

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD CIRINCIONE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 05-0145RU  
 )  
 DEPARTMENT OF AGRICULTURE AND )  
 CONSUMER SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on March 4, 2005, in Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Howard J. Hochman, Esquire  
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For Respondent: David W. Young, Esquire  
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STATEMENT OF THE ISSUE

Whether the practices or procedures set forth in Paragraphs 6a and 6b of Petitioner's 2nd Amended Challenge to Agency

Statements constitute rules in violation of Subsection 120.54(4), Florida Statutes (2004).<sup>1</sup>

PRELIMINARY STATEMENT

On January 18, 2005, Petitioner, Ronald Cirrincione (Cirrincione), filed with the Division of Administrative Hearings a Challenge to Agency Statements and an Amended Challenge to Agency Statements, asserting that certain practices or procedures of Respondent, Department of Agriculture and Consumer Services (Department), constituted rules within the meaning of Subsection 120.52(15), Florida Statutes (2004),<sup>2</sup> and violated the provisions of Subsection 120.54(1)(a), Florida Statutes.

On February 24, 2005, Petitioner filed a Motion for Leave to File 2nd Amended Challenge to Agency Statements. The motion was granted.

At the final hearing, the parties did not present live testimony. The following exhibits presented by Petitioner were admitted in evidence:

1. Petitioner's Exhibit 1, the deposition of Steven Dwinell, except for Exhibit C to the deposition, which was three pages from the transcript of a deposition of Gary Stanford.

2. Petitioner's Exhibit 2, the deposition of Joseph Parker.

3. Petitioner's Exhibit 3, the deposition of Michael Page.

4. Petitioner's Exhibit 4, the deposition of Steven J. Rutz.
5. Petitioner's Exhibit 5, the deposition of Aliska Akers.
6. Petitioner's Exhibit 6, the deposition of Eric Reese.
7. Petitioner's Exhibit 7, the deposition of Gary Stanford.
8. Petitioner's Exhibit 8, pages three through seven and pages 83 through 85 of the deposition of Philip Helseth.
9. Petitioner's Exhibit 9, the deposition of Ronald Cirrincione.
10. Petitioner's Composite Exhibit 10, the Administrative Complaints filed by the Department of Agriculture and Consumer Services against Ronald Cirrincione, DOAH Case Nos. 04-4317PL and 04-4318PL.
11. Petitioner's Exhibit 11, the Administrative Complaint filed by the Department of Agriculture and Consumer Services against Ronald Cirrincione in Agency Case No. 31576, which was voluntarily dismissed.

The parties agreed to file their proposed orders within 20 days of the filing of the Transcript, which was filed on April 14, 2005. On April 29, 2005, Petitioner filed a Motion for Extension of Time to file proposed orders. The motion was granted, extending the time for filing proposed orders to May 9,

2005. The parties timely filed their proposed orders, which have been considered in the rendition of this Final Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the provisions of Chapter 482, Florida Statutes, the "Structural Pest Control Act." The Director of the Division of Agricultural Environmental Services (Division) is appointed by the Commissioner of Agriculture to serve at his pleasure and is given the responsibility by Section 570.45, Florida Statutes, to enforce the provisions of Chapter 482, Florida Statutes. The Bureau of Entomology and Pest Control (Bureau), under the Division Director's supervision and the supervision of the Assistant Director of the Division, Steven Dwinell, investigates violations of Chapter 482.

2. The Department filed two Administrative Complaints against Cirrincione, alleging that he violated Florida Administrative Code Rule 5E-14.016(1) by failing to wear necessary protective equipment as stated on the label for the pesticide he was applying and Florida Administrative Code Rule 5E-14.106(6) by applying a deficient concentration of pesticide for preconstruction soil treatments for prevention of subterranean termites.

3. The evidence at final hearing did not establish that Cirrincione was a licensee, certified operator, or special

identification cardholder as those terms are defined in Section 482.021, Florida Statutes. At the time of the alleged violations, Cirrincione was an employee of Diligent Environmental Services. As an employee of Diligent Environmental Services, Cirrincione applied pesticides during preconstruction pest control treatments and would be subject to disciplinary actions pursuant to Section 482.161, Florida Statutes.

4. Cirrincione filed a challenge to certain practices and procedures of the Bureau relating to the investigative activities of the Bureau and its staff, alleging that the practices and procedures were unpromulgated rules. These practices and procedures are described in Paragraphs 6a and 6b of Petitioner's 2nd Amended Challenge to Agency Statements.

Paragraph 6a provides:

The practice of selectively advising pest control licensees in writing, that they are under investigation for possible violations of Florida Statute 482 and/or its associated administrative rules and requesting their licensees to respond to subject allegations with information, records, or documentation. This procedure is utilized when the Department either needs additional information in connection with their investigation or if they anticipate a substantial penalty, consisting of a \$5,000.00 administrative fine, suspension, or revocation.

5. Paragraph 6b of Petitioner's 2d Amended Challenge to Agency Statements provides:

There is a regularly employed multiple step procedure pursuant to which the Department makes the determination of whether or not to take disciplinary action against its licensees based inter alia upon the field inspector's investigative report. This procedure includes a preliminary determination that there is a sufficient factual and legal basis for disciplinary action which is characterized by the Department as the showing of "sufficient documentation." This preliminary disciplinary decision is made by a case reviewer who is then charged with the responsibility of drafting an administrative complaint consistent with his or her findings. The case reviewer's findings are then reviewed by the Environmental Manager/Enforcement Coordinator who, subject to any corrections, forwards the administrative complaint and associated documentation to the Assistant Division Director and Chief Officer of the Office of Entomology for final review. Ultimately, the Chief will execute the administrative complaint. The administrative complaints also include an addendum with a description of administrative penalties sought by the Department based upon policy guidelines.

6. The Pest Control Enforcement Advisory Council (Council) is created within the Department of Agriculture and Consumer Services "to advise the Commissioner of Agriculture regarding the regulation of pest control practices." § 482.243(1), Fla. Stat. At its November 20, 2003, meeting, the Council adopted unanimously Enforcement Response Guidelines, which included the following policy:

When the disciplinary action to be sought as a result of this process is a monetary fine in excess of \$5,000, or the suspension or revocation of a license, the Department will send a certified letter to the address of record notifying the responsible party that the Department intends to issue an administrative complaint. The responsible party will be given 14 working days to contact the Department to provide facts and arguments to the Department to consider to either modify the proposed administrative complaint, mitigate the proposed enforcement action, or to conclude that the proposed action should not be taken. If the certified mail is refused, the Department may proceed with the proposed action without further delay.

If the responsible party responds to the notification that an administrative action is being considered, the Department will evaluate the additional information provided and either conduct additional investigation as warranted, modify the complaint as needed, or proceed with the complaint.

7. The guidelines adopted by the Council are advisory, and the Department is not required to follow the guidelines; however, the Department has followed the guidelines pertaining to providing those who are subject to disciplinary actions an opportunity to provide additional information when the Department is considering taking disciplinary action in the form of an administrative fine in excess of \$5,000, revocation, or suspension. The Department has also used the procedure when the Department's investigation reveals that additional information is necessary. The procedure has been described as the

"opportunity letter" procedure. The opportunity letter is not sent to all persons who are under investigation for possible statutory or rule violations.

8. When asked if the guidelines were being followed strictly by the Department, Steven Dwinell described the Bureau's adherence to the guidelines as follows:

Well, I don't know if it was strictly. I mean, we're attempting to follow it, you know, I'm not going to testify that something slipped through, but as far as I know, we're following it.

9. The opportunity letter is part of the investigatory process and does not require the person or entity that is the subject of the disciplinary investigation to respond to the request for additional information or to provide arguments for the modification, mitigation, or dismissal of the proposed action. There is no penalty for failure to respond.

10. The ultimate decision of whether to issue an administrative complaint is made by either the Division Director or the Assistant Division Director. Prior to the issuance of an administrative complaint, an investigation is made by a field inspector, who completes a report setting out his findings. Sometimes the report will include a video tape of the application of the pesticide treatment at the site of the treatment. The report may also include a sample of the pesticide applied at the site. The sample will be sent to the



Department's laboratory for testing, including the concentration level.

11. The field inspector's report is reviewed by the field inspector's supervisor, who checks the investigatory file to make sure that it is complete. The file is then submitted to a reviewer, who looks at the video tapes and reviews the file and laboratory results. The reviewer prepares the first draft of the administrative complaint and sends the draft administrative complaint and the complete file to an environmental manager, who is responsible for enforcement coordination and supervising the reviewers. The environmental manager reviews the draft administrative report as a quality control measure.

12. After review by the environmental manager, the draft administrative complaint and file are sent to the Division for review and consideration by either the Division Director or the Assistant Division Director. The decision to issue an administrative complaint is made at the Division level. After the administrative complaint is approved, it and the file are returned to the environmental manager for any cosmetic changes that may be necessary. The final draft of the administrative complaint is sent to the Bureau Chief for execution.

13. This process of reviewing the file and drafting the administrative complaint prior to the decision being made to issue the administrative complaint is an internal process. It

has no application outside the Department, does not affect the private interests of a person, and is not a plan or procedure that is important to the public.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56(4), Fla. Stat.

15. Subsection 120.56(4), Florida Statutes, provides that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)." Subsection 120.54(1)(a), Florida Statutes, provides that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

Subsection 120.52(15), Florida Statutes, defines a rule as follows:

"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 does not include:

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

16. Cirrincione has the burden to establish that the practices and procedures listed in the petition constitute rules and have not been adopted by the rulemaking procedures provided in Section 120.54, Florida Statutes. A determination must be made whether the practices and procedures are ones of general applicability, and, if so, whether they are internal memoranda. Department of Highway Safety and Motor Vehicles v. Schulter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997).

17. In McDonald v. Department of Banking and Finance, 346 So. 2d 569, 582 (Fla. 1st DCA 1977), the court stated, "[T]he Section 120.54 rulemaking procedures are imposed only on policy statements of general applicability, i.e., those statements which are intended by their own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law."

18. The opportunity letter procedure is part of the investigatory process of the Department, wherein the Department is attempting to garner more information prior to making a final decision on disciplinary action. It is not applied to all persons or entities subject to disciplinary action pursuant to Section 482.161, Florida Statutes. The practice is to send the opportunity letters to those responsible persons in situations in which, based on its preliminary investigation, the Department

determines that the maximum monetary fine, revocation, or suspension may be the ultimate penalty and in situations in which the Department feels that additional information would be necessary to complete its investigation.

19. In Schulter, the court found that the following policies of the Department of Highway Safety and Motor Vehicles did not constitute rules because the policies were not statements of general applicability:

[1.] The Respondent has a policy of removing law enforcement officers under investigation, in certain circumstances, from their normal duties, and assigning them indefinitely to remain in their own residences as a duty station, and permitting them to leave their residences during duty hours only with the permission of their superiors.

[2.] The Respondent has a policy of ordering law enforcement officers under investigation, in certain circumstances, to have no contact with any person who may be a witness in the course of the investigation.

[3.] The Respondent has a policy of prohibiting law enforcement officers under investigation, in certain circumstances, from earning extra compensation by working in police off-duty employment.

Department of Highway Safety and Motor Vehicles v. Schulter, 705 So. 2d at 82. The court opined that because the policies were applied only under certain circumstances, which were not identified, were not applied uniformly to all law enforcement officers employed by the agency without exception, and the application of the policy was subject to the discretion of the

employees' supervisors, that the policies were not statements of general applicability. Id.

20. In the instant case, the opportunity letter does not apply to all persons who are under investigation by the Department. It is sent only in certain situations when the maximum monetary penalty, revocation, or suspension may be the penalty imposed and when additional information is needed. The Department has discretion in determining when the violations warrant the maximum monetary penalty, revocation, or suspension and in determining when additional information is needed.

21. The opportunity letter does not create a right for subjects of Departmental investigation to be advised of an investigation and to be given an opportunity to provide additional information. The opportunity letter does require that the subjects of Departmental investigation respond to the letter, and no penalty is imposed if no response is provided. Thus, the opportunity letter procedure is not a statement of general applicability.

22. The procedure that the Department utilizes in investigating possible violations, reviewing the investigation files, drafting administrative complaints, and reviewing draft administrative complaints are followed for all disciplinary actions. This procedure falls under the internal memoranda exception to the definition of a rule. The procedure has no

application outside the Department. It does not affect the private interests of persons who are subject to disciplinary action. At first blush, it would appear that because the investigatory process could end in a penalty being imposed upon the person being investigated that the procedure would affect the private interests of a person. However, a person who is subject to discipline by the Department has no statutory right in having the disciplinary case investigated in a certain manner, in having certain persons review the file before the final determination is made to take disciplinary action, or in having the administrative complaint drafted or reviewed in a certain manner. The ultimate decision to take the disciplinary action is made by the Division Director or Assistant Division Director and not by lower echelon staff.

23. The investigatory process is not a procedure that is important to the public. Section 482.061, Florida Statutes, provides that the Department shall appoint inspectors to do inspections and perform investigative work. If the inspectors find a violation, they are required to report it to the Department. The process that the Department utilizes in reviewing the report and subsequent investigative file, preparing an administrative complaint based on the investigative file, and reviewing the administrative complaint for quality control prior to the actual determination to take disciplinary

action is of no more importance to the public than what steps an agency uses in preparing and reviewing other types of documents that are sent out by the agency.


24. The two procedures which Cirrincione has challenged are not rules within the definition of Subsection 120.52(15), Florida Statutes, and are not subject to the rulemaking requirements set forth in Subsection 120.54(1), Florida Statutes.

ORDER

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

ORDERED that Petitioner's 2d Amended Challenge to Agency Statements is hereby dismissed.

DONE AND ORDERED this 3rd day of January, 2006, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of January, 2006.

ENDNOTES

1/ In Petitioner's Proposed Findings of Fact, Conclusions of Law and Recommended Final Order, Petitioner represented that the parties had stipulated to Petitioner's withdrawal of his challenge to the agency statement set forth in Paragraph 6(c) which pertains to the alleged informal amendment to Rule 5E-14.106(6).

2/ Unless otherwise indicated, all references to Florida Statutes are to the 2004 version. Petitioner referenced Subsection 120.52(14), Florida Statutes, in Petitioner's 2d Amended Challenge to Agency Statements. The correct citation to the definition of a rule is Subsection 120.52(15), Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.