without legislative correction, the presumption of correctness of an agency rule is even stronger. Department of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982). Rule 15B-9.003(2) represents a regulation reasonably related to the purpose of establishing a call allocation system within areas (zones) designated by the Patrol. Section 321.051, Florida Statutes, must be read in pari materia with Section 321.14, Florida Statutes, as a general delegation to the Department to establish rules relating to the wrecker allocation system that are designed to promote public safety.

48. The record in this proceeding supports the reasonableness of limiting wrecker participation in the Patrol's rotation system to all qualified operators who are physically located within the designated zone. The alternative could endanger motorists and foster undue hardship and confusion to the public and the Patrol. It would effectively eliminate any meaningful zone requirements contemplated by the statute.

49. Petitioners solely concentrate upon the second sentence of Section 321.051 and maintain that statutory language should be read so as to impose only two eligibility qualifications upon wrecker operators: (1) reputability and (2) equipment and drivers which meet recognized safety qualifications and mechanical standards ... for the size of vehicle it is designed to handle. 1/ Petitioners then propose that maintaining a "place of business" within each zone operated in has no relationship to either qualification.

50. Respondent has shown safety considerations, although not necessarily mechanical ones, which went into formulation of the rule. Reading Sections 321.14 and 321.051, Florida Statutes, in pari materia provides for an overall system whose establishment, maintenance, and safety must be of primary concern. It is the agency's responsibility, indeed its duty, to promulgate rules to implement that system. The title of the implementing legislation is consistent with this construction.

51. Petitioner's objection underlies their preference for a different call allocation system involving roving trucks with radio dispatched systems and no zone restrictions. The agency rule need only be within the range of reasonable interpretation to be sustained. Petitioners have therefore failed their burden of proof in attempting to show that the promulgated rule 15B-9.003(2) is arbitrary and capricious.

52. The six "place of business" definitive criteria articulated by Lt. Carmody may be characterized as incipient agency policy. The courts have recognized the validity of such policy as a precursor to rule. The incipient policy may be applied in Section 120.57 hearings, "provided the agency explicates, supports, and defends such policy with competent substantial evidence on the record in such proceedings." Gulf Coast Home Health Service of Florida, Inc. v. State Department of Health and Rehabilitative Services, 513 So.2d 704 (Fla. 1st DCA 1987).

53. Respondent suggests that Department of Highway Safety and Motor Vehicles v. Florida Police Benevolent Association, 400 So.2d 1302,1303 (Fla. 1st DCA 1981) controls. Therein, the courts declined to require Florida Highway Patrol general orders to be adopted as rules, where they were applied pursuant to a published Florida Administrative Code rule against insubordination. That case is not fully on point with the present one and is not controlling. There is no lawful way the six criteria interpreting "place of business" and resulting in administrative complaints against Murphy's and Lyons, among others, can be considered to be an "internal management memorandum."

54. It has been held that an agency statement is a "rule" if it purports in and of itself to create certain rights and adversely affects others or serves by its own effect to create rights, to require compliance or otherwise to have the direct and consistent effect of law. Balsam v. Department of Health and Rehabilitative Services, 452 So.2d 976 (Fla. 1st DCA 1984); State, Department of Administration v. Harvey, 356 So.2d 323 (Fla. 1st DCA 1978). The challenged policy is directly and consistently applicable to all Florida rotation listees and its immediate effect is not limited because Palm Beach County is the only county in which alleged violators were detected. The instant situation is distinguishable from the Department of Commerce v. Mathews Corp., 358 So.2d 256 (Fla. 1st DCA 1978). Therein, the court held a wage rate determination applied to one entity/party in one geographic location, for one construction project was not a rule because it was not of general applicability and did not have the consistent effect of law. Here, DHSMV applied its policy to all known offenders after investigation.

55. It has been proved that DHSMV has a policy which it has attempted to consistently apply once it became aware of violations thereof. That policy, as described in Findings of Fact 4 and 20 supra., is a "rule" based upon the plain reading of the definition in Section 120.52(16), Florida Statutes.

> 'Rule' means each agency's statement of general applicability that implements, interprets, or prescribes law or policy...

56. The policy/rule is not inconsistent with Chapter 321 or duly promulgated Rule 15B-9.003(2). It has not, however, been duly promulgated.

57. Nonetheless, Department of Highway Safety and Motor Vehicles--Florida Highway Patrol's admitted failure to promulgate its policy as a rule is not

fatal to FHP's application of that policy on a case-by-case basis. The opportunity for exposure and challenge to the policy is available in Section 120.57(1), Florida Statutes proceedings, in lieu of the Section 120.54, Florida Statutes rulemaking process.

58. The appellate courts, in construing Section 120.56, Florida Statutes have evolved from the early cases invalidating policies unpromulgated as rules, but within the virtually limitless definition of "rule" in Section 120.52(16), Florida Statutes. Agencies are given a choice of properly promulgating policies as rules and applying them with the force and effect of law, or fully explicating those policies and exposing them to challenge every time they are applied in an adjudicatory procedure. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977); Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43 (Fla. 1st DCA 1983); Gulf Coast Home Health Services of Florida, Inc. v. State of Florida, Department of Health and Rehabilitative Services, 513 So.2d 704 (Fla. 1st DCA 1987). In Amos page 47 supra., the agency's policy was invalidated, not solely because it had not been promulgated as a rule, but because the agency also failed to affirmatively show the reasonableness and factual accuracy of the policy.

59. Whether the policy is "incipient" or evolving, is not material to the application of this principle. The policies have been invalidated as rules. State Department of Administration v. Harvey, supra. This means of course, they cannot be applied as rules, but must be defended on a case-by-case basis each time the occasion arises in a Section 120.57(1), Florida Statutes proceeding.

60. This is precisely what is transpiring in DOAH Case Nos. 87-3962 and 87-4011, the related Section 120.57(1), Florida Statutes cases, which are companion to the instant one. Based upon the foregoing, it is hereby ORDERED:

1. Petitioners have standing to bring this action.

2. Rule 15B-9.003(2) is a valid exercise of delegated legislative authority pursuant to Sections 321.051 and 321.14, Florida Statutes.

3. DHSMV-FHP's policy establishing six criteria by which the term "place of business" as used in Rule 15B-9.003(2) Florida Administrative Code is to be defined is invalid as a rule for failure to promulgate pursuant to Section 120.54, Florida Statutes.

4. The policy is not invalid as contrary to Chapter 321, Florida Statutes or other statutory provisions raised in this proceeding, and is subject to be litigated on a case-by-case basis.

DONE and ORDERED this 22nd day of July, 1988, at Tallahassee, Florida.

_____

ELLA JANE P. DAVIS, Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 1988.

ENDNOTE

1/ Petitioners' construction is in tune with the construction employed for the same statute in AGO 85-60, which advised DHSMV-FHP that their prior guidelines might not, among other matters, prescribe storage requirements for towed vehicles. That opinion was written in the context of specific questions posed by the Agency and did not address the system of rotation lists employed by FHP. While instructional, it is not binding in this forum.

APPENDIX TO FINAL ORDER, CASE NO. 87-4975RX

The following constitute rulings pursuant to section 120.59(1), Florida Statutes, upon the respective proposed findings of fact (PFOF) of the parties herein.

Petitioners' PFOF

1-2 Accepted in FOF 18-20, 31.
3 Rejected for the reasons and upon the findings set forth in FOF 27, 30-32.
4 Opening statements cannot form the basis of a FOF. The remainder of the proposal is accepted in FOF 15, 21, 23.
5-7 Except as subordinate and unnecessary; see FOF 23-24, 28, 29. The testimony was that although no chronic response time exists, normal and sporadic problems exist in the various zones of Palm Beach County.
8 Rejected in part and accepted in part in FOF 21 and 26. The testimony recited applied to main offices, not satellite offices.
9 Accepted in FOF 23.
10 Rejected in FOF 15-16 and 21; Lt. Col. Carmody assumed the six criteria were always part of the rule.
11 Accepted in FOF 15.
12 Accepted in FOF 12-17.
13-22 Accepted in FOF 5-6, 10-11, 27-29.
23 Accepted in FOF 12.
24 Accepted in FOF 20.
25 Accepted in FOF 5-6, 10-11, 27-29.
26 Accepted but subordinate and unnecessary.
27 Accepted in FOF 31.
28 Accepted in FOF 25.
29 Accented as modified to conform to the record as a whole in FOF 29.
30-34 Except as subordinate or unnecessary, accepted in FOF 31.

Respondent's PFOF

1 Accepted in FOF 7.
2 Accepted in FOF 8.
3 Accepted in FOF 9.
4 Accepted in FOF 10.
5 Accepted in FOF 11.
6 Accepted in FOF 12.

7 Accepted as modified to conform with the greater weight of the credible competent record evidence as a whole in FOF 13.

8 Accepted as modified to conform with the greater weight of the credible competent record evidence as a whole in FOF 14.

9 Accepted in FOF 15.

10 Accepted in FOF 21-24.

11 Accepted in FOF 10, 23-24.

12 Accepted in FOF 24.

13 Accepted in FOF 16.

14-15, 18 Except as subordinate and unnecessary, covered in FOF 17.

16 Rejected as unnecessary.

17 Accepted in FOF 20, 32.

19-20 Accepted in FOF 18.

21 Accepted in FOF 19.

22 Accepted as modified to conform to the record as a whole in FOF 19-21.

23 Accepted in FOF 31.

24 Accepted in FOF 20.

25 Accepted in FOF 25.

26-27 Accepted in FOF 26-27, 29

28 Accepted in FOF 30.

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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.