

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BAYS, AIR AND CANALS,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 01-2326RU
)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondent.)
_____)

FINAL ORDER

On August 13, 2001, a final administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ralf G. Brookes, Esquire
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For Respondent: W. Douglas Beason, Esquire
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STATEMENT OF THE ISSUE

Whether the Department of Environmental Protection (DEP) has issued an agency statement defined as a rule which has not

been adopted by rulemaking as required by Section 120.54(1)(a), Florida Statutes. (All statutory citations are to the 2000 codification of the Florida Statutes. All rule citations are to the current Florida Administrative Code.)

PRELIMINARY STATEMENT

On June 7, 2001, Petitioner, Save Our Bays, Air and Canals, Inc. (SOBAC), filed a Petition to Invalidate Agency Statement under Section 120.56(4). SOBAC alleged that a statement reading "Mediation under section 120.573 of the Florida Statutes is not available for this proceeding": (a) has not been adopted as a rule; (b) is not in compliance with the requirements of Section 120.573; and (c) is an invalid statement of general applicability issued without the rulemaking required under Section 120.54(1)(a). The alleged agency statement was included in DEP's Intent to Issue an Industrial Waste Water Permit for a proposed desalination plant to Tampa Bay Desal. SOBAC subsequently challenged DEP's Intent to Issue under Sections 120.569 and 120.57 in DOAH Case No. 01-1949.

On June 12, 2001, DOAH issued an Order of Assignment which advised the parties that this case was assigned to Administrative Law Judge J. Lawrence Johnston. On June 19, 2001, the ALJ issued a Notice of Hearing scheduling final hearing for July 9, 2001. However, on July 2, 2001, DEP filed an agreed motion for a continuance which was granted. On

July 10, 2001, a Second Notice of Hearing was issued scheduling final hearing for August 9, 2001.

On July 3, 2001, SOBAC filed a Motion for Partial Summary Final Order on Limited Legal Grounds. On July 9, 2001, SOBAC filed a Supplemental Motion for Partial Summary Final Order - Additional Legal Grounds. On July 16, 2001, DEP filed a response in opposition. An Order Denying Summary Final Order was entered on July 25, 2001, because of fact issues as to SOBAC's standing and as to whether DEP made a statement, as provided in Section 120.573, that mediation is not available "for the type of agency action announced."

On August 2, 2001, DEP filed a Motion for Summary Final Order which asserted that there were no disputed issues of material fact and that DEP was entitled, as a matter of law, to entry of a final order dismissing the Petition to Invalidate Agency Statement for lack of standing. On August 7, 2001, SOBAC filed its Response. No ruling was issued prior to final hearing. While the Motion for Summary Final Order is now moot, the standing issues are addressed as part of this Final Order.

At the final hearing, SOBAC presented the testimony of two witnesses and had SOBAC's Exhibits 1 through 11 admitted into evidence. DEP's Exhibit 1 also was admitted into evidence. DEP called no witnesses.

After presentation of evidence, the parties were given ten days to file proposed final orders. Timely proposed final orders were filed and have been considered.

On August 22, 2001, SOBAC filed "Supplemental Authority - Proposed Final Order," consisting of an Administrative Law Section Newsletter article. On August 24, 2001, DEP filed a Motion to Strike, which is granted.

FINDINGS OF FACT

1. On April 20, 2001, DEP's Southwest District office issued an Intent to Issue with respect to Tampa Bay Desal's application for a NPDES permit for the construction and operation of a proposed desalination facility (DEP File No. FL0186813-001-IW1S).

2. DEP's Intent to Issue for the Tampa Bay Desal NPDES permit provided in part:

A person whose substantial interests are affected by the Department's proposed permitting decision may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57 of the Florida Statutes.

The Intent to Issue for the NPDES permit also specified the type of information that must be included in a petition filed under Sections 120.569 and 120.57. SOBAC timely challenged DEP's proposed agency action concerning the Tampa Bay Desal permit

application. The challenge is currently pending as DOAH Case No. 01-1949.

3. The Intent to Issue the Tampa Bay Desal permit also included the statement: "Mediation under section 120.573 of the Florida Statutes is not available for this proceeding." On June 7, 2001, SOBAC filed a Petition to Invalidate Agency Statement under Section 120.56(4). SOBAC alleged that the statement regarding mediation met the definitions of a rule but was not adopted by rulemaking as required by Section 120.54(1)(a).

4. By correspondence dated June 13, 2001, DEP notified counsel for SOBAC of DEP's willingness to participate in mediation in an effort to resolve the issues underlying the administrative challenge. However, DEP's offer to participate in mediation was predicated, at least in part, on the following conditions:

- (a) the parties would agree on the selection of the mediator;
- (b) any discussions and documents introduced in the mediation would remain confidential; and
- (c) notwithstanding the mediation, discovery in the administrative proceeding would continue, and the parties would be prepared to proceed to the final hearing as scheduled.

On or about June 14, 2001, Tampa Bay Desal agreed, at least in principle, to participate in mediation with SOBAC under those

conditions. There was no evidence that either DEP or Tampa Bay Desal ever agreed to toll the administrative proceeding (DOAH Case No. 01-1949) pending mediation.

5. On or about June 15, 2001, counsel for SOBAC contacted DEP and accepted DEP's offer to participate in a mediation conference.

6. On or about July 23, 2001, the Department, SOBAC and Tampa Bay Desal participated in a mediation conference in an effort to resolve the issues underlying SOBAC's challenge to Tampa Bay Desal's permit application. Mediation efforts failed.

7. According to the evidence, SOBAC is an organization with an interest in various environmental permitting activities in and around Tampa Bay. SOBAC monitors local newspapers for DEP notices of intent to issue permits. Besides the Tampa Bay Desal permit, SOBAC has become aware of three other DEP notices of intent of interest to SOBAC.

8. One was a notice of intent to issue a permit to Tampa Electric Company (TECO) for NPDES permit modifications relating to and for purposes of accommodating the Tampa Bay Desal project. This notice of intent also contained the statement: "Mediation under Section 120.573, Florida Statutes, is not available for this proceeding." SOBAC nonetheless requested mediation under Section 120.573. When the time to challenge the notice of intent was about to expire, SOBAC also filed an

administrative challenge under Sections 120.569 and 120.57. The TECO challenge also was referred to DOAH, where it was given Case No. 01-2720 and consolidated with Case No. 01-1949. TECO never agreed to mediation, and DEP never responded to SOBAC's request for mediation.

9. Another case involved a TECO air pollution permit unrelated to the desalination project. The notice of intent to issue stated: "Mediation is not available for this proceeding." The evidence did not indicate that SOBAC took any action with respect to this notice of intent to issue.

10. The third case involved IMC Phosphates Company and a permit to operate a barge loading facility handling phosphate materials. The notice of intent to issue stated: "Mediation under Section 120.573, F.S. is not available in this proceeding." SOBAC filed an administrative challenge to this permit under Sections 120.569 and 120.57. IMC never agreed to mediation. The evidence was not clear whether SOBAC received a response to its request for mediation.

11. After initiating the instant proceeding, SOBAC researched the Florida Administrative Weekly (FAW) from September 1999 through the date of final hearing and found 30 notices of intent, all of which stated essentially that mediation was not available for (or in) the proceeding, and one notice of intent. No further explanation was given. Of the 30,

24 were electric power plant siting cases, 4 were water quality exemptions, one involved a state revolving loan fund, and one was a joint coastal permit case with consent to use sovereign lands and requested variances.

12. SOBAC presented no evidence as to DEP intents to issue not published in FAW. However, DEP entered into the record evidence of one other DEP notice, apparently not published in FAW, of intent to issue a coastal construction control line permit stating that mediation under Section 120.573 was available and describing procedures to be followed for mediation.

13. SOBAC presented no other evidence to explain why mediation was not offered in the examples given or why it was offered on the one occasion. There also was no evidence as to whether any of the statements regarding availability of mediation reflected by the evidence were intended to mean that mediation was available in one type of case but not in another. Such an intent would have to be inferred. But the evidence was not sufficient to infer such an intent.

14. SOBAC complains that the statements in DEP's notices of intent as to availability of mediation under Section 120.573 force SOBAC to either waive rights or timely initiate administrative challenges under Sections 120.569 and 120.57 and incur litigation costs which might be unnecessary if mediation

were initiated. But there was no evidence of any case in which the parties agreed to mediation under Section 120.573. (The failed attempt at mediation in DOAH Case No. 01-1949 was not conducted under Section 120.573.) Second, even if the parties agreed to mediation under Section 120.573, the evidence did not prove the likelihood that mediation would be successful; if not, and if administrative litigation resumed, mediation would have added to the cost of litigation.

CONCLUSIONS OF LAW

15. Section 120.56.(4) provides in pertinent part:

CHALLENGING AGENCY STATEMENTS DEFINED AS
RULES; SPECIAL PROVISIONS.--

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall . . . show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

In this case, it is clear that the agency statement has not been adopted as a rule. It also is clear that DEP has made no attempt to prove that rulemaking is not "feasible and practicable." See Section 120.54(1)(b). The issues are whether SOBAC is substantially affected by the statement and whether SOBAC proved that the statement is defined as a rule. See Section 120.54(1).

16. Section 120.52.(15) provides in pertinent part:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

(The exclusions that follow in the statute do not apply in this case.)

17. On its face, the statement SOBAC contends is a rule does nothing more than give notice that mediation under Section 120.573 was "not available for this proceeding." It did not purport to make a statement of general applicability as to whether mediation under Section 120.573 was available "for the type of agency action announced." See Section 120.573. As found, there was no direct evidence, or any indirect evidence from which it could be inferred, that DEP intended the statement to have general applicability as to the type of agency action for which mediation under Section 120.573 is available.

18. Section 120.573 provides in pertinent part:

Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available

DEP maintains that the language of Section 120.573 only requires an agency to give notice as to the availability of mediation under Section 120.573; SOBAC argues that Section 120.573 requires more--i.e., that the agency make a statement of general applicability as to the availability of mediation under Section 120.573 in the type of agency action announced.

19. DEP's interpretation of Section 120.573 not only is reasonable, it also is consistent with the interpretation given to the statute by the Administration Commission in Uniform Rule 28-106.111(1), which states in pertinent part that: "The notice shall also advise whether mediation under Section 120.573, F.S., is available as an alternative remedy." See Section 120.54(5)(b)4 (the Administration Commission is statutorily responsible for adoption of uniform rules of procedure, including rules for the filing of petitions for administrative hearings under Sections 120.69 and 120.57). In addition, in accordance with Section 120.54(5)(a)3, DEP has promulgated rules of procedure as approved exceptions to the Administration Commission's Uniform Rules of Procedure which nonetheless are consistent with the Administration Commission's interpretation of Section 120.573 in that DEP's Rule 62-110.106(12) provides for a "Notice of Rights to Hearing and to Mediation" which in part either describes procedures for mediation, if available, or states simply: "Mediation is not available in this proceeding."

20. Even if Section 120.573 were given the interpretation urged by SOBAC, it still could not be found, on the record of this case, that the alleged statement does anything more than impart information as to the availability of mediation under Section 120.573 in a particular case. As such, it cannot be found to be a "statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency."

21. In reaching this conclusion, consideration also was given to Section 120.54(1)(d), which provides:

When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

It is telling that, unlike in the case of a statement of general applicability, DEP does not "rely" on the statement alleged in this case as the "basis for agency action." To the contrary, it was not proven that the alleged statement does anything more than impart information (as required by the applicable rules of procedure cited supra).

22. Since SOBAC did not prove that the alleged statement was anything more than an informational notice as to the availability of mediation under Section 120.573, SOBAC also could not prove that it was "substantially affected" by the

statement. In addition, as found, any effect on SOBAC would be remote and highly speculative. See Ameristeel Corp. v. Clark, 691 So. 2d 473, 477-478 (Fla. 1997). There was no evidence of any instance in which parties agreed to mediation under Section 120.573--including the provisions for tolling of the time limitations imposed by Sections 120.569 and 120.57. It also is not clear whether mediation under Section 120.573 would reduce or increase the cost of administrative litigation.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, SOBAC's Petition to Invalidate Agency Statement is denied.

DONE AND ORDERED this 19th day of September, 2001, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
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this 19th day of September, 2001.

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 the 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.