

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIM HARRIS AND HARRIS ECKLAND)
AND ASSOCIATES, INC.,)
)
Petitioners,)
)
vs.) Case No. 06-3259RU
)
DEPARTMENT OF FINANCIAL)
SERVICES,)
)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on November 1-2, 2006, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: H. Richard Bisbee, Esquire
Bill Reeves, Esquire
1882 Capital Circle, Northeast, Suite 206
Tallahassee, Florida 32308

For Respondent: Paul C. Stadler, Esquire
Marion Drew Parker, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4247

STATEMENT OF THE ISSUES

The issues in this case are whether the Fast Track Claims Process developed by the Bureau of Unclaimed Property is a

statement within the meaning of a rule as defined by Section 120.52(15)(a)(1), Florida Statutes, and if so, whether rulemaking is feasible and practicable under Section 120.56(4)(b), Florida Statutes. If so, then whether the Department would be in violation of Section 120.54(1)(a), Florida Statutes. Unless otherwise stated, all references to Florida Statutes in this Final Order shall be to the 2006 version.

PRELIMINARY STATEMENT

Petitioners filed a "Petition to Determine Invalidity of Agency Statements Defined as Rules and Unadopted Rules" on August 28, 2006, claiming that a new fast track review process developed by Respondent was an unpromulgated rule. On September 5, 2006, Respondent filed a Motion to Dismiss, stating that the Fast Track Claim process was not a rule of general applicability, but was merely an internal procedure for use by Department personnel only. The Motion was denied. Respondent then filed a Motion for Summary Final Order on September 11, 2006. This motion alleged the Fast Track Claims process, as set forth on a one-page outline taken from a Department policy manual, did not meet the definition of a rule as set forth in Subsection 120.52, Florida Statutes. Further, the motion alleged lack of standing by the Petitioners. The motion was denied. On September 15, 2006, Petitioner Harris Eckland and

Associates, Inc. ("HEA"), filed its own Motion for Summary Final Order averring that the Fast Track Claims procedure was a rule as defined by statute and interpreted by case law. This motion was also denied.

At the final hearing held on November 1-2, 2006, Petitioner called three witnesses: Richard Sweet, assistant bureau chief of the Bureau of Unclaimed Property; Jim Harris, co-owner of HEA; and Richard Eckland, co-owner of HEA. Petitioner also offered into evidence 14 exhibits. Objections were sustained to Petitioner's Exhibit number 8. The rest of Petitioner's exhibits were received in evidence. Respondent called two witnesses: Rick Sweet and Walter Graham, Bureau Chief. Respondent also offered eight exhibits into evidence; Exhibits numbered 1 through 4, 6, and 8 were received. Official recognition was also taken of Florida Administrative Code Rule 69I-20.

At the close of the evidentiary portion of the final hearing, the court reporter advised that the hearing transcript would be ready shortly after the Thanksgiving holiday. It was decided that proposed final orders would be due on or before December 15, 2006. Each party duly filed its Proposed Final Order and those were taken into consideration by the Administrative Law Judge in this Final Order.

FINDINGS OF FACT

1. The Florida Department of Financial Services, Bureau of Unclaimed Property (the "Bureau"), is responsible for enforcement and administration of the Florida Disposition of Unclaimed Property Act (the "Act"), Chapter 717, Florida Statutes. Pursuant to Subsections 717.117 and 717.119, Florida Statutes, holders of unclaimed property must report and remit unclaimed property to the Department. The Department is then responsible for safeguarding that property, locating its owners, and processing claims for such property so that it goes to the rightful owners.

2. Unclaimed property owners may sell the rights to their property to private investigators, certified public accountants, or attorneys. HEA is licensed and certified to act as a representative for owners of unclaimed property and/or to purchase their interests. HEA is co-owned by Jim Harris and Richard Eckland.

3. Petitioner has been in the business of submitting claims to the Bureau on behalf of claimants since 1994. Prior to setting up the unclaimed property business, Jim Harris was employed by the Bureau. He was an OPS employee working as a claims analyst for approximately eighteen months during calendar years 1991 to 1993. Jim Harris and Richard Eckland are both licensed by the Florida Department of Agriculture as private

investigators. HEA is one of the largest unclaimed property locator businesses in the state.

4. Petitioner's business has grown since its inception, and HEA currently submits about 20,000 claims a year on behalf of claimants. The majority of claims filed by HEA are for amounts less than \$250. The company uses a computer system, which it developed to track down unclaimed property, then directly mails letters to the owners of the property, offering to act as the owner's representative. In exchange, HEA is paid a fee.

5. The two types of claims HEA most frequently files are known as "106" and "108" claims. A 106 claim is filed by the apparent owner of the property, whether that person is the original owner or is someone who has purchased the claim. These persons may receive a form (DFS-UP-108) to file their claim by going on-line to the Bureau's website. A 108 claim is a claim filed by a representative or agent of the apparent owner; 108 claims are submitted on form DFS-UP-108.

6. When HEA purchases an owner's rights to property, it is referred to in the industry as a "buy-out" claim. In that instance, HEA pays the owner an agreed-upon amount up front (usually within two days of entering into a contract), then files the claim on its own behalf (as the new apparent owner) in order to receive the property from the Bureau. This would

constitute a 106 (apparent owner) claim because HEA has purchased all rights to the property in question and now owns the claimed property. Buy-out claims have historically constituted as much as 80 percent of Petitioner's business, but that percentage has been reduced in recent months.

7. HEA relies on an existing line of credit from Hancock Bank for funds to make buy-out purchases. The line of credit is tied to a master account belonging to HEA. The master account is used to replenish HEA's operating account as needed. The master account is also used to make payments to the line of credit. Those payments are made automatically through an arrangement with the bank, wherein HEA's master account is credited or debited depending on the company's monetary needs on any given day.

8. The Bureau pays claims via electronic transfer from its treasury to the owner or owner's agent financial institution. HEA has an electronic funds transfer (EFT) account set up solely for the purpose of receiving transfers from the State. The EFT transfers to HEA's bank go directly into its master account. Those funds are then used to pay off the line of credit and/or are transferred to HEA's operating account, as necessary.

9. HEA's business has steadily grown since its inception. There were a couple of years of difficulty when it first commenced operations, but since that time the business has grown

in volume and revenue each year. During the 2002-2003 season, the Bureau transferred \$558,348.35 to HEA's EFT account to pay for claims submitted by HEA. In 2003-2004, the amount was \$655,757.81; in 2004-2005 the amount rose to \$1,168,186.37; and the 2005-2006 transfer amount was \$1,432,587.79.

10. Historically, HEA was able to represent to its clients that payment of claims would be made within 60 to 90 days of filing the claim. There is no statutory or rule requirement that claims be paid by the Bureau within any specific time frame, but all claims are required by statute to be processed for payment within 90 days of submission. Nonetheless, payments were historically made within 60 to 90 days of the date the claim was submitted. HEA came to rely on this repayment regimen in its dealing with customers.

11. The Bureau had a policy in place called Procedure AP XVII, but that policy is no longer in effect. That policy included a provision that all claims would be processed in the order received, apparently regardless of the type of claim. No such written policy currently exists. Still, the Bureau attempts to process all claims in the order received, to the extent possible.

12. In April 2006, HEA began seeing a slowing of payments for its submitted claims. Claims which had taken an average of less than 80 days to be paid began to take as long as 90 or even

100 days. This slowdown lasted until June or July 2006, at which time the payment times began to take less time for processing. Data to review more recent history was not yet available at the time of the final hearing in this matter.

13. During the slowdown period, HEA was forced to borrow \$200,000 from a second bank in order to maintain its line of credit at Hancock Bank. (HEA was required to have no more than 85 percent of the line-of-credit amount in outstanding receivables at any point in time. If the A/R amount exceeded 85 percent of the line of credit amount, the bank could call the loan and HEA would have to pay the full outstanding balance. The \$200,000 loan was used to reduce the amount owed on the line of credit so that the entire line-of-credit loan would not be called. This allowed HEA to maintain the credit line and continue borrowing up to 85 percent of that line to purchase claims, pay operating expenses, etc.)

14. HEA believes the reason they were getting paid more slowly than normal was that the Bureau had developed a new payment process that affected payment times. The process came to be referred to as the Fast Track process.

The Fast Track Process

15. In October 2005, the Bureau developed a new process for Fast Track Claims. This process would allow certain 106 claims to be automatically processed by the Bureau's computer

system rather than manually processed. It works along these lines:

A person would access the Bureau website to request a form for making a claim. The computer would automatically determine, based upon information submitted by the claimant, whether the claim satisfied all fast track claim criteria. The form sent back to the claimant would then contain either an "F" designation for Fast Track or the traditional "C" designation for regular 106 claims. The form would be completed and returned to the Bureau at the appropriate address.

When the Department receives a fast track claim, it is date stamped as the initial step. Each eligible fast track claim is then visually inspected to make sure it contains a photo identification and that the claim is signed. Additional research is needed if either of those elements is missing.

Next, the receipt date is entered into the computer system at the same time that other claim types are entered. The claims are then returned to the file room for bar coding, scanning and indexing. Overnight, the computer updates the claims and approvable fast track claims are systematically approved, routed to the Approval Level 1 queue, and then (typically) paid.

16. Fast track claims that are not approvable are sent a deficiency letter and the claim loses its fast track identity. In addition, a claim will lose its fast track status if the claimant owes past-due child support, if there is a conflicting claim, or if additional money has been added to the account so that it now exceeds the allowable threshold (\$1,000.00).

17. Only 106 claims filed by the original owner are sent through the Fast Track Claims Process. The 106 buy-out claims are automatically deemed to require additional research because the Bureau would need to ascertain the validity of the purchase agreement, verify the change in ownership, etc.

18. The Fast Track Claims Process resulted in the creation of one of several new "queue" areas used to process claims. The purpose of the creation of the Fast Track queue was to allow automatic processing of as many claims as possible so that analysts' time could be spent making determinations on other types of claims. Fast track claims are one of the least complex kinds of claims processed by the Bureau. Therefore, they are the most easily assimilated into the automatic process. Compare simple fast track claims to HEA's 106 buy-out claims. Those kinds of claims require additional work performed by the analysts. For example:

Since ownership information entered by HEA does not match the missing owner information maintained by the Bureau, it must be verified. In addition, HEA is required to submit its purchase contracts for review. The Bureau must determine whether the contract has been entered within 45 days from the date of the account being loaded onto its database. Account numbers and amounts must be reviewed. Signatures, dates and fees must be reviewed. There must be a full disclosure statement in instances where the fee caps are exceeded. Payments must be split. Proof of payment must be included and verified.

19. It is clear the fast track claims can be more efficiently handled via automatic means, while other claims require manual attention.

20. The Bureau is processing a greater number of fast track claims at the present time than it did at the inception of the program. However, the number of claims in the other categories has drastically risen in recent years as well. In fiscal year 2001/2002 the Bureau processed 102,312 claims. That number dropped to 100,437 in 2002/2003. It rose to 163,802 the next fiscal year, 2003/2004. A rise in claims brought the number to 169,288 the next year and then jumped to 226,983 claims in 2005/2006. Thus, in four years the number of claims filed with the state has more than doubled. On August 31, 2005, there were 29,999 claims pending at the Bureau to be processed; that number jumped to 55,111 a year later, on August 31, 2006.

21. For fiscal year 2005/2006, the Bureau received more than \$354,000,000 of unclaimed property, paid claims for more than 225,000 accounts worth more than \$100,000,000 and transferred more than \$267,000,000 into the State School Board fund. That fiscal year's receipts and transfer of funds to the School Board were in excess of \$100,000,000 more than fiscal year 2003/2004.

22. While the number of claims has risen dramatically, there has not been a concomitant increase in the number of persons processing the claims. There are approximately ten analysts reviewing claims, but those employees have other duties as well. There are 17 FTEs in the claims section to handle claims, answer telephone inquiries, process mail, etc. Of the available employees, 10 work full-time to process 106 claims, five do the 107 claims, and three or four concentrate on 108 claims. By comparison, fast track claims are handled by two employees who dedicate an hour or two per day to process those claims.

23. The purpose of the Fast Track Claims Process is to reduce the number of claims of other types being handled by the Bureau's staff. The system has resulted in fast track claims being paid fairly quickly, averaging about 20 to 30 days.

24. Other types of claims continue to be processed under the traditional system. Those claims are processed more slowly than fast track claims, resulting in some backlogs. For example, a one-day snapshot of pending claims on August 31, 2005, indicated no 108 claims older than 60 days. On the same date in 2006, there were 8,828 108 claims over 60 days old. While this seems on its face to indicate 108 claims are being paid more slowly, consider that the total number of claims for those two years is significantly different: 7,240 claims in 2005

versus 20,904 claims in 2006. This difference is certainly a factor in the delays experienced by HEA and others getting payments for these type claims. Another factor is that the Bureau experiences cyclical increases in volume. Just after the April 30 reporting cycle (when holders of unclaimed property notify the Bureau), the number of claims seems to increase. This volume has an effect on time frames for processing payments.

25. There is undeniably a four-month period (approximately April to July 2006) that HEA's claims were taking longer to be paid. That time frame roughly correlates to an increase in the number of fast track claims. However, the fast track claims were being paid more slowly during that time as well. There is no evidence as to how quickly or slowly claims were being paid to other businesses or individuals during that time period.

26. The fast track process allows Bureau employees more time to devote to other types of claims. It is a shortcut applicable to a limited number of overall claims.

27. The Fast Track Claims process is encapsulated on a one page diagram located in a 120-plus page document maintained by the Bureau. The current Bureau Chief calls the document a training manual used to teach new employees how to process all types of claims. The manual was formerly referred to as a Policy & Procedure Manual by the Bureau. The manual contains

copies of the relevant statutes and rules; it has a history of the Bureau, along with data concerning numbers of claims processed; it explains how electronic transfers work, etc. It does not, in and of itself, constitute a rule.

28. The form used for fast track claims is the same as the existing 106 claim form. It does not generate any rights or require any additional action by persons making a claim for property. (The only difference is that fast track claims are given an F designation and the mailing address for filing the claim is different than the non-fast tract claims address.) The form used for fast track claims is an electronically generated version of the existing 106 form. Claims coming in on the electronically generated form go directly into a specific queue for payment. Those claims do not require additional review by the Bureau so the staff workload is reduced as a result.

29. Although the fast track process applies to some 106 claims, it does not apply to all such claims. Nor does it apply to 108 claims, 110 claims, 112 claims or any other type claim. An applicant is not required to take any additional action because of the fast track claim process. Rather, if the applicant's request is deemed eligible, then it will simply be processed automatically rather than manually. One means of expediting fast track claims is to allow them to be mailed to a different post office box than other claims, but use of a

different box is not a rule of general applicability; it is an internal action by the Bureau.

30. Fast track claims, which make up only about 15 percent of all 106 claims, are being processed in an average of 20 to 30 days. The 106 buyout claims are taking longer to process due to the extra verification process. The 106 buy-out claims and 108 claims take approximately the same amount of time to process. All claims of every type have increased dramatically in recent years.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and the following subsections:

Subsection 120.54(1)(a), Florida Statutes, which states:

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.

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

"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 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.

Subsection 120.56(4), Florida Statutes, states in relevant part:

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS. --

(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) [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).

32. Petitioner has standing to bring this proceeding. See NAACP, Inc. v. Florida Board of Regents, 863 So. 2d 294 (Fla. 2004); Jacoby v. Florida Board of Medicine, 917 So. 2d 358 (Fla. 1st DCA 2005). HEA, as owner of claims and on its own behalf,

is affected by the procedures used by the Bureau to process unclaimed property claims.

33. A clear understanding of the petition in this case requires a brief review of the statutory provisions dealing with the subject matter. Chapter 717, Florida Statutes, is entitled "Florida Disposition of Unclaimed Property." Section 717.139 states:

This chapter shall be applied and construed as to effectuate its general purpose of protecting the interest of missing owners of property, while providing that the benefit of all unclaimed and abandoned property shall go to all the people of the state, and to make uniform the law with respect to the subject of this chapter among states enacting it.

34. Florida Administrative Code Rule 69I-20 was created to implement Chapter 717. Rule 69I-20.0021 sets forth the procedures for filing claims and processing the claims by the Department. The rule addresses the forms to be used, directs that each form must be complete to be processed, and provides that the Department will make payments once a claim is approved. The specific duties of Department personnel are not spelled out by the rule. Those duties are covered by internal memoranda, policies, and procedures.

35. In Environmental Trust v. State Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998), the court found:

An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes.

36. The agency statement at issue in this proceeding is an outline pertaining to how certain 106 claims will be processed by Bureau employees. Persons filing a 106 claim are not required to do anything differently with their claims in order for it to go the "fast track" route. Rather, once the claim is filed, it will be processed according to the Department's internal policies. If the claim satisfies requisite fast track criteria, then it is slotted toward the appropriate queue. If not, then it goes to a different queue. Therefore, the fast track process is not generally applicable to all claims, nor does it create any rights or duties for persons making a claim for unclaimed property.

37. There is no competent, substantial evidence to support Petitioner's contention that the fast track claims process was the cause of delays in payments for the time period in question.

38. The fast track claims process (as delineated in the Bureau's policy/training manual) is not a rule in that it is not

"a statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency." Rather, it is solely an internal device used by agency personnel in carrying out their assigned duties. There is no need for the Bureau to prove that rule-making was either infeasible or impracticable.

ORDER

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

ORDERED that Petitioners have not established that the Fast Track Claim Form is a rule within the meaning of Subsection 120.52(15), Florida Statutes. Petitioner's challenge is hereby dismissed.

DONE AND ORDERED this 4th day of January, 2007, in Tallahassee, Leon County, Florida.



R. BRUCE McKIBBEN
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 4th day of January, 2007.

COPIES FURNISHED:

H. Richard Bisbee, Esquire
H. Richard Bisbee, P.A.
1882 Capital Circle Northeast, Suite 206
Tallahassee, Florida 32308

Paul C. Stadler, Esquire
Marion Drew Parker, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

Honorable Tom Gallagher
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Carlos G. Muniz, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Scott Boyd, Executive Director
Joint Administrative Procedures Committee
120 Holland building
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliot Building, Room 201
Tallahassee, Florida 32399-0250

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 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.