STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. PAUL ZIMMERMAN, DR. JOHN W. URIBE, JOHN LIVOTI, JONATHAN D. NITKIN, ANGELA DALEY, HELEN ESTERLINE, AND EDNA BUCHANAN,	)	
Petitioners,	)	
vs.	)	Case No. 05-2091RU
DEPARTMENT OF FINANCIAL SERVICES, OFFICE OF INSURANCE REGULATION,	)	
Respondent.	)	

SUMMARY FINAL ORDER OF DISMISSAL

On June 9, 2005, Petitioners filed with the Division of Administrative Hearings (DOAH) a petition (Petition) challenging, pursuant to Section 120.56(4), Florida Statutes, an alleged "unadopted rule (non-rule policy)" of the Department of Insurance, Respondent's predecessor. In their Petition, Petitioners made the following assertions concerning the "factual background" which gave rise to their challenge:

- "Petitioners are residents of coastal areas of the state where voluntary windstorm insurance is not available" and they therefore "must purchase windstorm coverage from the state residual insurer . . . .";

- "Prior to July 1, 2002, this 'residual' windstorm coverage was provided by [the] Florida Windstorm Underwriting Association (FWUA), an association of private insurers established pursuant to former Fla. Stat. § 627.351(2)";

- As a result of the enactment of Chapter 2002-240, Laws of Florida, the Citizen's Property Insurance Corporation (CPIC), "a quasi public corporation governed by appointees of the State Chief Financial Officer . . . succeeded to FWUA's operations, contracts, premiums, and assets, and [it] is responsible for FWUA's obligations . . . .";

- Not being able to "choose another insurer" because of the "monopoly" position FWUA held, "Petitioners paid FWUA the premiums charged for windstorm coverage in 2000-2002";

- The premiums Petitioners paid reflected rate increases resulting from an April 30, 1999, rate filing by FWUA seeking "to increase premium rates by a statewide average of 96% above its existing rates" (and by "as much as 300 to 400%" in southeast Florida, where Petitioners' property was located);

- "The FWUA filing for rate increases was based on data from computer models," and, therefore, given the size of the requested increase, "the filing required a noticed public hearing" pursuant to Section 627.0629, Florida Statutes,[1] and Florida Administrative Code Rule 4-166.051 (of the Department of Insurance)[2];

- "Although a noticed public hearing was required on this rate filing, the Department [of Insurance] never provided any public notice or conducted any public hearing on the filing";

- "On July 16, 1999, the Department [of Insurance] issued a notice of intent to disapprove FWUA's proposed rate filing, citing many reasons for disapproval";

- "The Department [of Insurance]'s letter allowed FWUA to contest the disapproval, either by filing a timely petition for formal administrative proceedings, with a right to judicial review, or by electing private arbitrators, whose ruling would be deemed final and binding on the Department . . . ."[3];

- "On July 19, 1999, FWUA chose private arbitration to decide its filing for increased rates";

- "On February 3, 2000, the private arbitration panel, by a 2-1 vote, issued a decision approving FWUA's entire rate filing, and providing a schedule to phase-in the increased rates";

- "The arbitration was not a noticed public hearing . . . .";

- "Petitioners have challenged FWUA's increased rates [in court] as (1) a violation of the statutes and rules requiring a noticed public hearing on rate increases, and (2) a violation of constitutional prohibitions against delegating state regulatory power to private persons," and "[t]hus far, the courts have required administrative remedies to be exhausted before court action can proceed";

- In a deposition that he gave in a lawsuit Petitioners had filed against FWUA and the Department of Insurance, Steven Rodenberry, the then Deputy Director of the Division of Insurer Services for the Department of Insurance, stated: "Based on my experience, the Department [of Insurance] does not typically hold a public hearing [on a rate filing] where grounds for denial have been identified."

According to the Petition, Mr. Rodenberry's deposition "testimony [a copy of which was appended to the Petition], as well as [the Department's of Insurance's] court filings opposing a public hearing, evidence a statement that the Department [of Insurance] exempted FWUA's [1999] rate filing from the required noticed public hearing, under a non-rule policy that statutory and rule requirements for a noticed public hearing [on a rate filing] would not apply if the Department [of Insurance] preliminarily intended to deny the rate increase, even though the rate increase was ultimately approved by arbitration and charged." It is this "non-rule policy" that Petitioners seek, in this proceeding, to have "declar[ed] . . . invalid for failure to comply with rulemaking procedures."

During a telephone conference held on June 13, 2005, in which the undersigned, counsel for Petitioners, and counsel for Respondent participated, the parties agreed to waive the requirement (of Section 120.56, Florida Statutes) that the final hearing on the Petition be scheduled within 30 days of the date of the Order of Assignment. Thereafter, on June 14, 2005, the undersigned issued a Notice of Hearing advising the parties that the hearing would be held on September 8, 2005.

On July 20, 2005, Respondent filed a Motion for Summary Final Order. In its motion, Respondent argued that, "since there are no genuine issues of material fact to be determined by the Administrative Law Judge, the matter must be dismissed" on the grounds that "the Petitioners lack standing to maintain this action" and "the alleged agency statement is not a 'rule'" subject to challenge in a Section 120.56(4) proceeding.

On July 29, 2005, Petitioners filed a Motion for Summary Final Order and Opposition to OIR's Motion for Summary Final Order (Petitioners' Motion for Summary Final Order). In their motion, Petitioners agreed with Respondent that "[t]he material facts [in this case] are not in dispute," but took issue with Respondent's claims that the "alleged agency statement" they are challenging in this case is not a "rule" and that they lack standing to challenge this statement in this proceeding. In

addition, they contended that this "unadopted policy is contrary to the statute and modifies an existing rule."

Oral argument on the parties' Motions for Summary Final Order was heard by telephone conference call on August 8, 2005, during which the parties, through counsel, indicated that, pursuant to the undersigned's request, they would attempt to enter into a stipulation of facts or agree to a stipulated record for use in the instant case.

On August 15, 2005, Petitioners filed a Motion to Compel Discovery, advising that "a stipulation appears unlikely" and requesting an order compelling Respondent "to produce a designated witness for deposition and to produce records of public notice of public hearings [on rate filings]." On August 16, 2005, Respondent filed a response opposing Petitioners' Motion to Compel Discovery.

Oral argument on Petitioners' Motion to Compel Discovery was heard by telephone conference call on August 18, 2005.

On August 22, 2005, Petitioners filed a Notice of Supplemental Authority.

Having carefully considered the matters of record in the instant case, and arguments orally made by the parties, the undersigned concludes that there are no disputed issues of material fact that need to be resolved and that this case may be disposed of based on the documents filed by the parties,

supplemented by their oral argument. The final hearing in this case, presently scheduled for September 8, 2005, is, therefore, hereby cancelled.

In this case, Petitioners are challenging an alleged policy statement made by Respondent's predecessor, the Department of Insurance, that they contend constitutes a "rule," within the meaning of Section 120.52(15), Florida Statutes, which provides 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 also includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
>
> (c) The preparation or modification of:
>
> 1. Agency budgets.
>
> 2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief

> fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
>
> 3. Contractual provisions reached as a result of collective bargaining.
>
> 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

It is Petitioners' position that this policy statement made by the Department of Insurance was not, but should have been, adopted in accordance with the rulemaking procedures set forth in Section 120.54(1)(a), Florida Statutes, which provides as follows:

> Rulemaking is not a matter of agency discretion. Each 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.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
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> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;
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> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or
>
> c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.
>
> 2. Rulemaking shall be presumed practicable to the extent necessary to provide fair

> notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:
>
> a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
>
> b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

"Section 120.54(1)(a) expresses the Legislature's intent that agencies adopt a statement that is the equivalent of a rule as a rule through the rulemaking process whenever possible." Osceola Fish Farmers Association, Inc. v. Division of Administrative Hearings, 830 So. 2d 932, 934 (Fla. 4th DCA 2002).

Petitioners are seeking relief herein pursuant to Section 120.56(4), Florida Statutes, which is entitled, "CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS," and provides as follows:

> (a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

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

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e)1. If, prior to a final hearing to determine whether all or part of any agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement, then for purposes of this section, a presumption is created that the agency is acting expeditiously and in good faith to adopt rules that address the statement, and the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).[4]

2. If, prior to the final hearing to determine whether all or part of an agency statement violates s. 120.54(1)(a), an agency publishes a notice of rule

development which addresses the statement pursuant to s. 120.54(2), or certifies that such a notice has been transmitted to the Florida Administrative Weekly for publication, then such publication shall constitute good cause for the granting of a stay of the proceedings and a continuance of the final hearing for 30 days. If the agency publishes proposed rules within this 30-day period or any extension of that period granted by an administrative law judge upon showing of good cause, then the administrative law judge shall place the case in abeyance pending the outcome of rulemaking and any proceedings involving challenges to proposed rules pursuant to subsection (2).

3. If, following the commencement of the final hearing and prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement and proceeds expeditiously and in good faith to adopt rules that address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).

4. If an agency fails to adopt rules that address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

5. If the proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f),

> the agency must immediately discontinue reliance on the statement and any substantially similar statement until the rules addressing the subject are properly adopted.
>
> (f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under any other section of this chapter. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

"When section 120.54(1)(a) is read together with section 120.56(4), it becomes clear that the purpose of a section 120.56(4) proceeding is to force or require agencies into the rule adoption process. It provides them with incentives to promulgate rules through the formal rulemaking process." Osceola Fish Farmers Association, Inc, 830 So. 2d at 934. The statute is forward-looking in its approach. It is designed to prevent future agency action based on statements not adopted in accordance with required rulemaking procedures, not to provide a remedy for agency action (based on such statements) that has already been taken and become final.

An agency statement constituting a rule may be challenged pursuant to Section 120.56(4), Florida Statutes, only on the ground that "the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54." See Southwest

Florida Water Management District v. Charlotte County, 774 So. 2d 903, 908-09 (Fla. 2d DCA 2001)("The basis for a challenge to an agency statement under this section [Section 120.56(4), Florida Statutes] is that the agency statement constitutes a rule as defined by section 120.52(15), Florida Statutes (Supp. 1996), but that it has not been adopted by the rule-making procedure mandated by section 120.54. In the present case, the challenges to the existing and proposed agency statement on the grounds that they represent an invalid delegation of legislative authority are distinct from a section 120.56(4) challenge that the agency statements are functioning as unpromulgated rules."); Florida Association of Medical Equipment Services v. Agency for Health Care Administration, DOAH Case No. 02-1314RU, slip op. at 6 (Fla. DOAH October 25, 2002)(Order on Motions for Summary Final Order)("[I]n a Section 120.56(4) proceeding which has not been consolidated with a proceeding pursuant to Section 120.57(1)(e), the issue whether a rule-by-definition is substantively invalid for reasons set forth in Section 120.52(8)(b)-(g), Florida Statutes, should not be reached. That being so, the ultimate issues in this case are whether the alleged agency statements are rules-by-definition and, if so, whether their existence violates Section 120.54(1)(a)."); and Johnson v. Agency for Health Care Administration, DOAH Case No. 98-3419RU, 1999 WL 1483785 *6 (Fla. DOAH May 18, 1999)(Final

Order of Dismissal)("It is apparent from a reading of subsection (4) of Section 120.56, Florida Statutes, that the only issue to be decided by the administrative law judge in a proceeding brought under this subsection is 'whether all or part of [the agency] statement [in question] violates s. 120.54(1)(a),' Florida Statutes, ...").

"If the administrative law judge rules in favor of the challenger on this issue [and declares the statement to be in violation of Section 120.54(1)(a), Florida Statutes], the agency can no longer rely upon the statement as a basis for agency action and the challenger is entitled to reasonable costs and attorney's fees under section 120.595(4)," Florida Statutes.[5] Osceola Fish Farmers Association, Inc, 830 So. 2d at 934. No other relief is available in a Section 120.56(4) proceeding.

Not everyone may bring a challenge under Section 120.56(4), Florida Statutes. Only those persons "substantially affected" have standing to institute such a challenge.

As was stated in Columbia Hospital Corporation of South Broward v. Department of Health, DOAH Case No. 02-0400RU, slip op. at 18-19 (Fla. DOAH April 11, 2002)(Final Order):

> 31. To meet the "substantially affected" test of Section 120.56(4), Florida Statutes, [would-be challengers] must demonstrate that, as a consequence of the statement alleged to be a rule not promulgated, it will suffer injury in fact and that the injury is within the zone of interest to be

> regulated or protected. See Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94 (Fla. 1st DCA 2000) in which the court applies the "substantially affected" test for standing to challenge an existing or proposed rule under Section 120.56(1)(a), Florida Statutes. . . .
>
> 32. Injury in fact must be both real and immediate. Lanoue, above. To satisfy the sufficiently real and immediate injury in fact element of the "substantially affected" test, the injury cannot not be based on pure speculation or conjecture. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995), cited with approval in Lanoue, above, at 96, 97.

Standing to initiate a Section 120.56(4) proceeding will not be found in the absence of a showing of a direct causal connection between the injury alleged and the agency's continued reliance on the challenged statement.

Persons seeking to challenge an agency statement pursuant to Section 120.56(4), Florida Statutes, must not only "meet the [statute's] 'substantially affected' test," they must also plead and establish specific "facts sufficient to show that the [challenged] statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54."

Not every agency statement is a "rule under s. 120.52." Only agency "statements of general applicability, i.e., those statements which are intended by their own effect to create

rights, or to require compliance, or otherwise to have the direct and consistent effect of law," constitute "rules," as defined in Section 120.52(15), Florida Statutes. Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997); and McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

The agency statement that Petitioners are seeking to challenge in the instant Section 120.56(4) proceeding is a statement, not of Respondent, but of the Department of Insurance, an agency which no longer exists (as a result of the repeal of Section 20.13, Florida Statutes, the statutory provision which created it).[6] Inasmuch as it is a statement of an agency that has been abolished (and that is therefore incapable of taking any agency action), the statement is one having no "applicability," rather than one of "general applicability" subject to challenge in a Section 120.56(4) proceeding (the purpose of which, as noted above, is "to force or require agencies into the rule adoption process" with respect to statements of "generality applicability"). Osceola Fish Farmers Association, Inc, 830 So. 2d at 934.

Petitioners have not alleged in their Petition that Respondent has a "non-rule policy," as they claim the Department of Insurance had, of dispensing with a "noticed public hearing" on a Section 627.0629(7)/Florida Administrative Code Rule 69O-

166.051-type rate filing when it determines, based on the face of the filing, to deny the requested rate increase. Even if Petitioners had made such a claim, however, they would not have standing to pursue it in this Section 120.56(4) proceeding because they could not show that, as policyholders, they would be "substantially affected" by such a "non-rule policy."

As explained in Florida Administrative Code Rule 69O-166.051, the purpose of having a "noticed public hearing" on a "significant rate increase" is to require the insurer to present, and to enable Respondent to receive, "information necessary to determine whether the increase renders the rates excessive, inadequate, or unfairly discriminatory." If Respondent were to determine, without the benefit of such a "noticed public hearing," that a rate increase sought by an insurer "render[ed] the [insurer's] rates excessive, inadequate, or unfairly discriminatory" and, based on this determination, were to deny the requested increase, the policyholders whose rates the insurer wanted to increase would not suffer, as a result of there not having been a "noticed public hearing," any "injury in fact" to an interest falling within the zone of interests intended to be protected by the "noticed public hearing" requirement, since the outcome of the examination process, under this scenario, would be in their favor. Cf. M. Z. v. State, 747 So. 2d 978, 980 (Fla. 1st DCA 1999)("In

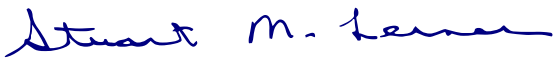
this case, while appellant may have initially been charged as an adult, the proceedings against him became, for all intents and purposes, juvenile proceedings once the trial court elected to treat him as a juvenile for purposes of disposition. Appellant emerged from these proceedings without an adult conviction or sentence. He, therefore, cannot show that his rights were actually adversely affected by the state initially charging him as an adult."); and Bodenstab v. Department of Professional Regulation, Board of Medicine, 648 So. 2d 742, 743 (Fla. 1st DCA 1994)("In the instant case, Dr. Bodenstab was *granted* licensure, and we reject the suggestion that he was adversely affected by such action."). If anyone could complain about Respondent's denying a rate increase without holding a "noticed public hearing" it would be the insurer, who, if the hearing had been held, would have had the opportunity to attempt to persuade Respondent to change its mind and to grant, rather than deny, the requested increase.

It is true that Section 627.062(6), Florida Statutes, provides that, after Respondent has denied a non-medical malpractice rate filing, the insurer may "require arbitration of the rate filing," and the outcome of the arbitration process (by which Respondent is bound) may be the approval of the rate increase that Respondent had previously disapproved.[7] Petitioners suggest, in their Motion for Summary Final Order,

that policyholders who would have to pay the increased rate (as Petitioners did as FWUA policyholders after the arbitration panel approved FWUA's 1999 rate filing) would "suffer[] real injury." Having to pay increased insurance rates pursuant to an arbitral award in favor of an insurer whose rate filing had been summarily denied by Respondent would certainly constitute an "injury" to policyholders, but it would not be one that could reasonably be said to be directly and immediately attributable to Respondent's not having conducted a pre-denial, "noticed public hearing."[8] Such an "injury" therefore would be insufficient to confer standing on these policyholders to challenge, pursuant to Section 120.56(4), Florida Statutes, any "no-pre-denial, noticed public hearing" policy Respondent might have.

In view of the foregoing, the Petition must be, and hereby is, dismissed.

DONE AND ORDERED this 24th day of August, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of August, 2005.

ENDNOTES

[1]/ Section 627.0629, Florida Statutes, is entitled, "Residential property insurance; rate filings." In 1999 (and until June 1, 2005, the effective date of Chapter 2005-111, Laws of Florida), Subsection (7) of the statute, provided as follows:

> Any rate filing that is based in whole or part on data from a computer model may not exceed 25 percent unless there is a public hearing.

This subsection now reads as follows:

> Any rate filing that is based in whole or part on data from a computer model may not exceed 15 percent unless there is a public hearing.

[2]/ Florida Administrative Code Rule 4-166.051 provided as follows:

> (1) Purpose. Substantial rate increases by insurers adversely affects the welfare of the insurance consuming public of the State

of Florida. The Department is authorized to conduct investigations of insurance matters as it deems proper to determine whether any person has violated any provision of the Florida Insurance Code and to secure information useful in the lawful administration of the Insurance Code. The Department is further authorized to examine each insurer as often as warranted for the protection of the policyholders and the public interest of this State. The Department has determined that the significant increase of rates fundamentally affects the rights of policyholders and the public interest of this State. The Department has determined further that in order to protect the public and to ensure compliance with the Insurance Code, and in the administration of the Code, the public welfare requires an examination of insurers which significantly increase rates in this State. These examinations will be conducted in an open forum, in the form of public hearings.

(2) Scope. This rule applies to residential and habitational, personal and commercial property insurance in the State of Florida (hereinafter, "residential property insurance"). This rule shall not be construed to limit the Department's authority or ability to conduct any examination authorized by Section 624.316, F.S.

(3) Public Hearings.

(a) Significant Rate Increases. The Department will hold a public hearing on any rate filing where the percentage of rate increase is 25% or more and the aggregate amount of such rate increase is $2,000,000 or more, or a rate increase of 50% or more.

> (b) Procedure.
>
> 1. The time and place of the public hearing will be noticed by order of the Department.
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> 2. The public hearing shall be for the purpose of gathering information and evidence, and is not subject to the procedures of Chapter 120, F.S. Each insurer shall bear its own costs, including any attorney's fees, which may be associated with this examination and with its attendance at the public hearing. Specifically, the public hearing will provide the Department with, and the insurer shall be prepared to present, information necessary to determine whether the increase renders the rates excessive, inadequate, or unfairly discriminatory.

Effective January 7, 2003, this Department of Insurance rule was transferred to Respondent pursuant to Section 20.121(4), Florida Statutes, which provided (as it still does today) as follows:

> Effective January 7, 2003, the rules of the Department of Banking and Finance and of the Department of Insurance that were in effect on January 6, 2003, shall become rules of the Department of Financial Services or the Financial Services Commission as is appropriate to the corresponding regulatory or constitutional function and shall remain in effect until specifically amended or repealed in the manner provided by law.

This transferred rule, which has been renumbered Florida Administrative Code Rule 69O-166.051, has remained in effect substantively unchanged since the transfer.

[3]/ Section 627.062(6), Florida Statutes, then provided (as it still does today, with the exception of the references to the Department of Insurance) as follows

> (a) After any action with respect to a rate filing that constitutes agency action for purposes of the Administrative Procedure

Act, an insurer may, in lieu of demanding a hearing under s. 120.57, require arbitration of the rate filing. Arbitration shall be conducted by a board of arbitrators consisting of an arbitrator selected by the department, an arbitrator selected by the insurer, and an arbitrator selected jointly by the other two arbitrators. Each arbitrator must be certified by the American Arbitration Association. A decision is valid only upon the affirmative vote of at least two of the arbitrators. No arbitrator may be an employee of any insurance regulator or regulatory body or of any insurer, regardless of whether or not the employing insurer does business in this state. The [D]epartment [of Insurance] and the insurer must treat the decision of the arbitrators as the final approval of a rate filing. Costs of arbitration shall be paid by the insurer.

(b) Arbitration under this subsection shall be conducted pursuant to the procedures specified in ss. 682.06-682.10. Either party may apply to the circuit court to vacate or modify the decision pursuant to s. 682.13 or s. 682.14. The [D]epartment [of Insurance] shall adopt rules for arbitration under this subsection, which rules may not be inconsistent with the arbitration rules of the American Arbitration Association as of January 1, 1996.

(c) Upon initiation of the arbitration process, the insurer waives all rights to challenge the action of the [D]epartment [of Insurance] under the Administrative Procedure Act or any other provision of law; however, such rights are restored to the insurer if the arbitrators fail to render a decision within 90 days after initiation of the arbitration process.

[4]/ Section 120.57(1)(e), Florida Statutes, provides as follows:

> (e) 1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.
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> 2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:
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> a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;
>
> b. Does not enlarge, modify, or contravene the specific provisions of law implemented;
>
> c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
>
> d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
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> e. Is not being applied to the substantially affected party without due notice; and
>
> f. Does not impose excessive regulatory costs on the regulated person, county, or city.
>
> 3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of

> the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

[5]/ Section 120.595(4), Florida Statutes, provides as follows:

> CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).--
>
> (a) Upon 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 attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.
>
> (b) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to payment of an award or reimbursement for payment of an award under any provision of law.

[6]/ While the Legislature provided, in Section 20.121(4), Florida Statutes, that "rules . . . of the Department of Insurance that were in effect [that is, those rules that the Department had adopted in accordance with required rulemaking procedures and not repealed, and which had not been invalidated] on January 6, 2003, [would] become rules of [Respondent]" and would remain so

"until specifically amended or repealed in the manner provided by law," the Legislature did not breathe life into those statements of "general applicability" of the Department of Insurance that, as of January 6, 2003, had not been adopted in accordance with required rulemaking procedures (and therefore were invalid and unenforceable). See Jenkins v. State, 855 So. 2d 1219, 1224 (Fla. 1st DCA 2003)("Pursuant to section 120.54(3), Florida Statutes (1999), prior to the adoption of a rule the agency must comply with certain requirements such as providing notice, holding hearings to allow input from interested parties and the public, filing, and publication. Failure to comply with these requirements renders an action or policy an unpromulgated rule or an invalid exercise of delegated legislative authority."); Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996)("An unpromulgated rule constitutes an invalid exercise of delegated legislative authority and, therefore, is unenforceable."); and State, Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878, 888 (Fla. 1st DCA 1988)(" We affirm the ruling that the application form constitutes an unpromulgated rule and is therefore invalid.").

[7]/ This arbitration option may not be available to all insurers. See, e.g., Zimmerman v. Florida Windstorm Underwriting Association, 873 So. 2d 411, 413-15 (Fla. 1st DCA 2004)("[Appellants] share with the Department [of Insurance] the view, which we today embrace, that the Department has never given its approval of the rate hike, and that FWUA's resort to arbitration as a means of raising rates was a 'material error . . . made by the insurer.' § 627.062(2)(g), Fla. Stat. (2003). . . . Under FWUA's Plan of Operation, insurance rate increases proposed by FWUA require approval by the Department of Insurance. Even after the Legislature amended the Insurance Code to provide that FWUA 'may require arbitration of a rate filing under s. 627.062(6),' ch. 97-55, § 5, at 332, Laws of Fla. (codified at § 627.351(2)(b)(5)(b), Fla. Stat. (1997)), the Department of Insurance, while revising FWUA's Plan of Operation in other respects, left intact provisions calling for rates 'approved by the Department' and for rate increases only 'upon approval of the Department.' Fla. Admin Code Ann. R. 4J-1.001 (2001). FWUA's resort to Section 627.062(6), Florida Statutes (1997), after the Department of Insurance disapproved the request for rate increases FWUA filed on April 30, 1999, was not authorized, therefore, because FWUA's Plan of Operation required departmental approval or assent, not an arbitration award. . . . The statutory amendment permitting rate arbitration was

permissive, not mandatory, and did not alter FWUA's Plan of Operation. . . . While, once the statute was amended, FWUA could have amended its Plan of Operation and the Department of Insurance could have amended its rule to allow FWUA to elect rate arbitration, the Plan and rule were never amended to confer such authority.").

[8]/ Respondent's conducting a pre-denial, "noticed public hearing" does not in any way prevent an insurer from "requir[ing] arbitration" and obtaining (through arbitration) approval of a requested rate increase. It is sheer speculation to argue that having such a hearing would affect the outcome of the arbitral process in a manner adverse to the insurer and favorable to policyholders.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Summary Final Order of Dismissal 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.