

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA HOME BUILDERS)
ASSOCIATION; FLORIDA A.G.C.)
COUNCIL, INC.; and PARRISH)
GROUP, INC.,)
)
Petitioners,)
)
vs.) Case No. 02-3097RU
)
DEPARTMENT OF INSURANCE,)
DIVISION OF WORKERS')
COMPENSATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on September 13, 2002, in Tallahassee, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are: whether Petitioners have standing to challenge the agency statements in the Division of Workers' Compensation Bulletin No. 234; whether the agency statements in Bulletin No. 234 constitute a "rule" as defined by Subsection 120.52 (15), Florida Statutes; and, if yes, whether the Department violated Subsection 120.54(1), Florida Statutes, by not adopting the statements in accordance with the rulemaking procedures.

PRELIMINARY STATEMENT

On August 5, 2002, Petitioners, Florida Home Builders Association, Florida Associated General Contractors' Council, Inc., and the Parrish Group, Inc., filed a Petition seeking an administrative determination that statements in the Division of Workers' Compensation Bulletin No. 234, issued on June 20, 2002, constituted a "rule," as defined by Subsection 120.52(15), Florida Statutes. When the bulletin was issued, the Division of Workers' Compensation, was within the Florida Department of Labor and Employment Security, but it is now within the Department of Insurance (Department). The Petition alleges that Bulletin No. 234 violates the rulemaking requirements of Subsection 120.54(1), Florida Statutes, because the Department of Insurance has not adopted it as a rule in accordance with

that provision. Finally, the Petition seeks attorneys' fees and costs pursuant to Subsection 120.595(4), Florida Statutes.

On August 27, 2002, Petitioners filed a motion for leave to amend the Petition in order to add Mark Madonia, d/b/a Chop's Acoustical Ceilings, as a Petitioner. By Order entered September 4, 2002, Petitioners' motion was granted.

Initially, the final hearing was scheduled for September 4, 2002, but upon the parties' joint motion, the hearing was rescheduled for September 13, 2002.

Prior to hearing, the parties entered into a pre-hearing stipulation that limited the necessity to establish certain facts at the final hearing. At hearing, Petitioners presented the testimony of five witnesses: Joanne Sturdivant, president of the Home Builders Insurance Agency; Douglas Buck, director of government affairs of the Florida Home Builders Association; Robert Allen Douglas, executive director of Associated General Contractors' Council; Robert Parrish, Jr., owner and president of Parrish Group; and Mark Madonia, owner of Chop's Acoustical Ceilings. The Department presented the testimony of Daniel Sumner, assistant director of the Department's Division of Workers' Compensation. Joint Exhibits numbered 1 through 3, Petitioners Exhibits numbered 2 through 5 and 7 through 10, and Respondent's Exhibits numbered 1 and 3 were offered and received into evidence.

At the conclusion of the hearing, the parties agreed to file proposed final orders within ten days of the filing of the transcript. The Transcript of the proceeding was filed on September 25, 2002. The Department and Petitioners filed Proposed Final Orders, which have been duly considered in rendering this Final Order.

FINDINGS OF FACT

1. Prior to the 2002 legislative session, pursuant to Sections 440.02 and 440.05, Florida Statutes (2001), certain persons in the construction industry could elect to be exempt from the provisions of Chapter 440, Florida Statutes (2001).

2. Pursuant to Section 440.05(3), Florida Statutes (2001), upon receipt of proper notice and documentation, the Department issued certificates of exemptions to persons seeking the Workers' Compensation exemption, unless the Department determined that the information contained in the notice was invalid.

3. Between July 1, 2000, and June 30, 2002, approximately 130,000 construction-related exemptions were active.

4. Pursuant to Subsection 440.05(6), Florida Statutes (2001), a construction industry certificate of election to be exempt is valid for a period of two years after the effective date on the certificate, unless the certificate was properly revoked.

5. Prior to July 1, 2002, the certificates of exemption were issued pursuant to Subsection 440.05(3), Florida Statutes (2001). These certificates of exemptions were applicable without regard to the value or cost of any particular building project on which the exemption holder may be working.

6. During the 2002 legislative session, the Florida Legislature enacted Section 5, Chapter 2002-236, Laws of Florida. Portions of this law amended Section 440.02(14), Florida Statutes. These amendments ("2002 Amendments") state, in relevant part, the following:

(14)(b) "Employee" includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous.

1. Any officer of a corporation may elect to be exempted from this chapter by filing written notice of the election with the division as provided in Section 440.05.

2. As to officers of a corporation who are actively engaged in the construction industry, no more than three officers may elect to be exempt from this chapter by filing written notice of the election with the division as provided in s. 440.05. However, any exemption obtained by a corporate officer of a corporation actively engaged in the construction industry is not applicable with respect to any commercial building project estimated to be valued at \$250,000 or greater.

3. An officer of a corporation who elects to be exempt from this chapter by filing a written notice of the election with the

division as provided in s. 440.05 is not an employee.

Services are presumed to have been rendered to the corporation if the officer is compensated by other than dividends upon shares of stock of the corporation which the officer owns.

(c)1. "Employee" includes a sole proprietor or a partner who devotes full time to proprietorship or partnership and, except as provided in this paragraph, elects to be included in the definition of employee by filing notice thereof as provided in s. 440.05. Partners or sole proprietors actively engaged in the construction industry are considered employees unless they elect to be excluded from the definition of employee by filing written notice of the election with the division as provided in s. 440.05. However, no more than three partners in a partnership that is actively engaged in the construction industry may elect to be excluded. A sole proprietor or partner who is actively engaged in the construction industry and who elects to be exempt from this chapter by filing a written notice of the election with the division as provided in s. 440.05 is not an employee. For purposes of this chapter, an independent contractor is an employee unless he or she meets all of the conditions set forth in subparagraph (d)1.

2. Notwithstanding the provisions of subparagraph 1., the term "employee" includes a sole proprietor or partner actively engaged in the construction industry with respect to any commercial building project estimated to be valued at \$250,000 or greater. Any exemption obtained is not applicable, with respect to work

performed at such a commercial building project.

(d) "Employee" does not include:

1. An independent contractor, if:

* * *

Notwithstanding the provisions of this paragraph or any other provision of this chapter, with respect to any commercial building project estimated to be valued at \$250,000 or greater, a person who is actively engaged in the construction industry is not an independent contractor and is either an employer or an employee who may not be exempt from the coverage requirements of this chapter.

* * *

(Amendments are underlined.)

7. The above-quoted 2002 amendments became effective on July 1, 2002.

8. After the legislature enacted Chapter 2002-236, Laws of Florida, but prior to its effective date, the Department issued Bulletin No. 234 ("Bulletin No. 234" or "Bulletin"), which states in relevant part the following:

TO: All Exemption Holders

FROM: Annemarie Craft, Interim WC
Administrator

DATE: June 20, 2002

SUBJECT: Law Changes Regarding Exemptions

On July 31, 2002, important changes in the workers' compensation law regarding

exemptions take effect. This Bulletin is intended to notify you of some of those changes. Exemption holders working on a commercial building project valued at \$250,000 or greater must purchase workers' compensation coverage, or be covered under a valid Florida Workers Compensation policy.

The changes apply to you if you are:

A corporate officer of a corporation that is actively engaged in the construction industry;

A sole proprietor or partner who is actively engaged in the construction industry; or

A person who is actively engaged in the construction industry as an independent contractor.

1. Beginning July 1, 2002, if you are a corporate officer of a corporation that is actively engaged in the construction industry, or a sole proprietor or partner who is actively engaged in the construction industry, then your exemption will not apply to any work performed at a commercial building project valued at \$250,000 or greater. If you work at a commercial building project valued at \$250,000 or greater, then you must secure workers' compensation coverage in accordance with s. 440.38. The value of the project is the value of the entire project and not merely the value of a part, such as the amount attributed to a particular subcontract. This applies to projects in existence on July 1, 2002, as well as projects to be started on or after July 1, 2002.

* * *

5. If you are a sole proprietor, partner, or corporate officer, you are permitted to maintain a certificate of election to be exempt issued pursuant to s. 440.05, F.S., while actively working on a commercial

building project valued at \$250,000 or greater; however, that exemption is not applicable with respect to work performed at a commercial building project valued at \$250,000 or greater.

9. In summary, Bulletin No. 234 states unequivocally the Department's practice which limits the use of exemption certificates for workers' compensation insurance. According to the Bulletin, beginning July 2, 2002, "exemption holders working on a commercial building project valued at \$250,000 or greater must purchase workers' compensation coverage, or be covered under a valid Florida Workers' Compensation policy." Next, the Bulletin states that, beginning July 1, 2002, "if you are a corporate officer of a corporation that is actively engaged in the construction industry, or a sole proprietor or partner engaged in the construction industry, then your exemption will not apply to any work performed at a commercial building project valued at \$250,00 or greater." Finally, the Bulletin provides that, "this applies to projects in existence on July 2002, as well as projects to be started on or after July 1, 2002."

10. The Department contends that the Bulletin is only for informational and notification purposes and that it merely paraphrases the provisions of Section 5, Chapter 2002-236, Laws of Florida. Furthermore, the Department asserts that the Bulletin was never intended to create any obligations or requirements that the Department will enforce in any action that

the Department engages in regarding the applicability of exemptions.

11. Based on the Department's belief that Bulletin No. 234 was only for the purpose of notifying all exemption holders of changes in the law, the Department did not adopt the Bulletin in accordance with rulemaking procedures in Section 120.54, Florida Statutes.

12. Notwithstanding the Department's argument in paragraph 11, as reflected within the four corners of the Bulletin, exemption holders actively engaged in the construction industry working on commercial building projects valued at \$250,000 or greater after July 1, 2002, must be covered by workers' compensation insurance, pursuant to the requirements of Chapter 440, Florida Statutes (2002), regardless of when the exemption certificates were obtained.

13. Contrary to the Department's view, the agency statements in Bulletin No. 234 adversely affect the rights of some exemption holders and require compliance with the provisions contained therein. Implicit in the terms of the Bulletin is that an exemption holder who fails to comply with its terms, will be subject to enforcement actions under Chapter 440, Florida Statutes. The extrinsic evidence presented by the Department, that it will not take such action in reliance of the Bulletin, is not controlling.

14. The Florida Home Builders' Association ("FHBA") is a Florida corporation, comprised of approximately 15,000 members. Of those members, approximately 5,000 to 6,000 are builder members that are actively engaged in the construction of housing or other developments. Hundreds of the builder members are involved in commercial construction activities. The remaining members are associate members comprised of industries, trades, and services that do business with the builder members. Associate members who are construction subcontractors are engaged in commercial building activities.

15. Most commercial construction projects that are new construction (as opposed to renovations) which FHBA members work on exceed \$250,000 in value. FHBA members who are providing services at commercial building projects with a value over \$250,000 have a reasonable expectation that they will continue to provide such services in the future.

16. Over 2500 member companies of FHBA have active workers' compensation exemption certificates for at least one employee each, issued, prior to July 1, 2002, pursuant to Section 440.05, Florida Statutes (2001). These members are involved in commercial building projects estimated to be valued at \$250,000 or greater and which started prior to July 1, 2002. Several dozen FHBA members affected by the limitations on the

exemptions stated in Bulletin No. 234 have contacted the FHBA for advice.

17. FBHA members who are contractors, whose exemptions are limited based on Bulletin No. 234, must attempt to secure workers' compensation insurance. Subcontractors to these members whose exemptions are limited must obtain insurance. To the extent the subcontractor has workers' compensation insurance obligations under existing contracts, either the subcontractor, the prime contractor or the owner of the project must absorb the cost of workers' compensation insurance premiums. The possibility also exists that the subcontractor may be forced off the job if he does not obtain the insurance and/or the cost of premiums cannot be accounted for.

18. The FHBA lobbies the Florida Legislature and executive agencies on issues that effect the construction industry, including workers' compensation insurance.

19. The Florida Associated General Contractors' Council ("A.G.C. Council") is a Florida corporation which has approximately 2,000 members. Of these members, approximately 800 are contractors and subcontractors actively engaged in the construction industry in Florida. The remaining members are involved in construction-related businesses.

20. The approximately 800 A.G.C. Council members engaged in construction activities are all commercial builders. Most of the projects on which they work on are valued at over \$250,000.

21. Of the approximately 800 A.G.C. Council members engaged in construction, 48 have active exemption certificates for from one to three employees each.

22. Approximately twenty to thirty A.G.C. Council members who worked on commercial projects valued at over \$250,000 and who were under prime contracts before July 1, 2002, have contacted the A.G.C. Council's office in response to Bulletin No. 234. These subcontractors were concerned that they would have to obtain workers' compensation insurance at costs that were not anticipated when they signed their contracts. The general contractors who called the A.G.C. Council Office were concerned because they had subcontractors who were going to have to obtain insurance and the general contractors were being asked to cover the costs. In some cases, subcontractors were unable to obtain insurance and the general contractor had to remove them from the job, which created an increased cost to the contractor by having to find a replacement subcontractor.

23. The A.G.C. Council represents its members before the Florida Legislature on a number of issues of interest to the construction industry, including codes, licensing, and workers'

compensation insurance. Moreover, the A.G.C. Council represents its members in administrative and judicial proceedings.

24. The Parrish Group is a Florida corporation which provides construction, design/build, development, and realty services to its clients. It has a number of subsidiary companies which also provide construction, development, and real estate services. The companies are all commonly owned and the finances are combined and reported on a single financial statement.

25. The Parrish Group is involved commercial construction projects, most of which have a value of over \$250,000, and it intends to continue developing such commercial projects.

26. The Parrish Group uses subcontractors for all of its construction activities, including site construction, foundation, structure, build-out, and internal build-outs. The Parrish Group has relationships with 40 to 50 subcontractors and generally uses approximately 30 of these subcontractors on any given project.

27. The Parrish Group does not have a valid exemption, but six of the Parrish Group's regular subcontractors, including Mark Madonia, d/b/a Chop's Acoustical Ceilings, hold active exemption certificates issued prior to July 1, 2002, pursuant to Subsection 440.05(3), Florida Statutes (2001).

28. The Parrish Group's subcontractors who held active exemption certificates issued prior to July 1, 2002, if required to obtain workers' compensation insurance, would try to pass the cost of premiums to the primary contractor, a Parrish Group subsidiary, Parrish Builders. If the subcontractor is successful in passing the cost to the primary contractor, the primary contractor would try to pass the costs on to the owner, i.e., the Parrish Group. If the subcontractor were unable to obtain the workers' compensation insurance, the primary contractor would have the subcontractor removed from the job. Alternatively, the prime contractor could retain the subcontractor as an employee, in which case the primary contractor would have to bear the cost of the additional insurance under its policy. These increased costs would not have been accounted for in the prime contract, if that contract was in effect prior to July 1, 2002.

29. Mark Madonia is one of Parrish Group's regular subcontractors. When faced with the prospect of having to obtain workers' compensation insurance, Mr. Madonia sought a change order from Parrish Builders. The Parrish Group, as owner, agreed to the change order and bore the additional costs.

30. When the Parrish Group's subcontractors, who had certificates of exemption, made bids used in prime contracts

that were effective before July 1, 2002, the cost of workers' compensation insurance was not included in the bid.

31. Mark Madonia, d/b/a Chop's Acoustical Ceilings, is a sole proprietor who installs ceiling grade systems. Mr. Madonia provides these services as a subcontractor to the Parrish Group and other developers.

32. Mr. Madonia works primarily on commercial building projects, most of which are valued at over \$250,000. Mr. Madonia expects to continue to work on commercial building projects valued at over \$250,000 in the future.

33. Mr. Madonia is a member of FHBA and has a valid workers' compensation exemption certificate that was issued prior to July 1, 2002. Mr. Madonia has had an exemption since 1994 and his current certificate is in effect until May 25, 2003.

34. Prior to July 1, 2002, Mr. Madonia had not obtained workers' compensation insurance because of his exemption.

35. When Mr. Madonia received Bulletin No. 234 on or about July 12 through 14, 2002, he attempted to obtain workers' compensation insurance. Three companies denied him coverage because he did not have a sufficient number of employees.

36. Mr. Madonia risked being removed from jobs had he not obtained the workers' compensation coverage required by the Bulletin.

37. Mr. Madonia eventually contracted with an employee leasing company. In order to do so, he had to make his subcontractors his employees. The cost of the employee leasing service, including workers' compensation coverage is \$27.00 per \$100.00 of payroll. Mr. Madonia could have been responsible for these costs, although in this case, the Parrish Group agreed to absorb the extra costs.

38. If a valid workers' compensation insurance exemption is limited and no longer applies to commercial construction projects with a value of \$250,000 or more, the general contractor for such projects will require that the affected persons provide proof of coverage or they cannot lawfully be allowed on the job site.

39. In the event a subcontractor with an exemption needs to obtain insurance, the subcontractor would have to obtain workers' compensation insurance. If the primary contract has already been signed by the owner and the general contractor, then the costs of the job have already been set. The subcontractor may absorb the costs or, alternatively, the subcontractor could attempt to pass the additional costs of insurance premiums to the general contractor. The general contractor could then try to pass the additional costs on to the owner. In any event, either the subcontractor, the general

contractor, or the owner will have to absorb the unanticipated costs of workers' compensation insurance.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. Sections 120.54, 120.56 and 120.57(1), Florida Statutes.

41. Section 120.56(4), Florida Statutes, states that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

42. The term "substantially affected person" includes trade or professional associations which meet the test for associational standing. Florida Homebuilders Association v. Department of Labor and Employment Security, 412 So. 2d 351, 352 (Fla. 1982). To meet the test for associational standing, an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by an agency statement or rule. Further, the subject matter of a rule must be within the association's general scope of interest and activity, and the relief requested must be a type appropriate for a trade association to receive on behalf of its members, e.g., no money damages are claimed on behalf of the association or its members. Id. at 353-354; Florida Board of

Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002).

43. With regard to the criteria required to establish "associational" standing, the evidence established that a substantial number of FHBA members and A.G.C. Council members have active workers' compensation exemptions that were issued prior to July 1, 2002, and that a substantial number of these members work on commercial building projects, most of which are valued in excess of \$250,000. Because of the limitation on workers' compensation exemption certificates stated in Bulletin No. 234, holders of exemption certificates issued prior to July 1, 2002, but not yet expired, will have to obtain workers' compensation insurance, beginning July 1, 2002.

44. As a result of the Department's statement in Bulletin No. 234, FHBA members and A.G.C. Council members will incur the cost of premiums for such coverage or will otherwise have to bear the expense of compliance with the statement in Bulletin No. 234. Furthermore, the subject matter of the agency statement, workers' compensation insurance, is within the general scope of interest of both FHBA and A.G.C. Council. Here, members of both organizations are engaged in the construction industry and are subject to workers' compensation insurance requirements. Finally, the relief sought by the FHBA and A.G.C. Council, the Department's discontinuance of reliance

on the Bulletin or similar agency statement, is appropriate for a trade association to obtain on behalf of its members.

45. Based on the foregoing, FHBA and the A.G.C. Council are substantially affected by the agency statement and, thus, have standing in this proceeding.

46. In order to demonstrate standing, the Parrish Group and Mark Madonia must also meet the criteria established in Subsection 120.56(4), Florida Statutes. In order to be deemed a "substantially affected" person, the person or entity challenging a statement or rule must show that the statement or rule will cause a real and sufficiently immediate injury and that the alleged injury is within the zone of interest to be protected or regulated. Florida Board of Medicine, 808 So. 2d, 243 at 250; Lonoue v. Florida Department of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 1999).

47. Mr. Madonia holds an active workers' compensation exemption certificate which, on its face, is valid until May 5, 2002. As applied to Mr. Madonia, Bulletin No. 234 requires him to secure workers' compensation insurance in order to lawfully work on commercial construction valued at \$250,000 or greater, even if such projects began prior to July 1, 2002.

48. The Parrish Group owns and develops commercial construction projects which are valued at \$250,000 or more and, through a construction subsidiary, regularly uses subcontractors

who hold active workers' compensation exemption certificates, issued prior to July 1, 2002. Bulletin No. 234 requires that subcontractors on these projects obtain workers' compensation insurance. On such projects for which the primary contract was executed prior to July 1, 2002, the cost of this insurance is borne by the Parrish Group's construction subsidiary or by the Parrish Group itself. On future commercial projects, valued at \$250,000 or greater, constructed while existing exemption certificates are in effect, the cost of workers' compensation insurance will be borne by the subcontractor, whose price to Parrish Builders will be increased to reflect the cost of workers' compensation premiums, and Parrish Builders will pay the increased cost to the subcontractor and charge a higher price to the owner. Parrish Group, the owner, will ultimately pay a higher cost for the construction. These increased costs represent a real and immediate injury to the Parrish Group and to Mr. Madonia and are within the zone of interest to be regulated.

49. Based on the foregoing, the Parrish Group and Mark Madonia are substantially affected persons and, thus, have standing to challenge the agency statement in Bulletin No. 234.

50. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of an issue under Chapter 120, Florida Statutes. See Florida

Department of Transportation v. J.w.C., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Petitioners have asserted that Bulletin No. 234 is an agency statement which constitutes a rule that has not been adopted by rulemaking procedures as provided in Section 120.54, Florida Statutes. Therefore, Petitioners bear the burden of proof.

51. To prevail, Petitioners must establish that the agency statement in Bulletin No. 234 is a rule within the meaning of Subsection 120.52(15), Florida Statutes. If the agency statement is determined to be a rule, the burden shifts to the Department to show that one of the defenses permissible under Subsection 120.54 (1) or (2), Florida Statutes, are applicable. Pursuant to those provisions, the Department may show that rulemaking was not feasible or practicable. In this case, the Department has not raised either of these defenses, but has maintained that the statements in Bulletin No 234 do not constitute a rule.

52. Subsection 120.52(15), Florida Statutes, defines the term "rule" to mean "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."

53. An agency statement is a rule if it has the effect of a rule regardless of whether the agency calls it a rule. If the alleged agency statements are deemed rules, they must be adopted through rulemaking procedure in accordance with Section 120.54, Florida Statutes.

54. Courts have provided guidance in determining whether an agency statement is a rule. Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976 at 977-978 (1st DCA, 1984) the court, quoting State Department of Administration v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1978), states that:

[a]ny agency statement is a rule if it purports in and of itself to create certain rights and adversely affect others' [cite omitted], or serves by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law.[cite omitted]

55. The agency statements in Bulletin No. 234 limit the use of exemptions issued prior to July 1, 2002, by requiring the holders of such exemptions to purchase workers' compensation insurance for commercial building projects valued at \$250,000 or greater. Additionally, the Bulletin requires the designated persons to purchase workers' compensation insurance for commercial building projects valued at \$250,000, without regard to the starting date of the projects or the date of the construction contract for the project. Finally, the Bulletin is applicable to designated classes of people, i.e., corporate

officers of corporations actively engaged in the construction industry, sole proprietors or partners actively engaged in the construction industry, and persons actively engaged in the construction industry as independent contractors.

56. The agency statements in Bulletin No. 234 have general applicability and implement, interpret, or prescribe "law or policy" concerning workers' compensation insurance. Moreover, the statements adversely affect rights and/or require compliance or otherwise have the direct and consistent effect of law. Accordingly, the statements are rules within the meaning of Subsection 120.52 (15), Florida Statutes, and must be promulgated pursuant to the rulemaking procedures in Section 120.54, Florida Statutes.

57. Section 120.595 (4)(a), Florida Statutes, provides that "[u]pon entry of a final order that all or part of an agency statement violates s. 120.54 (1)(a), the administrative law judge shall award reasonable costs and reasonable attorneys' fees to the petitioner" unless the agency demonstrates one of the exceptions listed in that provision.

58. The Department has not asserted or proved the applicability of any of the exceptions to the mandate that attorneys' fees and costs be awarded to the successful petitioner in a proceeding under Subsection 120.56(4), Florida Statutes. Accordingly, Petitioners are entitled to recover a

reasonable sum for attorneys' fees and costs it has incurred in this case.

59. Jurisdiction is retained to conduct a separate proceeding on the amount of attorneys' fees and costs to be awarded to Petitioner.

ORDER

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

ORDERED that:

1. The statements in Bulletin No. 234 constitute a rule that was not adopted under, and, therefore, violate, Section 120.54, Florida Statutes.

2. Jurisdiction is retained to conduct further proceedings as necessary to award attorneys' fees and costs to Petitioners, pursuant to Section 120.595(4)(a), Florida Statutes.

3. The parties have thirty (30) days from the date of this Final Order to resolve the amount of such award, subject to approval of the undersigned. If the parties have not resolved the amount of such award within the time prescribed herein, the

parties shall advise the undersigned, in writing, and a hearing will be scheduled to resolve the issue.

DONE AND ORDERED this 31st day of October, 2002, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of October, 2002.

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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 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.