STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY DAVIS, Petitioner, and FLORIDA PUBLIC EMPLOYEES COUNCIL 79, AFSCME, AFL-CIO, Intervenor, vs. DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent.	)	Case No. 05-3532RU

FINAL ORDER OF DISMISSAL

The instant case involves a challenge to the following statement, which is contained in Respondent's Operating Procedure No. 60-02, paragraph 1-10.b.(4): "In no case shall a Career Service employee who has been terminated for cause, or has resigned in lieu of termination or while the subject of an investigation be employed or re-employed by the Department" (Challenged Statement).

On December 2, 2005, the undersigned issued an Order Placing Case in Abeyance and Requiring Status Report, which provided, in pertinent part, as follows:

> It appearing that Respondent is acting expeditiously and in good faith to adopt a rule that addresses the statement (contained in Respondent's Operating Procedure No. 60-02) that is the subject of the instant controversy, this matter is hereby placed in abeyance pending the outcome of the rulemaking process, as suggested by Respondent.
>
> No later than 30 days from the date of this Order, Respondent shall advise the undersigned in writing of the status of the rulemaking process. If it appears from Respondent's status report that Respondent is not acting expeditiously and in good faith, or if Respondent fails to timely file the required status report, the final hearing in this case [which had originally been scheduled for October 21, 2005] will be rescheduled without delay.

On December 29, 2005, Respondent filed a Notice to Court, in which it advised, among other things, that it had "voluntarily taken" the following action: "Striking from [Respondent's Operating Procedure] 60-02, dated January 5, 2004, paragraph 1-10.b.(4), in its entirety." On January 3, 2006, the undersigned issued an Order Directing Response, requiring the parties to advise him in writing, within ten days, "as to what action, if any, they suggest[ed] the undersigned should take in light of the events recited in Respondent's Notice to Court."

On January 12, 2006, Petitioner and Intervenor filed their Response to the January 3, 2006, Order Directing Response, suggesting that the undersigned "should continue jurisdiction of this case, and declare the challenged statement a violation of

Section 120.54(1)(a), Florida Statutes," as well as award "reasonable costs and attorney fees to the Petitioner and his attorney pursuant to Section 120.595(4), Florida Statutes."

Respondent requested, and was granted, an extension of time until January 23, 2006, to file its response. On January 23, 2006, Respondent filed its Response to Order Directing Response, "urg[ing] denial of the petition [filed by Petitioner], or alternatively, dismissal on the petition, as moot." Appended to Respondent's Response was a December 23, 2005, memorandum from Respondent's Secretary, addressed to the "Central Office Leadership Team, Regional Director[s], District Administrators, [and] Hospital Administrators," which read as follows:

> This memorandum clarifies the department's policy relative to employment. Effective immediately, Section 1-10.b.(4), Children and Families Operating Procedure (CFOP) NO. 60-02, Chapter 1, Recruitment, Assessment and Selection, is revised to read:
>
> "(4) Approval to hire an applicant must be obtained in writing from the District Administrator, Regional Director, or Hospital Administrator for their respective positions, and the Deputy Secretary for Headquarters positions, if the hiring authority recommends employment of an applicant described below:
>
> a) a permanent Career Service employee who was dismissed by the department or another state agency for cause;
> b) other employees dismissed by the department or another state agency;

c) any employee who has resigned from the department or another state agency in lieu of dismissal, or;
d) any employee who has resigned from the department or another state agency while the subject of an investigation."

The Office of Human Resources is currently updating and revising CFOP NO. 60-02, Chapter 1, Recruitment, Assessment and Selection, which will incorporate the above provision. In addition, CFOP NO. 60-08, Chapter 8, Employee Separations and Reference Checks is currently being updated to incorporate a revised Notice of Separation form that must be completed for all employees separating from the department.

A telephone conference call was held on January 27, 2006, during which the parties were given the opportunity to present further argument in support of their respective positions on how the undersigned should proceed in the instant case.

On that same day (January 27, 2006), following the telephone conference call, Respondent filed a Supplemental Notice to the Court, in which it stated the following:

(1) Respondent does not intend to rely upon the statement appearing in CFOP 62-02, Chapter 1, Recruitment, Assessment and Selection, paragraph 1-10.b.4., bearing an effective date January 5, 2004, as the basis of future agency action.

(2) The statement set forth in CFOP 62-02, Chapter 1, Recruitment, Assessment and Selection, paragraph 1-10.b.4., bearing the effective date January 5, 2004, is abandoned in terms of the basis of future agency action.

> (3) By way of further clarification, the "statement" that is the subject of this supplemental notice reads as follows:
>
> "(4) In no case shall a Career Service employee who has been terminated for cause, or has resigned in lieu of termination or while the subject of an investigation be employed or re-employed by the Department [of Children and Family Services]."

For the reasons that follow, the undersigned agrees with Respondent that, in light of Respondent's voluntary "abandon[ment]" of its further reliance on the Challenged Statement, dismissal of Petitioner's petition is in order.

In his petition (the filing of which initiated this action), Petitioner contends that the Challenged Statement 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:
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> (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.

Not every agency statement is a "rule," as defined by Section 120.52(15). 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," fall within this definition. 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).

Petitioner further contends in his petition that the Challenged Statement 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).

Petitioner is seeking relief from this alleged violation of Section 120.54(1)(a), Florida Statutes, 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).[1]

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 [that desire to continue to rely on agency statements defined as rules] into the rule adoption process. It provides [these agencies] with incentives to promulgate [these statements as] rules through the formal rulemaking process." Osceola Fish Farmers Association, Inc., 830 So. 2d at 934.

"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.'" Zimmerman v. Department of Financial Services, Office of Insurance Regulation, DOAH Case No. 05-2091RU, slip op. at 11 (Fla. DOAH August 24, 2005)(Summary Final Order of Dismissal); see also 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 Fla. Div. Adm. Hear. LEXIS 5180 *15 (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, ..."). The sole remedy available under Section 120.56(4) for such a violation is prospective injunctive relief. See Zimmerman, slip op. at 11 ("The statute [Section 120.56(4), Florida Statutes] 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 final agency action (based on such statements) that has already been taken."). If a violation is found, the agency must, pursuant to Section 120.56(4)(d), "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action," and it must also, pursuant to Section 120.595(4), Florida Statutes,[2] pay the challenger's reasonable costs and attorney's fees, "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."

The agency statement that Petitioner is seeking to challenge in the instant Section 120.56(4) proceeding is one that Respondent has already "abandoned" and replaced (with a substantially different policy statement). Because it has been rescinded and thus will not be relied upon by Respondent as a basis for future agency action, it is unnecessary to adjudicate Petitioner's claim that this statement violates Section

120.54(1)(a), Florida Statutes, and he thus is entitled to prospective injunctive relief under Section 120.56(4).[3] There being no reason for this case to remain open in light of Respondent's rescission of the Challenged Statement,[4] Petitioner's petition must be, and hereby is, dismissed, and the file of the Division of Administrative Hearings in this case is closed. See Board of Public Instruction of Orange County v. Budget Commission of Orange County, 249 So. 2d 6 (Fla. 1971)("We have for review a judgment of the Circuit Court of Orange County, wherein Chapter 63-878, Laws of Florida, was held constitutional. On appeal here appellants have contended that Chapter 63-878 is an invalid special act. However, our attention has been called to House Bill No. 932, enacted on May 12, 1971, as Chapter 71-29, Laws of Florida, which repeals Chapter 63-878, Laws of Florida. Accordingly, the controversy over the validity of Chapter 63-878 has been rendered moot and the appeal must be and is hereby dismissed."); Mullings v. Barton, 620 So. 2d 258 (Fla. 1st DCA 1993)("The letter attached to appellee's motion to dismiss provides appellant with the relief he requested, thereby rendering moot the appeal of the disorderly-conduct charge. We therefore dismiss appellant's appeal of the summary denial of his petition for writ of habeas corpus in which appellant challenged his charge of disorderly conduct."); Fair v. Board of Elections, City of Tampa, 211 So.

2d 239 (Fla. 2d DCA 1968)("The question raised by appellant has been rendered moot by virtue of the repeal of the contested statute, Chapter 15533, Laws of Florida, Special Acts of 1931, as amended by Chapter 67-2123, Laws of Florida, Special Acts of 1967."); Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 326 F.3d 924, 929-30 (7th Cir. 2003)("Federation next argues that this case presents a live controversy because, though the City has repealed the challenged ordinance, the City remains free to reenact it at any time. In support of this argument, Federation cites the general principle that a defendant's voluntarily cessation of challenged conduct will not render a case moot because the defendant remains 'free to return to his old ways.' We do not dispute that this proposition is the appropriate standard for cases between private parties, but this is not the view we have taken toward acts of voluntary cessation by government officials. Rather, 'when the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine.' To adopt Federation's view that mere repeal is insufficient to moot a case would essentially put this court in the position of presuming that the City has acted in bad faith--harboring hidden motives to reenact the statute after we have dismissed the case--something we ordinarily do not presume. Rather than presuming bad faith, we have repeatedly held that

the complete repeal of a challenged law renders a case moot, unless there is evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar. This rule does not, as Federation suggests, conflict with Supreme Court precedent on the issue. In a string of cases, the Court has upheld the general rule that repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief.")(citations omitted); Cotton v. Mansour, 863 F.2d 1241, 1244-1245 (6th Cir. 1988)("We agree with the district court's conclusion that any request for prospective injunctive relief was moot. MDSS had clearly changed its policy of calculation months before plaintiff had filed suit and MDSS had even personally informed plaintiff's counsel of this change in MDSS policy. There was simply no ongoing violation by MDSS to enjoin."); Massachusetts Hospital Association v. Harris, 500 F. Supp. 1270, 1280 (D. Mass. 1980)("[T]his court lacks jurisdiction to consider the plaintiff's allegations concerning the inpatient rate methodology and reimbursement rates that are no longer in effect."); Yuan Jen Cuk v. Lackner, 448 F. Supp. 4, 10 (D. Cal. 1977)("Since the eligibility requirements of § 14005.6(a)(3) have been repealed in their entirety, and no comparable provisions enacted in their place, and since plaintiffs would be entitled only to prospective injunctive

relief, we further conclude that this action should be dismissed as moot."); and Simmons v. Inverness Inn, DOAH Case No. 93-2349, 1993 Fla. Div. Adm. Hear. LEXIS 5716 *5 (Fla. DOAH October 27, 1993)(Recommended Order)("As to the other relief available under subsection 760.10(13), it is noted that the Inn is no longer in business and thus the issue of whether a cease and desist order should lie is rendered moot."). Inasmuch as no determination has been (nor need be) made that the Challenged Statement violates Section 120.54(1)(a), Petitioner is not entitled to reasonable costs and attorney's fees pursuant to Section 120.595(4), Florida Statutes.

DONE AND ORDERED this 1st day of February, 2006, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2006.

ENDNOTES

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

> 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.
>
> 2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:
>
> 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;
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> c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
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> 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.

2/ 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.

3/ Contrary to the assertion made by Petitioner and Intervenor in their Response to Order Directing Response, there is nothing in Section 120.56(4)(e), Florida Statutes, suggesting that the Legislature intended to foreclose the possibility that an agency that no longer desired to rely on a statement under challenge in a Section 120.56(4) proceeding could effectively abort the

proceeding by voluntarily rescinding the statement. Section 120.56(4)(e) allows an agency that wants to continue to rely on a challenged statement to do so under the circumstances described therein. It does not purport to address the situation, present in this case, where the agency desires to discontinue its reliance on the statement.

4/ That Petitioner is also seeking an award of reasonable costs and attorney's fees pursuant to Section 120.595(4), Florida Statutes (which is attainable only if there is the "entry of a final order that all or part of [the challenged] agency statement violates s. 120.54(1)(a)") is not such a reason. See The Florida Electric Power Coordinating Group, Inc., v Department of Environmental Protection, DOAH Case Nos. 01-4018, 01-4019, 01-4020, 01-4021, and 01-4257RU, 2002 Fla. ENV LEXIS 101 (Fla. DOAH April 22, 2002)(Final Order)(administrative law judge rejected contention that an "award of attorney's fees under Section 120.595(4) is a collateral legal consequence that precludes dismissal of the underlying [Section 120.56(4)] action for mootness"); see also Lewis v. Continental Bank Corp., 494 U.S. 472, 480, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)("[An] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."); and Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 n.4 (10th Cir. 1994)("[A]n interest in attorney's fees is insufficient to create an Article III case or controversy where a case or controversy does not exist on the merits of the underlying claim.").

COPIES FURNISHED:

Ben R. Patterson, Esquire
Patterson & Traynham
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315-4289

Herschel C. Minnis, Assistant General Counsel
Department of Children and Family Services
1317 Winewood Boulevard
Building 2, Room 204-N
Tallahassee, Florida 32399-0700

Scott Boyd, Executive Director
and General Counsel
Joint Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Program Administrator
Bureau of Administrative Code
Department of State
R. A. Gray Building, Suite 201
Tallahassee, Florida 32399

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this 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.