STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOODE "BUDDY" YEOMAN,

Petitioner,

and

KENNETH GARY SMITH,

Intervenor,

vs. Case No. 04-2414RX

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,

Respondent.

FINAL ORDER

This case is pending before Administrative Law Judge Michael Parrish of the Division of Administrative Hearings for the preparation of a Final Order on the basis of stipulated facts and stipulated documents, all parties having stipulated to the waiver of an evidentiary hearing.

APPEARANCES

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STATEMENT OF THE ISSUES

This is a rule challenge proceeding in which the following specific issues are presented:

(1) Whether Florida Administrative Code Rule 61G4-12.006 is an invalid delegation of legislative authority, and

(2) Whether application of the provisions of Section 112.011(1)(b), Florida Statutes, by the Construction Industry Licensing Board in its quasi-judicial capacity constitutes an agency statement of general applicability that requires rulemaking by the agency.

PRELIMINARY STATEMENT

The events leading up to the initial filing of this case began when the Petitioner, Goode "Buddy" Yeoman, filed an application for initial licensure as a contractor. That application was denied based on his failure to provide proof that his civil rights had been restored. Shortly following notice of the denial of his application, the Petitioner filed a challenge to Florida Administrative Code Rule 61G4-

12.006(2), as well as a challenge to an agency statement defined as a rule. The events leading up to the Intervenor's interest in this case began when the Intervenor, Kenneth Gary Smith received a letter from the Department of Business and Professional Regulation (DBPR) requesting additional documents related to his application for licensure as a contractor. The requested documents related to proof that his civil rights had been restored. The Intervenor's interest in the outcome of this proceeding is, in essence, identical to the interest of the Petitioner. The Intervenor has adopted the Petitioner's position on all matters at issue in this case.

Shortly before the date scheduled for the final hearing, a case management conference was conducted in this case. Counsel for the Petitioner and the Respondent participated in the conference. At the time of the conference the Intervenor had not yet been granted party status and, in any event, counsel for the Intervenor was unable to attend the conference. During the course of the case management conference, counsel for the Petitioner and the Respondent agreed that this case could be submitted for disposition on a stipulated record without the need for an evidentiary hearing. Such counsel also advised that they had no objection to the proposed intervention and that they believed that the Intervenor would be agreeable to all of the stipulations

proposed by the other two parties. Following the case management conference, on August 24, 2004, the undersigned issued an Order Canceling Hearing and Scheduling Future Events. That order included the following:

> The Petitioner and the Respondent have no objection to the intervention sought by Kenneth Gary Smith.
>
> The Petitioner and the Respondent have entered into an agreement to waive an evidentiary hearing in this case and to submit the case on a stipulated record consisting of the pleadings in this case, a stipulation of facts, and copies of specific documents which will be filed with the stipulation of facts. The Petitioner and the Respondent have also agreed to dates for the filing of the stipulated facts and documents and for the submission of their respective proposed final orders.
>
> The Petitioner and the Respondent believe, but are not certain, that the Intervenor will join in the agreements described above.
>
> Upon consideration of all of the foregoing, it is ORDERED:
>
> * * *
>
> 3. That the Petitioner and the Respondent shall file their stipulation of facts with documents attached by no later than the close of business on Friday, August 27, 2004.
>
> 4. That all parties shall file their respective proposed final orders by no later than the close of business on Thursday, September 16, 2004.
>
> 5. That Kenneth Gary Smith is hereby granted status as an Intervenor. The

> Intervenor will be deemed to have agreed to all matters to which the Petitioner and Respondent have agreed and stipulated, unless, by no later than August 31, 2004, the Intervenor files and serves a written notice setting forth the Intervenor's specific disagreements.
>
> 6. The Petitioner and the Respondent will be deemed to have stipulated that the Intervenor applied for a license as a general contractor, that the Board advised the Intervenor that his application cannot be approved without "proof that civil rights have been restored," that the Intervenor has not supplied such proof, and that the Board would have approved the Intervenor's application for a license as a general contractor, but for the failure of the Intervenor to submit "proof that civil rights have been restored," unless, by no later than August 31, 2004, the Petitioner and/or the Respondent files and serves a written notice setting forth their specific disagreements.
>
> 7. If any party files a notice of the type described in paragraphs 5 and 6 above, a case management conference will be conducted by telephone at the earliest practicable time to fashion a process for the resolution of any remaining factual disputes.

Following the issuance of the August 24, 2004, order, none of the parties filed any notice of any disagreement regarding any of the matters addressed in the order. At the request of the parties, the deadline for filing their respective proposed final orders was extended to September 23, 2004. Thereafter, all parties filed timely proposed final

orders, which have been carefully considered during the preparation of this Final Order.[1]

FINDINGS OF FACT[2]

1. Petitioner, Goode “Buddy” Yeoman, is 64 years of age, and is an individual who has applied to the CILB for an individual certified general contracting license.

2. Petitioner Yeoman has a prior felony conviction and his civil rights have not been restored.

3. Petitioner Yeoman's felony conviction was imposed approximately 20 years ago in 1985 and was unrelated to the contracting practice or trade.

4. Petitioner Yeoman was required to, and did, submit a completed form DBPR CILB 4359.

5. Petitioner’s application was denied by the Construction Industry Licensing Board (“CILB” or “Board”), and on June 14, 2004, the CILB entered its “Notice of Intent to Deny” Petitioner Yeoman’s application for initial certified general contractor. Petitioner Yeoman has separately filed a petition for administrative proceedings regarding the CILB's denial of his initial certified general contractor license. As such, by operation of law no final agency action has to date been taken on Petitioner Yeoman's application. The license denial proceeding has been continued. This will allow

the parties in that case to have the benefit of the final order in this rule challenge case.

6. The sole basis for the denial of Petitioner Yeoman's application was that his civil rights had not been restored.

7. The CILB's "Notice of Intent to Deny" stated: "You have not provided proof to the Board that your civil rights have been fully restored subsequent to a previous felony conviction as required by Section 112.011(1)(b), Florida Statutes."

8. The requirement that a restoration of civil rights be obtained which is expressed in the challenged existing rule and the challenged agency statement defined as a rule negatively affect Petitioner Yeoman's substantial interests by denying him a certified general contracting license. As such, Petitioner Yeoman has standing to bring his challenge to Florida Administrative Code Rule 61G4-12.006(2) and the agency statement defined as a rule (Form "DBPR CILB 4359").

9. Intervenor Smith's felony conviction was for a drug offense in 1989 and was unrelated to the contracting business or trade.

10. Intervenor Smith filed an application with the CILB, including form "DBPR CILB 4359." On May 4, 2004, the CILB refused to consider his application because his civil rights have not been restored. As such, Intervenor Smith has

standing to bring his challenge to Florida Administrative Code Rule 61G4-12.006(2), and the agency statement defined as a rule (Form "DBPR CILB 4359").

11. Florida Administrative Code Rule 61G4-12.006 was adopted pursuant to Chapter 120, Florida Statutes, on January 6, 1980, and lists and incorporates by reference DBPR/CILB/025 (Rev. 01/01) entitled "Certifications: Certification Change of Status." This agency form is applicable to applications for certified licenses and change of status applications, and requires individuals applying for initial contracting licenses to provide proof that their civil rights have been restored if they have been convicted of a felony. The form states in the "Financial Responsibility/Background Questions" section: "NOTE: IF YOU, THE APPLICANT/LICENSEE, HAVE HAD A FELONY CONVICTION, PROOF THAT YOUR CIVIL RIGHTS HAVE BEEN RESTORED WILL BE REQUIRED PRIOR TO LICENSURE."

12. Form "DBPR CILB 4359" has an effective date of March 24, 2004, but has not been adopted as a rule under Chapter 120, Florida Statutes. The form is available for download on the agency's web-page as "Initial Issuance of Licensure for Certified Contractor Application Package." Applicants for licensure as a contractor must submit form "DBPR CILB 4359" to the DBPR.

13. Within the “DBPR CILB 4359" package is the form “DBPR CILB 4357 - Qualified Business (QB) License Application and Qualified Business Change of Status Application,” which requires an applicant previously convicted of a felony to provide proof that his/her civil rights have been restored. This form states: “IF YOU HAVE BEEN CONVICTED OF A FELONY, YOU MUST SUBMIT PROOF OF REINSTATEMENT OF CIVIL RIGHTS,” and also: “Note: If you, the applicant/licensee, have had a felony conviction, proof that your civil rights have been restored will be required prior to Licensure.”

14. Both the challenged Florida Administrative Code Rule 61G4-12.006(2) and the form “DBPR CILB 4359" are generally applicable to every individual applying for a contracting license from the CILB.

15. The CILB has previously approved applications for initial licenses, and change of status licenses, to applicants who did not have their civil rights fully restored, subject to probation until the applicant's civil rights have been restored.

16. Neither the type of crime for which a felony conviction has been imposed, the recency of the conviction, nor the completion of any punishment, have been a factor in the CILB’s denial of applications to individuals previously convicted of a felony crime but whose civil rights have not

been fully restored. The sole reason for denial is the lack of civil rights.

17. The lack of civil rights is the standard, expressed in Florida Administrative Code Rule 61G4-12.006(2) and in "DBPR CILB 4359," by which the CILB has denied contractor license applications, including Petitioner Yeoman's application, and Intervenor Smith's application, under the CILB's interpretation of Section 112.011(1)(b), Florida Statutes.

18. The CILB has not revoked any previously granted licenses due solely to a subsequent felony conviction and lack of civil rights of any licensee.

19. The CILB is a collegial body composed of 18 members, 16 of whom are professionals and two of whom are consumer members.

20. Each member is limited to two 4-year terms, and no member may serve more than two consecutive 4-year terms.

21. If a member is appointed to fill an unexpired vacancy, the new appointee may not serve for more than 11 years.

22. The current members of the Board, and their terms, are as follows:

a. Elizabeth Karcher; term 01/10/02-10/31/04

b. Barry Kalmanson; term 11/01/02-10/31/07

c. Lee-En Chung; term 09/01/99-10/31/06

d. Paul Del Vecchio; term 01-10-02-10-31-05

e. Michelle Kane; term 01-10-02-10/31/05

f. Joan Brown; term 03/14/00-10/31/07

g. Michael Blankenship; term 11/01/02-10/31/06

h. Carl Engelmeler; term 11/01/02-10/31/06

i. Jacqueline Watts; term 01/10/02-10/31/04

j. John Smith; term 11/01/02-10/31/06 (resigned effective 11/01/04)

k. Raymond Holloway; term 01/10/02-10/31/05

l. Edward Weller; term 11/21/02-10/31/06

m. Thomas Thornton; term 08/16/04-10/31/07

n. Robert Stewart; term 08/16/04-10/31/07

o. Doris Bailey; term 08/16/04-10/31/05

23. A quorum (51 percent) of the appointed members of the Board is necessary for the Board to conduct official business.

24. The CILB meets 11 times each year.

25. On November 8, 1999, the CILB denied the application of Michael A. Helish for the certification examination on the grounds that his civil rights had not been restored. This decision was per curiam affirmed in Helish v. Department of Business and Professional Regulation, 766 So. 2d 1047 (Fla. 1st DCA 2000).

26. The CILB has previously approved applications for initial licenses, and change of status licenses, to applicants whose civil rights had not been fully restored, at times subject to probation until the applicant's civil rights have been restored, as follows:

> a. On June 14, 2004, the Respondent granted an initial contractor license to Robert F. Jones, subject to probation until his civil rights are fully restored.
>
> b. On May 28, 2004, the Respondent granted an initial contractor license to William P. Campbell, subject to probation until his civil rights are fully restored.
>
> c. On May 28, 2004, the Respondent granted an initial contractor license to Glenn Kasper, subject to probation until his civil rights are fully restored.
>
> d. On May 28, 2004, the Respondent granted an initial contractor license to Danny Mitchell, subject to probation until his civil rights are fully restored.
>
> e. On March 3, 2004, the Respondent granted an initial contractor license to Timothy Burke, subject to probation until his civil rights are fully restored.
>
> f. On February 9, 2004, the Respondent granted an initial contractor license to Anthony Nicholas, Jr., subject to probation and the condition that his civil rights be fully restored within two years.
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> g. On June 25, 2003, the Respondent granted an initial contractor license to Andrew Dittenber, stating: "The Board permitted licensure with conditions in this case where applicant did not have his civil rights restored, because of the number of years that have passed since the conviction

and evidence that application for restoration has been made."

h. On June 25, 2003, the Respondent granted an initial contractor license to Robert W. Fleming, stating: "The Board permitted licensure with conditions in this case where applicant did not have his civil rights restored, because of the number of years that have passed since the conviction and evidence that application for restoration has been made."

i. On December 1, 2003, the Respondent granted an initial contractor license to James D. Munroe, Jr., subject to probation until his civil rights are fully restored.

j. On October 21, 2002, the Respondent granted an initial contractor license to Daryl F. Strickland subject to probation and the condition that his civil rights be fully restored within three years.

k. On September 4, 2001, the Respondent granted an initial contractor license to John Richard Brown, subject to probation and the condition that his civil rights be fully restored within three years. On June 24, 2004, the Respondent amended its initial order and again placed John Richard Brown's license on probation until such time as his civil rights are restored.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this case. §§ 120.56, 120.569, and 120.57, Fla. Stat.

28. Both Petitioner Yeoman and Intervenor Smith have standing to challenge Florida Administrative Code Rule 61G4-12.006 and the agency statement defined as a rule.

29. Section 120.52(15), Florida Statutes, with exceptions not relevant here, defines the term "rule" as "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."

30. No agency has inherent rulemaking authority. § 120.54(1)(e), Fla. Stat.

31. Florida Administrative Code Rule 61G4-12.006 is the rule by which the Board incorporated forms to be used by applicants for licensure. By Section 9 of Chapter 2001-278, Laws of Florida, the Florida Legislature amended Section 455.213(1), Florida Statutes. The Legislature gave sole authority to the DBPR to adopt forms to be submitted for initial licensure and licensure renewal.

> Notwithstanding any other provision of law, the department is the sole authority for determining the contents of any documents to be submitted for initial licensure and licensure renewal.

32. As a result of the amendment, the Board no longer has legislative authority to adopt application forms for licensure and licensure renewal. When a rule is superseded by

legislation enacted after the rule’s effective date, the rule loses all force and effect as soon as such legislation becomes law. As explained in Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992), review denied, 621 So. 2d 431 (Fla. 1993):

> . . . [A] conflict between a statute and an administrative rule, which rule was promulgated prior to a statutory amendment and enacted in reliance on case law existing prior to the amendment, does not give rise to an ambiguity in the statute. In the event of a conflict between a statute and an administrative regulation on the same subject, the statute governs. Nicholas v. Wainwright, 152 So.2d 458, 460 (Fla.1963); Canal Ins. Co. v. Continental Casualty Co., 489 So.2d 136, 138 (Fla. 2d DCA 1986). A regulation is operative and binding from its effective date "until it is modified or superseded by subsequent legislation . . . and it expires with the repeal of the statute from which it gains its life." Hulmes v. Division of Retirement, Dept. of Admin., 418 So.2d 269, 270 (Fla. 1st DCA 1982), review denied, 426 So.2d 26 (Fla.1983). The regulation relied on by Duda was superseded by the 1987 statutory amendment and was of no force or effect on the date of Duda's conveyances. Thus, no conflict or ambiguity existed in the instant case. To the contrary, the plain statutory language governed.

33. The 2001 legislative amendment of Section 455.213(1), Florida Statutes, was, in effect, a legislative repeal of Florida Administrative Code Rule 61G4-12.006. That legislative amendment nullified the statutory provision that authorized the Board to adopt the subject rule. The

nullification of the statutory authority for the rule of necessity nullified the rule. In other words, as the court said in Duda, supra, the rule "expires with the repeal of the statute from which it gains its life."

34. A rule that has no force or effect because it has been modified or superseded by statute is, like a repealed rule, no longer in existence in any meaningful sense. Section 120.56, Florida Statutes, does not authorize a challenge to a rule that is no longer in existence. Department of Revenue v. Sheraton Bal Harbour Association, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003) Although Florida Administrative Code Rule 61G4-12.006 still appears in the text of the Florida Administrative Code, for all practical purposes it is a nonexistent rule because of the legislative amendment that had the effect of repealing that rule.[3]

35. The challenged text in Form DBPR CILB 4359 is not a "rule" within the meaning of Section 120.52(15), Florida Statutes, because it is not a "form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." Rather, Form DBPR CILB 4359 is the means by which the Board obtains the information it needs in order to comply with Section 112.011(1)(b), Florida Statutes. Section 112.011(1)(b), Florida Statutes, reads as follows, in pertinent part:

> . . . [A] person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person whose civil rights have been restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought. (Emphasis supplied.)

36. The Board argues that the effect of the above-quoted statutory provision is to disqualify from licensure applicants who have lost their civil rights by reason of conviction of a crime and who have not yet had their civil rights restored. The Board's interpretation of the meaning of Section 112.011(1)(b) is reasonable, especially when note is taken of the rule of statutory construction known as "expressio unius est exclusio alterius." As stated in James v. Department of Corrections, 424 So. 2d 826, 827 (Fla. 1st DCA 1983):

> Expressio unius est exclusio alterius is a general principle of statutory construction which states that the mention of one thing implies exclusion of another. Thus, where the statute enumerates the things on which it is to operate, it is ordinarily construed as excluding from its operation all those not expressly mentioned.

37. To similar effect is the ancient rule of statutory construction described in Alsop v. Pierce, 155 Fla. 185, 19 So. 2d 799 (Fla 1944), as follows:

> When the Legislature has prescribed the mode, that mode must be observed. When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way. State ex re. Murphy v. Barnes, 24 Fla. 29, 3 So. 433; State ex rel Church v. Yeates, 74 Fla. 509, 77 So. 262; Weinberger v. Board of Public Instruction, 93 Fla. 470, 112 So. 253.

For a more recent application of the above-quoted rule, see Sun Coast International, Inc. v. Dept. of Business Regulation, 596 So. 2d 1118 (Fla. 1st DCA 1992). ("[A] legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way.")

38. Under the Board's interpretation of Section 112.011(1)(b), Florida Statutes, the Board cannot lawfully grant licenses to applicants who have lost their civil rights and have not yet had them restored.[4] Such being the case, in order to act in a manner consistent with Section 112.011(1)(b), the Board is required to know whether an applicant has been convicted of a crime that involves the loss of civil rights and, if so, whether the applicant's civil rights have been restored. The requirement that the Board obtain such information flows directly from the language of

the subject statutory provision. Because the statute makes it necessary for the Board to know whether an applicant has been convicted of a crime that involves the loss of civil rights and, if so, whether those rights have been restored, it is the statute that creates the requirement for that information. Such being the case, the agency statement at issue here (Form DBPR CILB 4359) is not a rule, because it does not solicit any information not specifically required by the statute.[5]

ORDER

In view of all of the foregoing it is ORDERED:

(1) That Florida Administrative Code Rule 61G4-12.006 is no longer an existing rule because it has been effectively repealed by legislative action repealing the authority for the rule.

(2) That a rule that has been effectively repealed by legislative action cannot be the subject of a rule challenge proceeding before the Division of Administrative Hearings.

(3) That the challenged agency statement contained in Form DBPR CILB 4359 is not a rule within the meaning of Section 120.52(15), Florida Statutes.

(4) That for the reasons set forth above, the original petition in this case and the petition to intervene in this case are both hereby dismissed and all relief sought by the Petitioner and the Intervenor is denied.

DONE AND ORDERED this 3rd day of December, 2004, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of December, 2004.

ENDNOTES

1/ The Petitioner and the Intervenor, because of the alignment of their interests, filed a single proposed final order in which they both joined. The Respondent, of course, filed a separate proposed final order.

2/ Paragraphs 1 through 24 of the Findings of Fact are facts which have been stipulated to by all parties.

3/ In the interest of clarity, it would probably be in the best interest of all concerned for the Board to go through the rule-making process to formally repeal Rule 61G4-12.006, citing as grounds for the repeal that the Board no longer possesses the statutory authority it had when the rule was adopted. But with or without such formal action, the rule has expired and no longer exists in any meaningful way.

4/ The Board orders described in the subparagraphs of paragraph 26 of the Findings of Fact, above, indicate that the Board sometimes acts in a manner inconsistent with its stated interpretation of Section 112.011(1)(b), Florida Statutes. Such inconsistencies may be problematic during administrative

proceedings challenging the Board's denial of license applications on the basis of Section 112.001(1)(b), Florida Statutes.

5/ On the basis of this line of reasoning, it is gratuitously noted that, in view of the provisions of Section 112.011(1)(b), Florida Statutes, if the Board still had statutory authority to promulgate application forms, Florida Administrative Code Rule 61G4-12.006, would not be found to be invalid on the record in this case.

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 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.