

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA INSURANCE COUNCIL, )  
INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-4490RP  
 )  
DEPARTMENT OF FINANCIAL )  
SERVICES, OFFICE OF INSURANCE )  
REGULATION AND FINANCIAL )  
SERVICES COMMISSION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER

Both Petitioner and Respondent filed separate Motions For Summary Final Order on April 15, 2005 and May 17, 2005, based on different grounds, but relying on essentially the same facts. Both parties filed responses to the other party's motion and presented oral argument on the motions. Based on the review of the file, the arguments of counsel and relevant statutory and case law, this matter is appropriate for summary disposition.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether proposed Rules 690-175.003, 690-170.005-007, 690-170.013, 690-170.0135, 690-170.014, 690-170.0141, 690-170.0142, and 690-170.0155 are valid exercises of delegated rulemaking authority.

PRELIMINARY STATEMENT

On November 12, 2004, in Volume 30, Number 46, of the Florida Administrative Weekly, the Office of Insurance Regulation (OIR) through the Department of Financial Services (Department), published two Notices of proposed rulemaking for proposed Rules 690-175.003, 690-170.005-007, 690-170.013, 690-170.0135, 690-170.014, 690-170.0141, 690-170.0142, and 690-170.0155. The proposed Rules variously deal with filing procedures for a variety of insurance rates. Thereafter, Petitioner, The Florida Insurance Council (FIC), Inc., filed a Petition challenging the proposed Rules as an invalid exercise of delegated legislative authority.

On January 14, 2005, in Volume 31, Number 2, of the Florida Administrative Weekly, OIR through the Department published two Notices of Change to proposed Rules 690-175.003, 690-170.005-

007, 690-170.013, 690-170.0135. 690-170.014, 690-170.0141, 690-170.0142, and 690-170.0155. Thereafter, on March 2, 2005, Petitioner filed an amended Petition challenging the validity of the proposed Rules.

Finally, on April 15, 2005, in Volume 31, Number 15, of the Florida Administrative Weekly, OIR through the Department published two Notices of Change to proposed Rules 690-175.003, 690-170.005-007, 690-170.013, 690-170.0135. 690-170.014, 690-170.0141, 690-170.0142, and 690-170.0155.

Both parties have engaged in extensive discovery and have filed relevant responses to discovery and depositions. Additionally, both parties have offered oral arguments in support of their Motions for Summary Final Order.

#### FINDINGS OF FACT

1. Section 20.05, Florida Statutes, addresses the structure and powers of the Department. Section 20.05 provides as follows, in pertinent part:

20.05 Heads of departments; powers and duties.--

(1) Each head of a department, except as otherwise provided by law, must:

\* \* \*

(b) Have authority, . . . , to execute any of the powers, duties, and functions vested in the department or in any administrative unit thereof through administrative units . . . designated by the head of the department, . . . unless the

head of the department is explicitly required by law to perform the same without delegation.

\* \* \*

(e) Subject to the requirements of chapter 120, exercise existing authority to adopt rules pursuant and limited to the powers, duties, and functions transferred to the department.

2. The Financial Services Commission (Commission) was created within the Department pursuant to Section 20.121, Florida Statutes. However, the Commission is not "subject to control, supervision or direction by the Department of Financial Services in any manner." § 20.121(3), Fla. Stat. The Commission is composed of the Governor and Cabinet, who collectively serve as the agency head of the Commission. Action by the Commission can only be taken by majority vote "consisting of at least three affirmative votes." Id.

3. OIR is a structural unit of the Financial Services Commission. Section 20.121(3) states in relevant part, as follows:

(a) Structure.— The major structural unit of the commission is the office. Each office shall be headed by a director. The following offices are established:

1. The Office of Insurance Regulation, which shall be responsible for all activities concerning insurers and other risk-bearing entities . . .

\* \* \* \*

(b) Organization.-- The commission shall establish by rule any additional organizational structure of the offices. It is the intent of the legislature to provide the commission with the flexibility to organize the offices in any manner they determine appropriate to promote both efficiency and accountability.

(c) Powers.-- Commission members shall serve as the agency head for purposes of rulemaking . . . by the commission and all subunits of the commission. . . .  
(emphasis supplied)

4. Clearly, under the Department's, the Commission's and the OIR's organizational structures, only the Commission may promulgate rules for both itself and OIR. The Department does not have rulemaking authority over areas that have been given to the Commission. On the other hand, nothing in the statute prohibits OIR, as directed by the Commission, to perform steps, preliminary to proposing a rule, that often occur in the rule development process prior to the actual Notice of proposed rulemaking. See also § 120.54, Fla. Stat. To that end, the Commission, by non-rule policy, has delegated authority to OIR to engage in rulemaking activities on behalf of the Commission. However, this delegation is not limited to rule development activities that occur prior to the Notice of proposed Rules, but authorizes publication of the Notice prior to approval by the Commission of any proposed language or policy statement.

5. As indicated, the Notices for the proposed Rules were published in the Florida Law Weekly in November 2004, with various changes made thereafter. The proposed Rules were published as OIR rules. Disturbingly and misleadingly, all the Notices for the proposed Rules state that the agency head approved the Rule that is the subject of the Notice on September 3, 2004 or November 2, 2004. However, none of the proposed Rules were approved by the Commission, the agency head, prior to their publication as a proposed rule in the Florida Administrative Weekly.

6. The specific agency authority listed in the Notices for promulgating the proposed Rules was Section 624.308(1), Florida Statutes. Section 624.308(1) grants the Department of Financial Services (Department) and the Financial Services Commission (Commission) the general authority to adopt rules, pursuant to Sections 120.536(1) and 120.54 in order to implement laws that confer duties upon them. The statute does not confer the authority on the Office of Insurance Regulation (OIR) to adopt rules. See § 624.05, Fla. Stat. The statutes that confer a specific grant of rulemaking authority over the areas of the laws implemented in the proposed Rules are Sections 627.0651 and 627.331, Florida Statutes. These two statutes confer specific rulemaking authority over certain areas of insurance ratemaking only to the Commission; specific rulemaking authority is not

granted to the Department or to OIR. Other than rulemaking authority, the various duties assigned in the laws implemented by proposed Rules are given to OIR.

#### CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

8. The Administrative Procedures Act specifically requires the "agency head" to approve all proposed rules prior to publication in the Florida Administrative Weekly. Section 120.54, Florida Statutes, provides, in material part:

- (3) Adoption procedures.
- (a) Notices.—
  - 1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.  
(Emphasis supplied)

9. Section 120.54(3)(a)(1) specifically uses the term "agency head" and requires "approval of the agency head" to notice the intended action in the Florida Administrative Weekly. Subsection (3) is denominated "Notices" and refers to the

procedural requirements for noticing rules, including what the notice should contain and when and where it must be published. This is the notice which must be given in order that affected persons may request a hearing to challenge the proposed official policy of the agency.

10. Other subsections of Section 120.54 pertain to the conduct of the hearing. See § 120.54(3)(c), Fla. Stat. None of these other sections use the term "agency head," but rather refer to the "agency." For example, "the agency" shall schedule a public hearing and give affected persons an opportunity to present evidence and argument. § 120.54(3)(c)(1), Fla. Stat. Such evidence and argument shall be considered by "the agency." Id. The "agency" shall file the rule with the Secretary of State. § 120.54(3)(e). The only reference to "agency head," as well as the only requirement for rulemaking that must be performed by the agency head, is the approval of the proposed rule prior to notice in the Florida Administrative Weekly.

11. The legislative use of different terms in different portions of the same statute is evidence that different meanings were intended. State v. Bradford, 787 So. 2d 811 (Fla. 2001); See also Russello v. United States, 464 U.S. 16, 104 S. Ct. 296 (1983)("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally



and purposely in the disparate inclusion or exclusion"); and Dept. of Revenue v. Central Dade Malpractice Trust Fund, 673 So. 2d 899 (Fla. 1st DCA 1996)("the legislative intent may be discerned from the Legislature's election to use different words to convey different meanings within a statute"). The use of the term "agency head" in Section 120.54 clearly demonstrates that approval of the language or policy of the proposed rule or rules is required since the Notice must contain the rule's proposed language.

12. Reading Sections 20.05(1)(b), 20.05(1)(e), 20.121(3)(c), 120.54(3), 624.308(1), 627.0651 and 627.331, Florida Statutes, together makes clear that only the Commission is the agency head for purposes of rulemaking under Sections 120.536(1) and 120.54, Florida Statutes, of the Administrative Procedures Act, when implementing Sections 624.308, 627.0651 and 627.331, Florida Statutes, and the other various sections of the insurance code involved in these rules. Therefore, OIR does not have the authority to promulgate rules under Chapter 120, Florida Statutes. One purpose of the process of rulemaking under Chapter 120 is to afford an affected person the opportunity to challenge a proposed rule, approved by an agency head, in a disinterested forum before the after-notice time period expires and the rule becomes law. Because the Commission is the agency head for purposes of rulemaking, the Commission,

at a minimum, must approve the language of any proposed rule, prior to its being noticed as a proposed rule as set forth in Section 120.54(3)(a), Florida Statutes. Without such approval, the proposed rule does not represent any official statement of potential agency policy.

13. In this case, the process used by OIR does not obtain the approval of the Commission, its agency head, until after the Notice has been published. Without such approval, there is no official statement of potential policy from the agency. In short, the process used currently by the Commission and OIR forecloses the opportunity for an affected person to challenge a proposed official policy of an agency prior to such policy having the effect of law, because the agency head does not approve the language of the proposed rule until after the Notice is published. This process also forces an affected person to litigate language which has not been approved by the agency head and, as occurred in this case, face potential motions to dismiss or motions for summary disposition for lack of ripeness based on the fact the Commission has not approved the language of the proposed rules.

14. As indicated, the above-referenced statutes do not prevent the Commission from giving Respondent instructions to assist in the development of a rule, but the Commission must review and approve the content of a proposed rule before

providing notice of its adoption. A general delegation of authority to OIR, through an agenda item, to independently develop and give notice of adoption of proposed rules is insufficient since it is each statement of potential policy that must be approved. See § 120.54(3), Fla. Stat. Of necessity, such approval is specific to each policy, or the agency head will not know what its lower divisions are doing or what its statements of potential policy are.

15. The Legislature expressly made a decision to require the Commission to consider and approve proposed rules before a notice of intended agency action is published. It is not placing form over substance to require the Commission, as agency head, to comply with these non-delegable rulemaking procedures. Therefore, the agency has materially failed to follow the applicable rulemaking procedures set forth in Chapter 120, in violation of Section 120.52(8)(a), Florida Statutes, and the proposed Rule is invalid because the proposed Rules were noticed for adoption without being approved by the Commission. See also AIU, et al. v. Dept. of Financial Services, et al. Case No. 04-1540RP (The Commission must review and approve the content of a proposed rule prior to the Notice being published in the Florida Administrative Weekly).

DONE AND ORDERED this 11th day of August, 2005, in  
Tallahassee, Leon County, Florida.

*Diane Cleavinger*

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Filed with the Clerk of the  
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THE 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 agency 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.