STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE W. EYER, Petitioner, vs. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent, and FLORIDA ASSOCIATION OF D.U.I. PROGRAMS, INC., Intervenor.	)	Case No. 97-0924RX

FINAL ORDER

A formal hearing was held in this case before Larry J. Sartin, a duly designated Administrative Law Judge of the Division of Administrative Hearings, on June 16, 1997, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Kelly H. Buzzett, Esquire
2 Hotz Avenue
Grayton Beach, Florida 32459

For Respondent: Electra Theodorides
Assistant General Counsel
Department of Highway Safety and Motor Vehicles
Neil Kirkman Building, A432
Tallahassee, Florida 32399-0500

For Intervenor: Edwin A. Steinmeyer, Esquire
Lewis, Longman, and Walker, P.A.
125 South Gadsden Street, Suite 300
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue in this case is whether Rule 15A-10.043, Florida Administrative Code, and certain forms incorporated therein, constitutes an invalid exercise of delegated legislative authority to the extent that the rule interprets the term "drug" to include alcohol.

PRELIMINARY STATEMENT

On March 3, 1997, Lee W. Eyer filed a Petition Seeking Administrative Determination of Validity of Rule. In the petition, Mr. Eyer challenged the validity of Rule 15A-10.029, Florida Administrative Code, pursuant to Section 120.56(1), Florida Statutes. The petition was designated Case Number 97-0924RX. The matter was assigned to the undersigned by an Order of Assignment entered March 6, 1997.

The formal hearing on Mr. Eyer's petition was scheduled for Monday, March 31, 1997, by Notice of Hearing entered March 10, 1997. On Friday, March 27, 1997, Respondent filed Respondent's Motion to Dismiss. The motion was not received by Petitioner or the undersigned until the commencement of the formal hearing.

In the motion, Respondent represented that Rule 15A-10.029(4), Florida Administrative Code, the specific provision being challenged by Mr. Eyer, had been repealed

March 5, 1997. Upon further inquiry, Respondent represented that it was still using certain forms which had been adopted by reference in Rule 15A-10.043, Florida Administrative Code, that contained language which had the same effect as the language of the rule challenged by Mr. Eyer. The rule adopting those forms, however, adopts several forms by reference. Therefore, it was determined that the hearing should be postponed to allow Mr. Eyer an opportunity to review the Rule 15A-10.043, Florida Administrative Code, to determine which forms he was challenging, and then file an amended petition. Mr. Eyer was given until April 10, 1997, to file an amended petition. An Order Granting Respondent's Motion to Dismiss was entered April 29, 1997.

During the formal hearing on March 31, 1997, it was agreed that the issue in this case was primarily an issue of law. Therefore, it was suggested to the parties that they attempt to stipulate to any factual issues in order to avoid scheduling another hearing.

On April 4, 1997, Mr. Eyer filed an Amended Petition Seeking Administrative Determination of Validity of Rule. In this petition, Mr. Eyer identified the forms he was challenging. The rule which adopts those forms by reference was not cited in the petition, however.

On April 14, 1997, Respondent filed Respondent's Motion to Dismiss Petitioner's Amended Petition. Respondent argued in the motion that Petitioner had failed to allege facts which would

support a finding that he has standing to institute this matter. On April 30, 1997, Petitioner's Response to Motion to Dismiss the Amended Petition and Request for Hearing was filed.

On May 16, 1997, a hearing to consider the motion to dismiss was conducted by telephone. Petitioner's alleged injury in support of his standing was the denial of an application for a hardship driver's license. The authority for the denial was the language of the challenged forms. This alleged injury, however, was moot. The denial of his application was a decision of Respondent which Petitioner could have appealed. Petitioner did not appeal the denial and, therefore, the Respondent's denial had become final. Therefore, even if Petitioner were to be successful in his rule challenge, the injury he had alleged could not be remedied. In light of these conclusions, the parties were informed during the motion hearing that the amended petition was dismissed. An order granting the motion to dismiss was entered May 20, 1997.

Counsel for Petitioner represented during the motion hearing that Petitioner intended to reapply for a hardship driver's permit in the immediate future. Based upon this representation, Petitioner was given an opportunity to file a second amended petition.

During the motion hearing, the parties agreed that the formal hearing should be rescheduled for June 16, 1997. The parties also agreed to attempt to enter into a stipulation of the

pertinent facts in lieu of a formal hearing.

A Second Notice of Hearing was entered May 21, 1997.

A Second Amended Petition Seeking Administrative Determination of Validity of Rule was filed on May 20, 1997. Petitioner challenged Rule 15A-10.043, Florida Administrative Code, to the extent that the rule sets forth forms, implementing and codifying Respondent's interpretation of Section 322.271(2)(b), Florida Statutes, that an applicant for hardship driver's license must abstain from the use of "alcohol" for a period of one year prior to obtaining a hardship license.

On June 2, 1997, the Florida Association of D.U.I. Programs, Inc., filed a Petition for Leave to Intervene. The petition was granted without objection at the commencement of the formal hearing.

On June 9, 1997, a Joint Motion for Summary Final Order was entered by Respondent and Intervenor. Petitioner filed Petitioner's Cross Motion for Summary Final Order at the commencement of the formal hearing. Oral argument in support of these motions was heard at the formal hearing of this case on June 16, 1997.

The parties also filed a pleading titled "Stipulated Facts" at the commencement of the formal hearing. The parties agreed to the pertinent facts in this case in the Stipulated Facts. Attached to the Stipulated Facts were Exhibits A through E. Those Exhibits are accepted into evidence. The parties also

stipulated to the facts alleged in the Petition for Leave to Intervene.

At the conclusion of the formal hearing, the parties were given until June 26, 1997, to file proposed final orders. Respondent and Intervenor filed a Proposed Final Order on June 26, 1997. Petitioner did not file a proposed final order.

FINDINGS OF FACT

1. The following facts, stipulated to by the parties in the Stipulated Facts, are hereby accepted:

> 1. On March 16, 1993, Lee Eyer was convicted of his second DUI within 5 years, and his license was suspended for a period of five years (5) pursuant to section 322.28(2)(a)2, Florida Statutes.
>
> 2. Under section 322.271(2)(b), Florida Statutes, a person whose license has been suspended for a period of 5 years or less may seek a reinstatement of a license for employment purposes (known as a hardship license). The statutory language requires that the person seeking the hardship license must "have been drug free for a least 12 months immediately prior to such reinstatement . . . ."
>
> 3. Pursuant to Lee Eyer's request for a reinstatement of driving privileges restricted to business and employment purposes (hardship license), a hearing officer of the [Department of Highway Safety and Motor Vehicles] conducted an administrative hearing on January 24, 1997. (Exhibit A).
>
> 4. Pursuant to the direction of the hearing officer, Lee Eyer went to Bridgeway Center, Inc., in Ft. Walton Beach, Florida, on February 18, 1997, for the purpose of being evaluated for admission to its Special Supervision Services (SSS) Program, completion of which is required by the [Department of Highway Safety and Motor

Vehicles] in order to receive a hardship license.

5. As part of the initial screening for the SSS Program at Bridgeway Center, Mr. Eyer completed a questionnaire, HSMV Form 72748 (re-numbered in 1/97 as Form 77013), on which he indicated that he consumes alcohol "4/week" and that he drank a beer on January 22, 1997. (Exhibit B).

6. At the time of his initial screening at Bridgeway Center, Mr. Eyer was given DHSMV Form 72062 (11/96), which states that an applicant "[m]ust not have consumed any alcohol or drugs . . . for 1 year prior to reinstatement." (Exhibit C). Additionally, Mr. Eyer was given DHSMV Form 72747 (re-numbered in 1/97 as Form 77012), which states that "[a]n applicant with a revocation of 5 years or less must have not used any drugs for at least the past twelve (12) months. Drugs include alcohol . . . ." (Exhibit D).

7. By letter dated February 19, 1997, Mr. Eyer received written notice that he was denied entry into the DUI SSS Program because of his "reported last use of alcohol on [1/22/97]." The letter further stated that he must be "drug/alcohol free for a minimum of one year prior to acceptance" into the SSS Program. (Exhibit E).

8. Through section 15A-10.043, Florida Administrative Code (1997), the [Department of Highway Safety and Motor Vehicles] specifically adopts and incorporates by reference Forms 77012 (formerly numbered 72747) and 77013 (formerly numbered 72748).

9. On March 3, 1997, Lee Eyer filed a rule challenge petition with the Division of Administrative Hearings. After a hearing on March 31, 1997, Mr. Eyer was given leave to file an amended petition, which was filed on April 4, 1997. Pursuant to a hearing on May 16, 1997, Petitioner was given leave to file a second amended petition, which was filed on May 20, 1997, and which alleged that the rule promulgated by the [Department of Highway Safety and Motor Vehicles] was an invalid exercise of delegated legislative authority.

> 10. Should Lee Eyer be successful in his rule challenge, he intends to seek admission into the SSS Program offered by Bridgeway Center, Inc., in Fort Walton Beach, Florida.

2. The following facts, which were contained in the Petition for Leave to Intervene filed by the Florida Association of D.U.I. Programs, Inc. (hereinafter referred to as "FADP"), and stipulated to by the parties, are hereby accepted:

> . . . . FADP is a not-for-profit Florida corporation. Its membership is composed entirely of licensed DUI programs.
>
> 11. FADP's primary goal is to enhance the safety of all Floridians through a strong statewide system of DUI enforcement, education and treatment. FADP seeks to achieve this goal by promoting high standards and uniformity in all licensed DUI programs throughout the state, and by promoting substance abuse safety education related to drinking, drugs and driving.
>
> 12. FADP represents its members by means of education, public relations, and participation in legislative activities, administrative proceedings, and court litigation.
>
> 13. FADP has 24 member programs, all of which are licensed DUI programs. FADP and its members will be substantially affected by any interpretation of the rules at issue in this proceeding because FADP and its members are subject to regulation by the rules, and because DUI programs must apply the challenged rule to DUI offenders on a regular basis.
>
> 14. Bridgeway Center, Inc., the DUI program to which Petitioner applied and was denied admission pursuant tot he challenged rule, is a member of FADP.
>
> 15. The relief sought by FADP in this proceeding is appropriate for an association to receive on behalf of its members.

3. Pursuant to the Second Amended Petition Seeking Administrative Determination of Validity of Rule filed in this case, Mr. Eyer has challenged Rule 15A-10.043, Florida Administrative Code, to the extent that it adopts by reference HSMV Forms 77012 (formerly numbered 72747), 77013 (formerly numbered 72748), and 72062 (hereinafter referred to as the "Challenged Rule").

4. The Challenged Rule is a rule adopted by Respondent, the Department of Highway Safety and Motor Vehicle (hereinafter

referred to as the "Department"), to implement Section 322.271(2)(b), Florida Statutes.

5. In pertinent part, Section 322.271(2)(b), Florida Statutes, provides that "the Department shall require [applicants for a restricted driver license] to have not driven and to have been drug free for at least 12 months immediately prior to such reinstatement. . . ." In implementing this language, the Department has provided the following on HSMV Form 72062, "Administrative Hearing Requirements for Revocations" for persons who have been convicted of a second DUI conviction within 5 years of the first conviction:

> 2. Must complete DUI school and be enrolled in DUI Special Supervision Services and receive a favorable evaluation from that program . . . .
>
> . . . .
>
> 5. Must not have consumed any alcohol or drugs or driven a motor vehicle for 1 year prior to reinstatement*
>
> . . . .
>
> *Drugs include alcohol and those so-called non-alcoholic beers or wines which contain less than .5% of alcohol. . . .

6. HSMV Form 77013 (formerly numbered 72748) is a "Screening Form" completed at the time of registration at the DUI Special Supervision Services school. In pertinent part, this form provides the following:

> 5. How often do you presently consume alcohol, including the so-called non-alcoholic beers or wines which contain less that [sic] 0.5% of

alcohol?

7. HSMV Form 77012 (formerly numbered 72747), an "Information Sheet," is also provided at the time of registration. In pertinent part, this form provides the following:

> An applicant with a revocation of 5 years or less must have not used any drugs for at least the past twelve (12) months. Drugs include alcohol and those so-called non-alcoholic beers or wines which contain less than .5% of alcohol. . . .

8. Mr. Eyer is challenging the Department's interpretation of the term "drug" as used in Section 322.271(2)(b), Florida Statutes, to include alcohol.

CONCLUSION OF LAW

A. Jurisdiction.

9. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding. Section 120.56, Florida Statutes (Supp. 1996).

B. Standing.

10. The evidence in this case proved that Mr. Eyer is a "person substantially affected" by the rule which he is challenging in this proceeding.

11. The evidence also proved that FADP has standing to intervene in this proceeding. FADP has alleged facts, stipulated to by the parties, that support a conclusion that it is substantially affected by the rule at issue, and that it meets

the test for standing by an association. See Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982).

C. Mr. Eyer's Challenge.

12. Mr. Eyer has alleged that the Challenged Rule is an invalid exercise of delegated legislative authority. In particular, Mr. Eyer has contended that the Challenged Rule "enlarges, modifies, or contravenes the specific provisions of law implemented." Section 120.52(8)(c), Florida Statutes.

13. The law implemented and interpreted by the Department in the Challenged Rule is Section 322.271(2)(b), Florida Statutes:

> (b) A person whose license has been revoked for a period of 5 years or less . . . may, upon the expiration of 12 months after the date said revocation was imposed, petition the department for reinstatement of his or her driving privilege on a restricted basis. . . . Reinstatement of the driving privilege pursuant to this subsection shall be restricted to business or employment purposes only. In addition, the department shall require such persons upon reinstatement to have not driven and to have been drug free for at least 12 months immediately prior to such reinstatement, to be supervised by a DUI program licensed by the department, and to report to the program at least three times a year as required by the program for the duration of the revocation period for supervision. . . . [Emphasis added]

14. Pursuant to the Challenged Rule, the Department has interpreted the term "drug" to include alcohol.

15. For the Challenged Rule to withstand challenge, it must be concluded that the it has been promulgated to "implement,

interpret, or make specific the particular powers and duties granted by the enabling statute." Section 120.52(8), Florida Statutes (Supp. 1996).

D. Legislative Intent.

16. In determining whether the Challenged Rule enlarges, modifies, or contravenes Section 322.271(2)(b), Florida Statutes, or simply implements, interprets, or makes specific the particular powers and duties granted by Section 322.271(2)(b), Florida Statutes, it must be determined what the Legislature intended when it used the term "drug" in Section 322.271(2)(b), Florida Statutes.

17. It is the Legislature's intent that controls statutory construction. St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071 (Fla. 1982). The starting point in making such a determination is the language of the statute itself. Mayo Clinic Jacksonville v. Department of Professional Regulation, 625 So. 2d 918 (Fla. 1st DCA 1993).

18. Where the language of a statute is plain and clear, the legislative intent must be determined from that clear language itself, and a court, or an agency adopting rules, may not go beyond or behind the language of the statute in order to give a different meaning that the clear meaning of the language used. Kirby Center v. Department Labor & Employment Security, 650 So. 2d 1060 (Fla. 1st DCA 1995).

19. Other rules of statutory construction which have been

considered in this case include the following:

a. An administrative agency is afforded wide discretion in interpreting statutes which it is charged with administering. Amisub v. Department of Health and Rehabilitative Services, 577 So. 2d 648 (Fla. 1st DCA 1991). An agency's interpretation is, however, not absolute; an agency may not, through its interpretation, disregard established rules of statutory construction. Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193 (Fla. 1st DCA 1991); and Palm Harbor Special Fire Control District v. Kelly, 500 So. 2d 1382 (Fla. 2d DCA 1987);

b. Statutory language should be accorded its common, everyday meaning, where a common, everyday word is used. James Lewis Drywall v. Davis, 627 So. 2d 1302 (Fla. 1st DCA 1993);

c. Statutes should be construed in light of the purpose to be achieved by the legislation. Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Services, Inc., 444 So. 2d 926 (Fla. 1983); and

d. Where the Legislature uses a term in one section of a statute, but omits it from another section of the same statute, the omitted word is not to be implied where it has been excluded. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995); and Nikolits v. Nicosia, 682 So. 2d 663 (Fla. 4th DCA 1996).

E. The Legislative Intent of Section 322.271(2)(b), Florida

Statutes.

20. The Department has argued that the common, every day meaning of the term "drug" includes alcohol. The Department argues that to "interpret the term 'drug' to exclude alcohol is contrary to the common, everyday meaning of the term 'drug.'"

21. Mr. Eyer attempted to counter this argument by suggesting that caffeine and nicotine are also commonly accepted as constituting "drugs," but surely the Legislature did not intend to prohibit their use in using the term "drug" in Section 322.271(2)(b), Florida Statutes.

22. Neither argument is persuasive. The argument that the common meaning of the term "drug" includes alcohol ignores the fact that what the term "drug" may commonly mean depends on the context in which it is used. It is true that it is generally accepted that alcohol is a "drug." It also true, however, that when someone refers to a person as a "drug" user, they are referring to controlled substances, and not to alcohol. The term "drug" simply does not have one, common meaning.

23. The suggestion of Mr. Eyer that to interpret the term "drug" as used in Section 322.271(2)(b), Florida Statutes, to include alcohol would require that caffeine and nicotine also be included ignores the context in which the term "drug" has been used by the Legislature. In this instance, the Legislature has declared that the use of alcohol and certain controlled substances while operating a motor vehicle will constitute

grounds for suspending or revoking a persons right to drive. Chapter 322, Florida Statutes, does not apply to persons who drive while consuming caffeine or nicotine. It is only substances, like alcohol and controlled substances, which may impair a persons ability to operate a motor vehicle that were of concern to the Legislature in enacting Chapter 322, Florida Statutes.

24. A consideration of the use of the terms "drug" and "alcohol" throughout Chapter 322, Florida Statutes, also fails to give a clear answer to the intent of the Legislature. There are provisions in Chapter 322, Florida Statutes, where the terms are used in a manner which supports Mr. Eyer's interpretation of the term "drug," and there are provisions in Chapter 322, Florida Statutes, where the terms are used in a manner which supports the interpretation of the term "drug" by the Department and FADP:

a. Section 322.01, Florida Statutes, provides definitions of certain terms. The terms "alcohol," "controlled substances," and "narcotic drugs" are defined. There is, however, no definition of the term "drug." This suggests that the Legislature was aware that the term "drug" may be viewed as including "alcohol" and, therefore, the different types of "drugs" being dealt with in the law (alcohol, controlled substances, and narcotic drugs) are separately defined rather than attempting to define only one term: "drug;"

b. Section 322.095(1), Florida Statutes, provides, in

establishing traffic law and "substance abuse" education programs that "[t]he curriculum for the course must provide instruction on the physiological and psychological consequences of the abuse of alcohol and other drugs, the societal and economic costs of alcohol and drug abuse, the effects of alcohol and drug abuse on the driver of a motor vehicle . . ." This provision supports Mr. Eyer. It provides greater support for the Department and FADP;

c. Section 322.055, Florida Statutes, provides penalties for conviction of "certain drug offenses." This section defines the "drug offenses" in terms of the use of "controlled substances," and not in terms of alcohol. This provision supports Mr. Eyer;

d. Section 322.056, Florida Statutes, provides penalties for "certain alcohol or drug offenses." This provision supports Mr. Eyer; and

e. Section 322.271(2)(c), Florida Statutes, uses the terms "alcohol-related or drug-related offense." This provision supports Mr. s.

25. Based upon the Legislature's use of the terms "alcohol" and "drugs" in Chapter 322, Florida Statutes, it is still not apparent what the Legislature intended by its use of the term "drug" in Section 322.271(2)(b), Florida Statutes.

26. The statutory language at issue, based upon the foregoing, does not establish the intent of the Legislature. It

is, therefore, appropriate to consider any available legislative history concerning the term at issue:

a. The language at issue was added to Section 322.271, Florida Statutes, by Chapter 90-102, Laws of Florida.;

b. An earlier version of the legislation, Committee Substitute for Senate Bill 60, used the term "alcohol free" instead of "drug free"; and

c. During a hearing of the Senate Judiciary-Criminal Committee during the 1990 Legislative Session, the sponsor of the bill, Senator Girardeau, stated that "drug" was being substituted for the term "alcohol" because "alcohol is a drug."

27. This legislative history supports the Department's interpretation of Section 322.271(2)(b), Florida Statutes.

28. The most compelling support for the Department's interpretation of Section 322.271(2)(b), Florida Statutes, comes from a consideration of the purpose behind the inclusion of the prohibition of "drug" use during the 12-month period prior to reinstatement of a restricted driver license. Persons who must apply for a restricted license under Section 322.271(2)(b), Florida Statutes, have had their right to operate a motor vehicle revoked for a first conviction, or second conviction within a period of five years after the first conviction, for operating a motor vehicle under the influence of a mind-altering substance. The Legislature has provided for the revocation of the person's right to operate a motor vehicle because the Legislature believes

that the mind-altering substance, whether it be alcohol or some other mind-impairing drug, has impaired the person's ability to safely operate a motor vehicle.

29. When an individual has been convicted of operating a motor vehicle under the influence of a mind-altering substance, the Legislature has expressed its intent that such person not be allowed to operate a motor vehicle, even for work purposes, unless the person has refrained from using "drugs" during the past 12 months. Clearly, the Legislature has recognized that persons who have operated a motor vehicle while using a mind-altering drug other than alcohol should not be allowed to operate a motor vehicle even for a limited purpose until they refrain from such use for a year. Mr. Eyer's position in this case suggests that the Legislature intended that the same restriction should not apply to persons who use one of the mind-altering substances for which a person's right to drive can be revoked: alcohol. To accept this suggested interpretation of Section 322.271(2)(b), Florida Statutes, would lead to an absurd interpretation.

30. Based upon the foregoing, it is concluded that the Legislature intended to prohibit the use of alcohol during the 12-months prior to application for a hardship license when it used the term "drug" in Section 322.217(2)(b), Florida Statutes.

ORDER

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

ORDERED that the Second Amended Petition Seeking Administrative Determination of Validity of Rule is DISMISSED.

DONE AND ORDERED this 24th day of July, 1997, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 1997.

COPIES FURNISHED:

Kelly H. Buzzett, Esquire
2 Hotz Avenue
Grayton Beach, Florida 32459

Electra Theodorides, Assistant General Counsel
Enoch J. Whitney, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
Tallahassee, Florida 32399-0500

James W. Linn, Esquire
Edwin A. Steinmeyer, Esquire
LEWIS, LONGMAN and WALKER, P.A.
125 South Gadsden Street, Suite 300
Tallahassee, Florida 32301

Carroll Webb, Executive Director
and General Counsel
Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building
Tallahassee, Florida 32399-0250

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.