STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN FACTORS GROUP, INC., and THE ENVIRONMENTAL TRUST, Petitioner,	)	
vs.	)	CASE NO. 95-0343RU
DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Susan B. Kirkland, held a formal hearing in this case on May 15, 1995, in Tallahassee, Florida.

APPEARANCES

For Petitioner: E. Gary Early, Esquire
Akerman, Senterfitt & Eidson, P.A.
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For Respondent: W. Douglas Beason, Esquire
Mary Stuart, Esquire
Assistant General Counsels
Department of Environmental Protection
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STATEMENT OF THE ISSUES

1. Whether the challenged agency statement is a rule as defined under Section 120.52(16), Florida Statutes.

2. If the agency statement is a rule, whether Respondent has violated Section 120.535(1), Florida Statutes, by failing to adopt the alleged agency statement as a rule.

3. If the agency statement is a rule, whether it is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On January 26, 1995, the Petitioners, American Factors Group, Inc. (AFG) and The Environmental Trust (TET), filed a Petition for Administrative Determination of Agency Statement pursuant to Section 120.535(1), Florida

Statutes, for Administrative Determination of the Invalidity of a Rule pursuant to Section 120.56, Florida Statutes, and for Administrative Hearing pursuant to Section 120.57(1)(b)15, Florida Statutes. With regard to the use of "factoring" within the context of the Department's review of a reimbursement application under Chapter 62-773, Florida Administrative Code, the petition alleges the Department of Environmental Protection (Department) has issued the following agency statement:

The difference between the face value of an invoice for services and the purchase price of a related receivable shall be deemed to be a "carrying charge" regardless of the relationship between the parties, regardless of whether the "carrying charge" is itemized as a reimbursable charge in an application for reimbursement and regardless of whether the "carrying charge" affects the allowability of the costs incurred for the cleanup or the reasonableness of the rates charged for such costs. The difference between the face value of an invoice and the purchase price of the related receivable, negotiated at arms length in a transaction as described herein, shall be deducted from the amount sought in reimbursement.

The final hearing was scheduled for February 21, 1995. By order dated February 9, 1995, the parties' ore tenus motion for continuance was granted.

On April 28, 1995, the Department filed a Motion for Summary Final Order. On May 9, 1995, the motion was heard and the Petition for Administrative Hearing pursuant to Section 120.57(1)(b)15, Florida Statutes, was dismissed.

At the final hearing Petitioner presented the following witnesses: Steve Parrish, Charles Williams, Dr. Jerome S. Osteryoung and Robert Beard. Petitioners' Exhibits 1, 3-6 and 8-11 were admitted in evidence.

At the final hearing, the Department called Charles Williams as its witness. Department's Exhibits 1-8 were admitted in evidence. Petitioner introduced the deposition of Charles Williams as rebuttal evidence. The parties submitted posthearing those portions of the deposition which were designated as rebuttal testimony and any objections to those portions. By Order dated June 16, 1995, the Hearing Officer ruled on the admissibility of the designated portions of the deposition.

FINDINGS OF FACT

1. Respondent, Department of Environmental Protection (DEP), is the administrative agency of the State of Florida which administers the relevant portions of Chapter 376, Florida Statutes, and the rules pertaining thereto with regard to the reimbursement of actual and reasonable costs of cleanup of petroleum sites.

2. Petitioner, American Factors Group, Inc. (AFG), is engaged in the business of financing storage tank clean-ups eligible for reimbursement pursuant to Section 376.3071(12), Florida Statutes.

3. Petitioner, The Environmental Trust (TET), is affiliated with AFG. Certain principals of AFG are also trustees of TET. TET acts as the funder of the contractors and subcontractors performing rehabilitation activities at petroleum sites.

4. Environmental Factors, a division of AFG, negotiates and enters into the financing contracts with the contractors and subcontractors.

5. American Environmental Enterprises, which is affiliated with AFG, handles the financial transactions relative to the contracts in which Environmental Factors enters as a division of AFG. In other words, American Environmental implements the contracts on behalf of AFG.

6. Under the reimbursement program, the invoices are submitted to DEP after the program task is completed or not more than once every six months for remedial actions. DEP will reimburse the applicant for the actual and reasonable costs incurred for site rehabilitation. The application is reviewed by DEP within sixty days of receipt. If additional information is needed, DEP will advise the applicant. DEP is required to deny or approve the application for reimbursement within ninety days of the date the additional information is submitted or at the end of the sixty-day review period if no additional information is requested. Because of backlogs in the past, DEP has taken longer than the statutory time frames to make a payment for reimbursement.

7. In the financial arrangements between a contractor and AFG, the contractor is required to submit invoices to AFG upon the completion of the contractor's services. AFG advances the contractor a discounted amount based upon a percentage of the face value of the invoice. The contractor is also required to contribute a certain percentage of the invoice amount to a reserve trust account.

8. The turn around time between AFG's receipt of the contractor's invoice and the advance of the discounted amount to the contractor is typically five to ten days.

9. This financial arrangement between AFG and the contractors is known as factoring. Factoring is generally construed as the purchase of an asset, which may include an account receivable, from another person at a discount.

10. An account receivable reflects the costs that a company charges for its service after that service has been rendered but has not been paid by the entity responsible for payment. Thus, when a contractor completes his rehabilitation task, the amount of his invoice that would be submitted to DEP for reimbursement is an account receivable.

11. In determining how much the invoice is to be discounted, AFG will take into consideration the time value of the funds. In other words, AFG uses how long will it take for AFG to receive the invoice amount from DEP as a component in determining the percentage of discount.

12. In the instant case, AFG is not actually buying the account receivable, but is buying the right to receive the payment for the account receivable when it is paid. AFG has recourse against the contractor through an indemnity and such recourse is secured by the contractor's contribution to a reserve trust account.

13. AFG has been using this type of financing in Florida in the context of clean ups of petroleum sites since 1993. By letter dated September 10, 1993, Paul DeCosta, an attorney representing AFG, requested Lisa Duchene of the DEP to advise him how certain activities contemplated by AFG in financing expenses for reimbursable environmental cleanups would be treated by DEP pursuant to Section 376.3071, Florida Statutes.

14. By letter dated November 4, 1993, E. Gary Early, counsel for AFG, advised Bill Sittig of DEP of his understanding of a discussion between Mr. Sittig and representatives of AFG on October 21, 1993. The discussion concerned DEP's position on certain aspects of the financing arrangements that AFG contemplated using for the environmental cleanups.

15. On January 18, 1994, Mr. Early wrote to Lisa Duchene, outlining AFG's plan for providing capital for site rehabilitation, and requesting that she advise him if there were any obvious problems with the proposed financing structure.

16. Rule 62-773.350(4)(e), Florida Administrative Code prohibits the reimbursement of costs associated with interest or carrying charges of any kind with the exception of those outlined in Rule 62-773.650(1), Florida Administrative Code.

17. In November, 1994, Mr. Early, Ms. Duchene, and Charles Williams, Environmental Administrator for DEP's Bureau of Waste Cleanup, had a telephone conversation concerning factored invoices. Mr. Early was advised the following by DEP staff:

> That the difference between the amount that a contractor accepted in payment for his services, which was a discounted amount after factoring, the difference between that and the face value of the invoice which was claimed and marked up in the application was determined to be a carrying charge or interest, which is specifically disallowed for reimbursement in the reimbursement rule.

This position had been formulated at meeting of DEP representatives prior to the telephone call. The statement was limited to the scenario that Will Robbins of AFG had outlined in an earlier meeting with DEP staff. The statement of DEP was an informal opinion of how DEP would propose to deal with an application involving AFG and the scenario described if such an application should be submitted to DEP. In determining whether DEP would also treat the discounted amount as a carrying charge in other transactions of other entities involving factoring, DEP would have to deal with it on a case by case basis.

18. By memorandum dated April 21, 1995, Bruce French, an Environmental Manager with DEP, set forth DEP's policy regarding factored and/or discounted reimbursement applications. The memorandum was issued to provide guidance to DEP reviewers when considering applications that involve factoring and reimbursement fees. The memorandum provided:

> Regarding reimbursement applications where the program task organization structure of the applicants may involve any combination of a general contractor, management company, funder and responsible party and any other parties with claims in applications from these entities, only incurred costs of the general contractor and subcontractors including allowable markups are to be considered for reimbursement.

> Specifically, invoices from subcontractors, vendors, suppliers, and/or the general contractor which were paid a factored (e.g., discounted) amount by a third party capital participant (e.g., funder) represents the actual amount incurred by that entity and subsequently by the general contractor.

Additionally, the memorandum gave an example of factoring involving the payment of factoring fees, and explained what amounts would be allowed in the scenario. The factoring scenario described in the memorandum was not the same scenario that AFG representatives described to DEP. Petitioners have not challenged the validity of the April 25, 1995, memorandum as a rule.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding.

20. Petitioners have challenged the agency statement pursuant to Sections 120.535 and 120.56, Florida Statutes. In order to prevail under either statute, Petitioners must establish as a threshold requirement that the oral communication constitutes a rule as defined in Section 120.56, Florida Statutes.

21. Section 120.52(16), Florida Statutes, defines rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency."

22. Statements of "general applicability" as that term is used in Section 120.52(16), Florida Statutes, are "statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." McDonald v. Department of Banking and Finance, 346 So.2d 569, 581 (Fla. 1st DCA 1977).

23. The oral communication to AFG was limited to DEP's position as it related only to the scenario described by Will Robbins in a meeting with DEP staff. It was not to apply generally to all applicants for reimbursement. Charles Williams testified that DEP would have to consider each case individually in order to determine whether the difference in the original invoice and the discounted invoice would be considered interest or a carrying charge. Thus, the oral communication did not have general applicability and is not a rule as defined by Section 120.52(16), Florida Statutes. See Citifirst Mortgage Corp. v. Department of Banking and Finance, 15 F.A.L.R. 1735 (Final Order dated April 1, 1993).

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Petitioners challenge to the agency statement pursuant to Sections 120.535, 120.56, and 120.57(1)(b)(15) are hereby DISMISSED.

DONE AND ORDERED this 24th day of July, 1995, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-343RU

To comply with the requirements of Section 120.59(2), Florida Statutes (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

1. Paragraphs 1-4: Accepted in substance.
2. Paragraphs 5-6: Rejected as irrelevant.
3. Paragraph 7: Accepted in substance except for the fifth sentence which is rejected as irrelevant.
4. Paragraph 8: The last sentence is accepted in substance. The remainder is rejected as irrelevant.
5. Paragraph 9: Accepted in substance.
6. Paragraph 10: Rejected as irrelevant.
7. Paragraph 11: Accepted in substance.
8. Paragraph 12: The first sentence is accepted in substance. The remainder is rejected as irrelevant.
9. Paragraphs 13-14: Rejected as irrelevant.
10. Paragraph 15: Accepted.
11. Paragraph 16: Rejected as irrelevant.
12. Paragraph 17: Accepted to the extent that the statement was made to AFG as DEP's policy on the scenario described by AFG.
13. Paragraph 18: The first sentence is accepted in substance. The second sentence is rejected as not supported by the greater weight of the evidence. At the time of the oral communication, DEP had not had claims that involved the factoring scenario that was described by AFG.
14. Paragraph 19: The first sentence is accepted to the extent that each application would have to be evaluated on a case by case basis to determine whether the discount would be considered a carrying charge or interest. The second sentence is rejected as irrelevant since AFG does not use reservation fees. The last two sentences are rejected as irrelevant since Petitioners have not challenged the memorandum and the

memorandum contemplates scenarios which may differ from the scenario on which the oral communication was based.

15. Paragraph 20: Rejected as not supported by the greater weight of the evidence.
16. Paragraph 21: Rejected as constituting a conclusion of law.
17. Paragraph 22: The first sentence is rejected as constituting a conclusion of law. The second and third sentences are accepted in substance. The fourth sentence is accepted as it relates to what DEP's position would be as it related to the specific scenario described by AFG. The fifth sentence is accepted in substance. The sixth sentence is accepted in substance to the extent that DEP would have to look at each application on a case by case basis to determine whether the discount in its financing scheme would be the equivalent to a carrying charge or interest. The remainder is rejected as irrelevant.
18. Paragraph 23: The first sentence is accepted as it pertains to only to AFG's specific scenario of financing. The remainder is irrelevant given the finding that the oral communication is not a rule.
19. Paragraphs 24-55: Rejected as irrelevant given the finding that the oral communication is not a rule.

Respondent's Proposed Findings of Fact.

1. Paragraphs 1-7: Accepted in substance.
2. Paragraphs 8-9: Rejected as subordinate to the facts found.
3. Paragraphs 10-11: Accepted in substance.
4. Paragraph 12: Rejected as unnecessary.
5. Paragraph 13: Accepted in substance.
6. Paragraphs 14-17: Rejected as unnecessary.
7. Paragraph 18: Accepted in substance.
8. Paragraphs 19-25: Rejected as irrelevant.
9. Paragraph 26: Accepted in substance.
10. Paragraphs 27-66: Rejected as irrelevant given the finding that the statement does not constitute a rule.

COPIES FURNISHED:

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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 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 in the appellate district where the agency maintains its headquarters or where a party resides. The Notice of Appeal must be filed withing 30 days of rendition of the order to be reviewed.