

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY KRAVITSKY,)
)
 Petitioner,)
)
 vs.) Case No.06-0022RU
)
 DEPARTMENT OF AGRICULTURE AND)
 CONSUMER SERVICES, BUREAU OF)
 ENTOMOLOGY AND PEST CONTROL,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on September 17, 2008, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Larry Kravitsky, pro se
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4692 Powerline Road
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For Respondent: David W. Young, Esquire
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STATEMENT OF THE ISSUE

Whether the practices and procedures set forth in paragraphs 6.1., 6.2, and 6.3 of the Challenge to Agency Statements filed by the Petitioner on December 28, 2005, constitute agency statements defined as rules but not adopted as such, in violation of Section 120.54, Florida Statutes.

PRELIMINARY STATEMENT

In paragraph 6 of the Challenge to Agency Statements filed with the Division of Administrative Hearings on December 28, 2005, Larry Kravitsky alleged that the following practices or procedures of the Department of Agriculture and Consumer Services ("Department"), Bureau of Entomology and Pest Control ("Bureau"), constitute unpromulgated rules within the meaning of Section 120.54(4), Florida Statutes (2008)¹:

1. The establishment [of] a particular quantum or burden of proof, which must be satisfied before agency action can be taken.

2. The practice of advising pest control licensees in writing, that they are under investigation for possible violations of Florida Statute[s] 482 and/or its associated administrative rules and requesting their licensees to respond to subject allegations with information, records or documentation. The exact process or practice utilized by the Department is subject to complex variations which are not clearly or reliably communicated so that the specific nature of the same cannot be more specifically described herein. These practices transpire before the issuance of an administrative complaint by the Department and are used to

determine the appropriateness of issuing such complaints as well as the content and penalties sought therein. Specific requests have been made to the Department for the adoption of a formalized, knowable procedure modeled after Florida Statute[s] 455, which requests appear to have been rejected by the Department.

3. The creation of a review process, pursuant to which employees of the Department confer with each other in person, telephonically or in writing for the express purpose of considering investigative reports received from the Department's inspectors and issuing or causing to be issued administrative complaints which seek the imposition of substantial disciplinary penalties upon the Department's licensees based upon alleged violations of Florida Statute[s] 482 and/or the Department's administrative rules. One or more versions of this practice of correlating and evaluating investigative information vis a vis some unspecified legal standard and then rendering agency action has been utilized by the Department for many years, with a substantial impact upon hundreds of different licensees.

Mr. Kravitsky requested that these agency statements be declared invalid and unenforceable because they are rules within the meaning of Section 120.52, Florida Statutes.

The Chief Judge of the Division of Administrative Hearings assigned this matter to the undersigned Administrative Law Judge, and, after numerous continuances granted at Mr. Kravitsky's request, the final hearing was held on September 17, 2008. At the hearing, Mr. Kravitsky presented the testimony of Michael Page, Chief of the Bureau, but did not

offer any documents into evidence.² The Bureau did not present any testimony and did not offer any documents into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on October 7, 2008, and the Bureau timely filed its proposed findings of fact and conclusions of law, which has been considered in the preparation of this Recommended Order. Mr. Kravitsky did not file a post-hearing submission.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

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 and is given the responsibility by Section 570.45, Florida Statutes, to enforce the provisions of Chapter 482, Florida Statutes. The Bureau is created in the Division and is responsible for, among other duties, investigating violations of Chapter 482, Florida Statutes. The Bureau Chief makes the ultimate decision to file an administrative complaint against a certificate-holder or to preliminarily deny an application for certification as a pest

control operator or for an identification card for a pest control employee.³

2. At one time, Mr. Kravitsky was certified by the Bureau as a pest control operator. When he applied for renewal of his certificate, the Bureau issued a notice in 2004 that it intended to deny the application because of alleged violations of Chapter 482, Florida Statutes, committed by Mr. Kravitsky while he engaged in the business of a certified pest control operator. In 2005, the Bureau issued another notice that it intended to deny a second application for renewal of Mr. Kravitsky's pest control operator's certificate, based on the same allegations of wrong-doing. And, finally, the Bureau issued a notice in 2005 that it intended to deny Mr. Kravitsky's application for a pest control employee's identification card.⁴ Mr. Kravitsky is, therefore, substantially affected by the agency statements at issue herein.

3. The Bureau Chief's decisions to file an administrative complaint against a certificate-holder for violations of Chapter 482, Florida Statutes, or to deny preliminarily applications for a certificate, a renewal certificate, or an employee identification card are based on information gathered as part of an investigation of a licensee or an applicant. If the investigation is of a certificate- or card-holder, an investigation is initiated either as a routine enforcement

action or as the result of a consumer complaint. A field inspector for the Bureau collects information, including statements, affidavits, photographs, videotapes, documents, and any information that pest control operators and employees are required to maintain.

4. Once the information is gathered by the field inspector, the case file is sent to the inspector's supervisor, who reviews the case file for completeness. The supervisor requests additional information, if necessary. Once the supervisor considers the file complete, it is sent to the Bureau's office in Tallahassee, Florida, where the file is given a case number and assigned to a case reviewer who evaluates the evidence contained in the file to determine if there is a possible violation of the provisions of Chapter 482, Florida Statutes. If the case reviewer finds no violation, the case is closed. If it appears to the case reviewer that there is evidence of a violation, an administrative complaint is drafted, and the draft complaint and case file are sent to an enforcement administrator or to a case manager, who independently evaluates the evidence collected in the case. The enforcement administrator or case manager then makes a recommendation to the Bureau Chief regarding whether the draft administrative complaint should be filed. Anyone reviewing the case file can

ask that additional information be gathered if he or she finds that the file is not complete.

5. This investigation and review process is an internal process that is not applied outside the Department, it does not affect the private interests of any person, and it is not a procedure that is important to the public.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.56(4), Florida Statutes.

7. Section 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)." Section 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."

8. Section 120.52(16), Florida Statutes, defines a rule in pertinent part 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 any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

9. Mr. Kravitsky has the burden to establish by a preponderance of the evidence that the practices and procedures listed in the Challenge to Agency Statements constitute rules that have not been adopted by the rulemaking procedures provided in Section 120.54, Florida Statutes. §§ 120.56(1)(e) and (4)(a), Fla. Stat.

10. Virtually the same issue raised in the instant case was addressed by Administrative Law Judge Susan B. Harrell in two previous cases, Cirrinzione v. Department of Agriculture and Consumer Services, DOAH Case No. 05-0145RU (Final Order January 3, 2006), and Baker v. Department of Agriculture and Consumer Services, DOAH Case No. 05-0947RU (Final Order January 4, 2006). Administrative Law Judge Harrell rejected the claims in these cases that the practices and procedures that the Bureau utilizes in investigating possible violations of Chapter 482, Florida Statutes, are agency statements defined as rules. Administrative Law Judge Harrell reasoned in Cirrinzione as follows:

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.

11. Administrative Law Judge Harrell's reasoning is compelling in this case and supports the conclusion that the practices and procedures by which the Bureau investigated the violations cited in the notices of intent to deny Mr. Kravitsky's applications are not rules within the definition of Section 120.52(16), Florida Statutes, and are not subject to the rulemaking requirements set forth in Section 120.54(1), Florida Statutes.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Challenge to Agency Statements filed by Larry Kravitsky is hereby dismissed.⁵

DONE AND ORDERED this 25th day of November, 2008, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2008.

ENDNOTES

^{1/} Although the Challenge to Agency Statements was filed in 2005, the 2008 edition of the Florida Statutes is the appropriate edition to apply in this case to evaluate the Bureau's practices and procedures with regard to investigations and decisions to take agency action, and all references herein to Florida Statutes shall be to the 2008 edition unless indicated otherwise.

^{2/} Mr. Kravitsky focused much of his presentation at the final hearing on allegations that the Bureau violated the Sunshine Law, Section 286.011, Florida Statutes, when Bureau employees allegedly secretly conferred and reached a decision to take action against him by denying his applications for renewal licenses as a pest control operator and his application for an identification card allowing him to work for a pest control company. The undersigned advised Mr. Kravitsky that he would not be permitted to raise the issue of violations of the Sunshine Law because he had made no allegations regarding such violations in the Challenge to Agency Statements. And, in any event, it would be inappropriate to raise this issue in a challenge to agency statements defined as rules.

Mr. Kravitsky stated that he had not reviewed the Challenge to Agency Statements for some time prior to the final hearing and that he was prepared to address only the issue of violations of the Sunshine Law. He requested a continuance of the final hearing to allow him time to prepare to address the issues raised in paragraphs 6.1., 6.2, or 6.3 of the Challenge to Agency Statements. This request was denied because this case has been pending for an inordinate amount of time, at Mr. Kravitsky's request, and because Mr. Kravitsky had sufficient notice that the final hearing on this rule challenge would be held on September 17, 2008. Mr. Kravitsky was advised, however, that he should proceed with his examination of Mr. Page regarding the policies and procedures of the Bureau and that he could address the factual and legal issues related to the issues raised in the Challenge to Agency Statements in a written submission to be filed after the final hearing. Mr. Kravitsky acknowledged his right to file a written post-hearing submittal

and proceeded to question Mr. Page regarding the process by which the Bureau investigates licensees and evaluates investigative reports and other documentation to determine if an administrative complaint should be filed or other preliminary agency action should be taken.

^{3/} At the time of the preliminary decisions to deny Mr. Kravitsky's applications, the director or assistant director of the Division of Agricultural Environmental Services made the final decision to take agency action.

^{4/} These preliminary denials are before the Division of Administrative Hearings for administrative proceedings pursuant to Section 120.57(1), Florida Statutes, in DOAH Case Nos. 04-4061, 06-0132, and 06-414.

^{5/} It is noted that Mr. Kravitsky did not offer any evidence or argument related to the issues raised in paragraphs 6.1. and 6.2. of his Challenge to Agency Statements.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the 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.