

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FRED GOODMAN, d/b/a EYES AND EARS )  
INVESTIGATIVE SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No: 01-4356RU  
 )  
DEPARTMENT OF BANKING AND FINANCE, )  
DIVISION OF FINANCE, )  
 )  
Respondent. )  
----- )

FINAL ORDER

Pursuant to a stipulation, all parties in this case waived their right to an evidentiary hearing and agreed that this case would be submitted to the Administrative Law Judge for disposition on the basis of stipulated facts and certain documentary exhibits identified in the stipulation.

APPEARANCES

For Petitioner: Philip J. Stoddard, J.D.  
Finder Resource, Inc.  
150 Kent Road, Suite 2-A  
St. Augustine, Florida 32086

For Respondent: Paul C. Stadler, Jr., Esquire  
Office of the Comptroller  
Department of Banking and Finance  
The Fletcher Building, Suite 526  
101 East Gaines Street  
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The central issue presented in this case concerns whether the Department of Banking and Finance's application of Section 717.124(5), Florida Statutes, as amended effective October 1, 2001, to claims filed prior to October 1, 2001, but paid after October 1, 2001, is an unpromulgated rule in violation of Section 120.56(4), Florida Statutes.

PRELIMINARY STATEMENT

On or about November 9, 2001, Fred Goodman, d/b/a Eyes and Ears Investigative Services ("Petitioner"), filed the instant Petition with the Division of Administrative Hearings.

In his Petition, Petitioner challenges as an unpromulgated rule the application of Section 717.124(5), Florida Statutes, as amended, to claims filed with the State of Florida, Department of Banking and Finance ("Department"), prior to October 1, 2001, and paid on or after October 1, 2001.

On January 14, 2002, Petitioner and the Department filed a stipulation which stipulated to certain facts and also stipulated that certain documentary exhibits would be received in evidence. The parties also stipulated to the filing of their proposed final orders on or before February 20, 2002. All parties filed timely proposed final orders containing proposed findings of fact and conclusions of law. The

parties' proposals have been carefully considered during the preparation of this Final Order.

FINDINGS OF FACT

Computer Mart Claim

1.(A) On or about September 4, 2001, Petitioner filed a claim on behalf of Computer Mart, Inc., for unclaimed property account number 3563-1994-44 in the amount of \$1,854.85 and reported in the name of Computer Mart ("the Computer Mart Claim").

(B) Prior to the filing of the Computer Mart Claim, Computer Mart, Inc., executed an Agreement authorizing Petitioner to file the claim on its behalf.

(C) Petitioner obtained a bankruptcy search for Florida Central Realty, formerly known as Computer Mart.

(D) On or about October 12, 2001, the Department approved the Computer Mart Claim.

(E) The Agreement authorized the payment of fees of thirty percent of the accounts claimed, which equaled \$556.45.

(F) The remaining seventy percent of the accounts claimed equaled \$1,298.40.

(G) On or about October 19, 2001, the Department issued a warrant in the amount of \$556.45 to Petitioner.

(H) On or about October 19, 2001, the Department issued a warrant in the amount of \$1,298.40 to Computer Mart, Inc.

Diversified Claim

2.(A) On or about September 4, 2001, Petitioner filed a claim on behalf of Diversified Hospitality Group, Inc., for unclaimed property account numbers 6467-96-31364, 1165-92-2634, 1165-92-2241, 1165-92-24712, and 1165-92-1871 in the aggregate amount of \$4,165.60 and reported in the name of Diversified Hospitality or Diversified Hospitality Group ("the Diversified Claim").

(B) Prior to the filing of the Diversified Claim, Diversified Hospitality Group, Inc., executed an Agreement authorizing Petitioner to file the claim on its behalf.

(C) Petitioner obtained a bankruptcy search for Diversified Hospitality Group, Inc.

(D) On or about October 8, 2001, the Department approved the Diversified Claim.

(E) The Agreement authorized the payment of fees of thirty percent of the accounts claimed, which equaled \$1,249.68.

(F) The remaining seventy percent of the accounts claimed equaled \$2,915.92.

(G) On or about October 19, 2001, the Department issued a warrant in the aggregate amount of \$1,249.68 to Petitioner.

(H) On or about October 19, 2001, the Department issued a warrant in the aggregate amount of \$2,915.92 to Diversified Hospitality Group, Inc.

Charde Claim

3.(A) On or about November 13, 2001, Petitioner filed a claim on behalf of Charde, Inc., for unclaimed property account number 4432-00-2 in the amount of \$1,641.47 and reported in the name of Charde, Inc. ("the Charde Claim").

(B) Prior to the filing of the Charde Claim, Charde, Inc., executed an Agreement authorizing Petitioner to file the claim on its behalf.

(C) Petitioner obtained a bankruptcy search for Charde, Inc.

(D) On or about November 13, 2001, the Department approved the Charde Claim.

(E) The Agreement authorized the payment of fees in the amount of \$125.00.

(F) After the deduction of fees, the remaining amount equals \$1,516.47.

(G) On or about November 20, 2001, the Department issued a warrant in the amount of \$125.00 to Petitioner.

(H) On or about November 20, 2001, the Department issued a warrant in the amount of \$1,516.47 to Charde, Inc.

MTS Claim

4.(A) On or about July 11, 2001, Petitioner filed a claim on behalf of MTS Roofing and Installation Corporation, for unclaimed property account number 1495-96-83 in the amount of \$1,000.00 and reported in the name of MTS Roofing Corporation ("the MTS Claim").

(B) Prior to the filing of the MTS Claim, MTS Roofing and Installation Corporation, executed an Agreement authorizing Petitioner to file the claim on its behalf.

(C) Petitioner obtained a bankruptcy search for MTS Roofing and Installation Corporation

(D) On or about November 7, 2001, the Department approved the MTS Claim.

(E) The Agreement authorized the payment of fees of thirty percent of the accounts claimed, which equaled \$300.00.

(F) The remaining seventy percent of the accounts claimed equaled \$700.00.

(G) On or about November 14, 2001, the Department issued a warrant in the amount of \$300.00 to Petitioner.

(H) On or about November 14, 2001, the Department issued a warrant in the amount of \$700.00 to MTS Roofing & Installation Corp.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings.

Sections 120.56, 120.569 and 120.57, Florida Statutes.

6. Section 120.52(15), Florida Statutes, provides:

(15) "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 term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

7. Section 120.56, Florida Statutes, provides in pertinent part:

(4) 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 include the text of the statement or a description of the statement and shall state with particularity facts sufficient to 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.

\* \* \*

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) 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.

8. With regard to the types of claims which underlie the dispute in this case, Section 717.124, Florida Statutes, as amended effective October 1, 2001, provides as follows, in pertinent part:



(5)(a) If an owner authorizes an attorney, Florida-certified public accountant, or private investigative agency which is duly licensed to do business in this state to claim the unclaimed property on the owner's behalf, the department is authorized to make distribution of the property or money in accordance with such power of attorney.

(b)1. Payments of approved claims for unclaimed cash accounts shall be made to the owner after deducting any fees authorized pursuant to a written power of attorney.

2. Payments of fees authorized pursuant to a written power of attorney for approved cash claims shall be forwarded to the designated attorney, Florida-certified public accountant, or private investigative agency.

9. It is fundamental that, in order to have created a "rule," as defined, subject to invalidation for lack of a formal promulgation consistent with the requirements of Chapter 120, Florida Statutes, Petitioner must establish that an agency has issued a statement of general applicability. No such statement has been stipulated to by the parties, nor is any such statement revealed in the exhibits stipulated into the record. This shortcoming, standing alone, is dispositive of Petitioner's challenge pursuant to Section 120.56(4), Florida Statutes. Petitioner has failed to establish by stipulation or evidence the existence of any agency statement defined as a rule that has been impermissibly issued by the Department. Petitioner has, therefore, failed to carry his ultimate burden in this proceeding.<sup>1</sup>

10. The stipulated facts in this matter show only that the Department has been consistent in the manner in which it has applied the requirements of Section 717.124(5), Florida Statutes (2001), to the payment of claims paid after October 1, 2001, in those circumstances where the claims were filed by an authorized third party on behalf of the owner of unclaimed property. On the four occasions which form the basis for Petitioner's complaints in this case, the Department has sent Petitioner his fee and has sent the remaining proceeds of the claim to the respective owners. Such a distribution of the property appears to be nothing more or less than what is provided for and required by the statutory language quoted above. An agency is not required to embark upon rulemaking in order to take action that is mandated by a statute.

11. In order to prevail in a case of this nature, a Petitioner must, by means of stipulation or by means of persuasive evidence, establish each and every essential element of the statutory prerequisites to the relief he seeks.

Petitioner in this case has failed to establish several essential elements.<sup>2</sup> Such being the case, his petition must be dismissed and the relief he seeks must be denied.<sup>3</sup>

12. In the closing portion of its Proposed Final Order, the Department argues that an order should be issued pursuant

to Section 120.569(2)(c), Florida Statutes, imposing sanctions against Petitioner and his representative. Upon consideration of the language of Section 120.569(2)(c), Florida Statutes, as explained and interpreted in such cases as, Mercedes Lighting and Electrical Supply, Inc. v. Department of General Services, 560 So. 2d 272 (Fla. 1st DCA 1990), Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So. 2d 603 (Fla. 1st DCA 1997), and Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42 (Fla. 1st DCA 2000), this does not appear to be a case in which sanctions are warranted.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

That the petition in this case is hereby dismissed, and that all relief requested by Petitioner is hereby DENIED.

DONE AND ORDERED this 2nd day of April, 2002, in Tallahassee, Leon County, Florida.

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MICHAEL M. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of April, 2002.

ENDNOTES

1/ In this regard it is also worthy of note that the petition in this case falls quite a bit short of compliance with the statutory requirement that the petition "shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to 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."

2/ Most significantly, he has failed to establish the existence of an agency statement that constitutes a rule. Petitioner has also failed to establish that he is substantially affected by any such statement.

3/ The specific relief sought by Petitioner would have to be denied in any event, because there is no language in Section 120.56(4), Florida Statutes, which authorizes an award of damages to a Petitioner.

COPIES FURNISHED:

Paul C. Stadler, Esquire  
Office of the Comptroller  
Department of Banking and Finance  
101 East Gaines Street  
The Fletcher Building, Suite 526  
Tallahassee, Florida 32399-0350

Philip J. Stoddard, J.D.  
Finder Resource, Inc.  
150 Kent Road, Suite 2-A  
St. Augustine, Florida 32086

Honorable Robert F. Milligan  
Office of the Comptroller  
The Capitol, Plaza Level 09  
Tallahassee, Florida 32399-0350

Robert Beitler, General Counsel  
Department of Banking and Finance  
Fletcher Building, Suite 526  
101 East Gaines Street  
Tallahassee, Florida 32399-0350

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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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.