STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION AND JOHN W. JENNINGS, CAPITAL COLLATERAL REGIONAL COUNSEL,	)	
Petitioners,	)	
vs.	)	Case No. 06-3537RU
DEPARTMENT OF FINANCIAL SERVICES,	)	
Respondent.	)	

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing of this case on October 31, 2006, in Tallahassee, Florida, for the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Peter J. Cannon, Esquire
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For Respondent: Richard T. Donelan, Jr., Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent's construction of Section 11.062, Florida Statutes (2006), is an unadopted rule, described

in Subsection 120.56(4), Florida Statutes (2006); whether rulemaking is not feasible for a reason authorized in Subsection 120.54(1)(a), Florida Statutes (2006); and whether either of the petitioners is a person substantially affected by the unadopted rule. (Statutory references are to Florida Statutes (2006)).[1]

PRELIMINARY STATEMENT

On September 19, 2006, Petitioners filed a rule-challenge petition with DOAH pursuant to Subsection 120.56(4). DOAH assigned the matter to the undersigned on September 22, 2006. The ALJ scheduled the hearing for October 18, 2006, but continued the hearing until October 31, 2006, pursuant to Respondent's Unopposed Motion for Continuance.

At the hearing, Petitioners presented the testimony of three witnesses and submitted 13 exhibits for admission into evidence. Respondent presented the testimony of three witnesses and submitted five exhibits for admission into evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the two-volume Transcript of the hearing filed with DOAH on November 28, 2006. The parties timely filed their respective proposed final orders (PFOs) on December 8, 2006.

FINDINGS OF FACT

1. Petitioner, Capital Collateral Regional Counsel-Middle Region (CCRC-MR), is one of three governmental units authorized

in Section 27.701 to provide collateral legal representation for certain persons convicted and sentenced to death in the state. Each governmental unit functions in a distinct multi-county region identified in the statute as either the northern, middle, or southern region.

2. The middle region in which CCRC-MR is statutorily required to function consists of eight judicial circuits. The judicial circuits are statutorily identified as the Fifth, Sixth, Seventh, Ninth, Tenth, Twelfth, and Thirteenth Judicial Circuits.

3. Petitioner, John W. Jennings, is the Capital Collateral Regional Counsel with statutory responsibility for administering CCRC-MR. The Supreme Court Judicial Nominating Committee recommended Mr. Jennings to the Governor, the Governor appointed Mr. Jennings, and the Florida Senate confirmed the appointment.

4. Each appointment is for a three-year period. Mr. Jennings is currently subject to reappointment.

5. The administration of CCRC-MR is supervised by the Commission on Capital Cases (Commission). The Commission has exclusive statutory responsibility for the oversight of each regional office pursuant to Section 27.709.

6. The Commission consists of six members each of whom serves a term of four years. The Governor appoints two members to the Commission. The President of the Senate and the Speaker

of the House each appoint two members. One of the two members appointed by the President and Speaker, respectively, must be a member of the majority party, and the other appointee must be a member of the minority party. The Office of Legislative Services is statutorily required to provide staff support to the Commission.

7. Salaries for each regional office must be submitted annually to the Justice Administrative Commission and the offices of the President of the Senate and the Speaker of the House in accordance with Subsection 27.705. However, Section 27.702(1) provides, in relevant part:

> The three capital collateral regional counsels' offices shall function independently and be separate budget entities, and the regional counsels shall be the office heads for all purposes. The Justice Administrative Commission shall provide administrative support and service to the three offices to the extent requested by the regional counsels. The three regional counsels shall not be subject to control, supervision, or direction by the Justice Administrative Commission in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.

8. Respondent is a state agency authorized in Section 17.002. Respondent is an executive agency described in Subsection 20.121.

9. Section 11.062, in relevant part, prohibits an executive, judicial, or quasi-judicial department from using public funds to retain a lobbyist other than a full-time agency employee (outside lobbyist) to represent the department before the legislative or executive branches of government (prohibited lobbying). If public funds are misused for prohibited lobbying, the statute provides that Respondent "shall" deduct the amount of misused public funds from the salary of the responsible state employee and that the offending department will be barred from authorized lobbying for two years.[2]

10. It is undisputed that Petitioners have registered and paid outside lobbyists to lobby the legislative and executive branches of government on behalf of CCRC-MR from 2001 through 2005. The primary purpose of the lobbying effort has been to ensure annual budgets that are adequate for effective legal representation of persons convicted and sentenced to death in those judicial circuits that are within the functional and territorial purview of CCRC-MR.

11. Between April 15, 2002, and June 22, 2005, Petitioners submitted approximately 28 invoices to Respondent totaling $119,000. Two invoices on April 15 and May 23, 2002, were for $10,000 each. Five invoices from August 25, 2003, through January 26, 2004, were for $2,600 each. The remaining 21 invoices ranged from $3,400 to $7,500 each.

12. Each of the invoices were earmarked as payments for "consulting services." However, Respondent has been aware since 2001 that CCRC-MR has engaged outside lobbyists to represent CCRC-MR before the legislative and executive branches of government. Respondent approved all of the invoices.

13. A primary dispute between the parties involves the issue of whether CCRC-MR is an agency of the executive branch of government (executive agency) or an agency of the legislative branch (legislative agency). Respondent construes Section 11.062 to mean that CCRC-MR is an executive agency and that Section 11.062 prohibits CCRC-MR from using public funds to lobby the legislative or executive branches of government. Petitioners construe Section 11.062 to mean that CCRC-MR is a legislative agency that is not prohibited from using public funds for prohibited lobbying.[3]

14. A determination of whether CCRC-MR is an executive or legislative agency is not necessary for the disposition of this rule challenge. A rule challenge conducted pursuant Section 120.56(4) does not require a determination that Respondent's statutory construction of Section 11.062 is invalid because it exceeds the scope of delegated legislative authority or for any of the other reasons described in Subsections 120.52(8)(b) through (f). The scope of this rule challenge is limited to a determination of whether the challenged statutory construction

is invalid solely because Respondent has failed to promulgate the statutory construction as a rule within the meaning of Subsection 120.52(8)(a).

15. For Petitioners' rule challenge to succeed, Subsection 120.56(4) first requires the evidence to show that the challenged statutory construction is a rule. Subsection 120.52(15) defines a rule, in relevant part, to mean:

> . . . each agency statement of general applicability that implements, interprets, prescribes law or policy [but] . . . does not include [the express exceptions in Subsections 120.52(15)(a)-(c)].

16. Subsection 120.52(15) imposes several requirements that must be satisfied in order for Respondent's construction of Section 11.062 to be defined as a rule. First, Respondent must express the challenged statutory construction as an agency statement. Second, the agency statement must satisfy the test of general applicability. Third, the statement of general applicability must, in relevant part, implement, interpret, or prescribe law or policy. Finally, the statement of general applicability that implements, interprets, or prescribes law or policy must not fall within one of the express exceptions to the definition of a rule.

17. Respondent has expressed the challenged construction of Section 11.062 in several statements of longstanding agency policy. That policy traces its roots to the early 1990s, and

Respondent has iterated its policy through various means of government communication.

18. Most recently, Respondent stated its policy in a letter to Mr. Jennings dated September 27, 2006, approximately eight days after Petitioners filed the instant rule challenge. In relevant part, the letter states:

> This is in response to your letter to the Bureau of State Payrolls dated September 20, 2006, regarding your W-4 Form.
>
> Whenever state employees are under investigation for possible misuse of state funds, we routinely flag their W-4 record in our payroll system; your payroll account was flagged because of questions surrounding lobbying expenditures you authorized. Because of this action, however, our data processing system automatically generated a new W-4 form that was inadvertently sent to you twice. Please disregard both of these W-4 forms. No action of any kind has ever been taken by this office as a result of the duplicate forms you received.
>
> We apologize for any inconvenience that may have been caused.

Petitioner's Exhibit(P)- 9.

19. Respondent previously stated the challenged statutory construction in an investigative report precipitated by several complaints against the Capital Collateral Regional Counsel for the Southern Region (CCRC-SR), the last of which Respondent received on March 29, 2005. Respondent's Office of Fiscal Integrity (OFI) initiated a formal investigation of CCRC-SR and

subsequently expanded the scope of the investigation to include the lobbying activities of CCRC-MR.

20. Respondent issued a final report of the investigation on August 29, 2006. In relevant part, the report expressed the challenged statutory construction as follows:

> CCRC officials have argued that CCRC's are not part of the executive branch, claiming this would make them exempt from the provisions of Section 11.062. . . . A legal opinion dated January 11, 2006, by DFS counsel indicates that although CCRC's were initially created in the judicial branch, they were moved to the executive branch in 1997. The legal opinion noted that the CCRC's have been repeatedly defined by statute as executive branch agencies. . . . Examples include Section 23.21(1). . . , which notes that CCRC's are included as "principal administrative unit(s) within the executive branch of state government. . . . CCRC's are also defined by name in Section 186.003(6) . . . as state agencies, which are in turn defined in this section as "any official, officer, commission, board . . . or department of the executive branch of state government.[4]
>
> * * *
>
> In the case of the CCRC-Middle office, a staff attorney working for Jennings wrote an opinion saying essentially that the CCRC's were exempt from the provisions of Section 11.062 . . . because in their opinion, they are not part of the executive branch. In Jennings sworn statement, he acknowledged that he did not seek a legal opinion from anyone outside of his office. According to Jennings' sworn statement, he continues to pay . . . for lobbying services even though the contract reflects "consulting services."

> Jennings, on behalf of CCRC-Middle authorized payments . . . totaling $119,000.
>
> * * *
>
> It is recommended that . . . DFS legal staff initiate action against . . . Jennings to recover . . . funds that were inappropriately paid by Jennings to lobbyist[s] in violation of Sections 11.062 and 216.311.

P-1 at 19 and 20.

21. Respondent has also stated the challenged statutory construction in an Interoffice Communication dated January 11, 2006, and in a memorandum to state agencies dated March 31, 2003. Respondent issued the latter memorandum as a direct result of the lobbying expenditures of CCRC-MR but did not deliver the memorandum to CCRC-MR.

22. Respondent argues that it has not uttered an agency statement, in relevant part, because the recommendation in the Report of Investigation has no force or effect without the authorization of the agency head.[5] The argument ignores substantial evidence of other iterations of the agency statement over the years as well as the consistent interpretation by agency witnesses of the force and effect of the statement in its various iterations.

23. The agency statement of the challenged statutory construction satisfies the test of general applicability. Respondent intends the agency statement to have the force and

effect of law. Respondent applies the statement in a manner that requires compliance by all state agencies and employees with the direct and consistent effect of law. The statement creates enforcement rights in Respondent and imposes substantive standards on state agencies and employees who are not described in the express terms of Section 11.062.

24. According to the Program Manager in charge of OFI, it is unlawful for Petitioners to expend funds for outside lobbying irrespective of whether CCRC-MR is an executive agency or legislative agency. "The issue of whether they're an executive agency is just an issue of collection." Respondent's Director of the Division of Accounting and Auditing agrees with the testimony of the Program Manager.

25. The agency statement of general applicability interprets and implements Section 11.062. Section 11.062 does not expressly define an executive agency to include CCRC-MR.[6] The agency statement defining CCRC-MR as an executive agency interprets law within the meaning of Subsection 120.52(15).

26. The executive branch of government is constitutionally and statutorily required to organize its executive agencies into no more than 25 departments.[7] The executive departments enumerated in Chapter 20 do not expressly identify CCRC-MR as an executive agency. The agency statement that CCRC-MR is an

executive agency interprets law within the meaning of Subsection 120.52(15).

27. Respondent relies on Subsection 23.21(1) to define CCRC-MR as an executive agency for the purposes of Section 11.062. Subsection 23.21(1), in relevant part, defines the term "department" to include "a principal administrative unit within the executive branch . . . and includes . . . the Capital Collateral Representative. . . ." However, the quoted definition is expressly limited to "the purposes of this part", i.e., the Paper Reduction provisions in Sections 23.20 through 23.22. Expanding the quoted definition for purposes other than Paper Reduction, including the purposes of Section 11.062, interprets law within the meaning of Subsection 120.52(15).

28. In similar fashion, Respondent relies on Subsection 186.003(6) to define CCRC-MR as a state agency. Expanding the definition beyond the purposes of Chapter 186 to include the purposes of Section 11.062 interprets law within the meaning of Subsection 120.52(15).

29. Respondent states in the alternative that CCRC-MR is not an agency but is a subdivision of an executive agency. The parties devoted a substantial amount of evidence in an effort to demonstrate that CCRC-MR is a unit of either a legislative or executive agency of government. As previously stated, the scope

of this proceeding does not require a resolution of the dispute between the parties. The competing evidence, however, does demonstrate that the challenged agency statement interprets law within the meaning of Subsection 120.52(15).

30. The agency statement of general applicability that interprets law and implements Section 11.062 does not fall within an express exception to the definition of a rule in Subsection 120.52(15). The iteration of the agency statement in the letter to Mr. Jennings that followed the report of investigation is not an internal management memorandum, legal memorandum, or memorandum to other state agencies within the meaning of Subsections 120.52(15)(a), (b), or (c). The iteration of the agency statement in an internal management memorandum issued as a direct result of the lobbying efforts of CCRC-MR affects the private interests of Mr. Jennings, if for no other reason, by subjecting his salary to garnishment.

31. The challenged statutory construction is a rule within the meaning of Subsection 120.52(15). Respondent has not promulgated the rule pursuant to the rulemaking procedures prescribed in Section 120.54.

32. A preponderance of evidence does not support a finding that rulemaking is not feasible within the meaning of

Subsection 120.54(1)(a)1. Respondent argued but offered no factual evidence to support such a finding. Nor did Respondent initiate rulemaking in accordance with Subsection 120.56(4)(e).

33. Mr. Jennings is a person substantially affected by the unpromulgated rule within the meaning of Subsection 120.56(4)(a). Subsection 11.062(1) requires Respondent to garnish the salary of Mr. Jennings if Respondent determines that Mr. Jennings violated the statutory prohibition against outside lobbying.

34. After Respondent concluded the administrative investigation on August 29, 2006, the Director of the Division of Accounting and Auditing directed the Bureau Chief for the Division of State Payrolls to access the personal payroll account of Mr. Jennings on two occasions. Respondent subsequently exercised prosecutorial discretion not to garnish the salary of Mr. Jennings.

35. Mr. Jennings is currently subject to reappointment to his position of employment. Mr. Jennings must disclose to the Supreme Court Judicial Nominating Committee that he is currently under investigation by OFI. The disclosure subjects Mr. Jennings to a potential loss of reappointment.

36. CCRC-MR is a person substantially affected by the unpromulgated rule. A change in leadership would impair the institutional knowledge required to adequately represent persons

in eight judicial circuits who have been convicted and sentenced to death.

37. Placement of CCRC-MR within the executive branch of government creates a potential conflict of interest for CCRC-MR. Such a placement arguably would make the legal representative of death row inmates responsible to the executive branch of government which, in turn, must either execute the clients of the representative or commute their death sentences.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the subject matter and the parties in this proceeding. §§ 120.569, 120.54, and 120.56(4)(a). DOAH provided the parties with adequate notice of the administrative hearing.

39. Petitioners have the burden of proving by a preponderance of the evidence that the challenged statutory construction satisfies the definition of a rule in Subsection 120.52(15). § 120.56(4)(b). The burden then shifts to the agency to prove that rulemaking is not feasible. Id.

40. Petitioners satisfied their burden of proof. Petitioners showed by a preponderance of evidence that the challenged statutory construction is a rule within the meaning of Subsection 120.52(15) and has not been promulgated pursuant to the rulemaking procedures prescribed in Section 120.54.

41. An agency statement defined as a rule may be expressed through various means of communication. An agency statement is not required to be reduced to writing in order to be defined as a rule. Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81 (Fla. 1st DCA 1997).

42. An agency statement may be expressed in letters, telephone calls, and other conventional communications of government. Krestview Nursing Home v. Department of Health and Rehabilitative Services, 381 So. 2d 240, 241 (Fla. 1st DCA 1979). An agency statement may be expressed in internal practice manuals, proposed agency enforcement action, or any other method that states substantive statutory requirements. Cf. Reiff v. Northeast Florida State Hospital, 710 So. 2d 1030, 1032 (Fla. 1st DCA May 27, 1998)(enforcement of clinical privileges in hospital by-laws is an invalid rule); Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996)(unpromulgated policy of general applicability that repeals an existing promulgated rule is itself a rule under former Section 120.535 even when agency denies existence of the unpromulgated policy); Department of Revenue of State of Florida v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (enforcement of tax assessment procedure in training manual is an invalid rule); Christo v. Florida

Department of Banking and Finance, 649 So. 2d 318, 319 (Fla. 1st DCA 1995)(enforcement of "CAMEL" ratings as a means to recover costs of examination and supervision of an institution is an invalid rule under former Section 120.535), rev. dismissed mem., 660 So. 2d 712 (Fla. 1995); Florida Public Service Commission v. Central Corporation, 551 So. 2d 568, 570 (Fla. 1st DCA 1989)(administrative order is invalid rule); McCarthy v. Department of Insurance and Treasurer, 479 So. 2d 135, 136 (Fla. 2d DCA 1985)(letter establishing qualifications for eligibility and revoking certification is invalid rule), reh'g denied; Department of Administration, Division of Personnel v. Harvey, 356 So. 2d 323, 324 (Fla. 1st DCA 1977)(statement denying application is an invalid rule), reh'g denied. Agency enforcement action may not be employed to prescribe substantive standards. Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 887 (Fla. 1st DCA 1977), cert. denied, 359 So. 2d 1210 (Fla. 1978).

43. The issue of whether an agency statement is a statement of incipient non-rule policy or has emerged into a statement of general applicability is determined by the effect of the agency statement rather than the label ascribed to it by the agency. Department of Revenue of State of Florida v. Vanjara Enterprises, Inc., 675 So. 2d 252 (Fla. 5th DCA 1996); Balsam v. Department of Health and Rehabilitative Services, 452

So. 2d 976 (Fla. 1st DCA 1984); Amos v. Department of Health and Rehabilitative Services, 444 So. 2d 43 (Fla. 1st DCA 1983); Department of Administration, Division of Personnel v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1977).

44. Agency statements satisfy the test of general applicability if they:

> . . . are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law.

McDonald, 346 So. 2d at 580.

45. The agency statement at issue in this proceeding satisfies the test of general applicability. The statement creates enforcement rights in Respondent and requires compliance with substantive standards by state agencies and employees that are not described in the express terms of Section 11.062.

46. The agency statement of general applicability interprets law and implements Section 11.062. The legislature did not include in Section 11.062 an express statement of legislative policy defining CCRC-MR as an executive agency that is barred from retaining outside lobbyists. Rather, the legislature deleted from the final enactment of Chapter 27 draft language that expressly provided that CCRC-MR is an executive agency.[8] The challenged agency statement would interpret Section

11.062 to enforce a statement of legislative policy that the legislature intentionally excluded from Chapter 27.

47. The separation of powers doctrine prohibits an executive agency such as Respondent from exercising the powers of the legislature. Fla. Const., Art. II, § 3. The doctrine encompasses two prohibitions. First, no branch of government may encroach upon the powers of another. Second, no branch may delegate to another its constitutionally assigned power. The second prohibition is the non-delegation doctrine. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-265 (Fla. 1991).

48. The non-delegation doctrine prohibits the legislature from delegating legislative authority to an agency of the executive branch. For example, the legislature cannot delegate to the executive branch the power to reapportion the state budget. See Chiles, 589 So. 2d at 267-268.

49. In Chiles, the court held, inter alia, that the legislature could not delegate to the Administration Commission the power to revise, reduce, or review the budget of the judicial branch. The court viewed a statute defining the judicial branch as a "state agency" subject to budgetary oversight by the executive branch as an attempt to make legislators of the executive branch rather than an attempt to make laws. See Chiles, 589 So. 2d at 267-269.

50. The non-delegation doctrine requires fundamental and primary policy decisions to be made by a legislature that is elected by the people to make such decisions. Chiles, 589 So. 2d at 266. The administration of legislative programs by executive agencies such as Respondent must be pursuant to some minimal standards and guidelines that are ascertainable by reference to statutory terms enacted by the legislature, terms enacted in Section 11.062 in this case. Id.

51. Section 11.062 does not include express standards and guidelines that define CCRC-MR as an executive agency subject to budgetary oversight by Respondent and enforcement of the statutory prohibition against outside lobbying. However, the challenged agency statement construes Section 11.062 to impose such enforcement rights and standards.

52. Any doubt concerning the proper interpretation of Section 11.062 must be resolved in a manner that is consistent with the non-delegation doctrine. Executive branch rulemaking must be carried out in furtherance of, not in opposition to, legislative policy. Willette v. Air Products and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation, 700 So. 2d 397, 399 (Fla. 1st DCA 1997).

53. In Willette, the court rejected an agency's argument that a validly adopted rule which contradicts a statute is

entitled to enforcement in the absence of a Section 120.56 rule challenge. As the court explained:

> Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in a manner repugnant to a constitutional provision, so a duly promulgated rule, although "presumptively valid until invalidated in a section 120.56 rule challenge" [citations omitted], must give way . . . to any contradictory statute that applies.

Willette, 700 So. 2d at 399.

54. An unadopted rule cannot accomplish that which is prohibited in an adopted rule. One of the principal purposes of the Administrative Procedure Act (APA) is to eliminate unwritten rules and invisible policy-making in the administration of laws by the executive branch. Straughn v. O'Riordan, 338 So. 2d 832, 834 n.3 (Fla. 1976), accord, Schluter, 705 So. 2d 81.

55. In rejecting unwritten requirements as invalid rules, the APA has as one of its principal goals:

> . . . the abolition of "unwritten rules" by which agency employees can act with unrestrained discretion to adopt, change and enforce [legislative] policy. . . .

Id.

56. The requirement to invalidate an unadopted rule is intended to:

> . . . close the gap between what the agency and its staff know about the agency's law

> and policy and what an outsider can know. (citations omitted)

McDonald, 346 So. 2d 569, 580 (Fla. 1st DCA 1977).

57. Respondent did not show by a preponderance of the evidence that rulemaking is not feasible for a reason authorized in Subsection 120.54(1)(a). Respondent offered no factual evidence to support such a finding.

58. Each of the petitioners is a person substantially affected by the challenged agency statement. In Florida, unlike the federal system, the doctrine of standing has not been rigidly followed. Coalition for Adequacy of Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 403 (Fla. 1996). The APA is intended to expand, rather than constrain, public access to the administrative process. NAACP, Inc. v. Florida Board of Regents, 863 So. 2d 294, 298 and 300 (Fla. 2003).

59. The parties submitted a substantial amount of evidence during the hearing intended to prove that CCRC-MR is either an executive agency or a legislative agency. Courts have wrestled over the years with similar issues. See, e.g., Office of the State Attorney for the Eleventh Judicial Circuit v. Polites, 904 So. 2d 527 (Fla. 3d DCA 2005)(a state attorney carries out an executive function when exercising prosecutorial discretion but a public defender does not exercise an executive function). Compare Orlando-Orange County Expressway Authority v. Hubbard

Construction Co., 682 So. 2d 566 (Fla. 5th DCA 1996)(territorial test showed expressway authority operating in more than one county is a state agency), and Pepin v. Division of Bond Finance, 493 So. 2d 1013 (Fla. 1986)(functional test showed intra-county part of statewide system served a public purpose and benefited the citizens of the state), with Booker Creek Preservation, Inc. v. Pinellas Planning Council, 433 So. 2d 1306 (Fla. 2d DCA 1983)(territorial test showed planning council was a unit of local government and not a state agency because council authority was limited to one county), and Rubinstein v. Sarasota County Public Hospital Board, 498 So. 2d 1012 (Fla. 2d DCA 1986)(territorial test showed hospital board is not a state agency because jurisdiction is confined to one county).

60. A determination of whether CCRC-MR is an executive or legislative agency may have been necessary if Petitioners were to have pursued the remedies in Subsection 120.57(1)(e). Such a proceeding may have required DOAH to determine whether the challenged agency statement is an invalid exercise of delegated legislative authority for one or more of the reasons described in Subsections 120.52(8)(b) through (f).

61. Petitioners did not pursue the remedies in Subsection 120.57(1)(e). Rather, Petitioners seek the remedies authorized in Subsection 120.56(4).

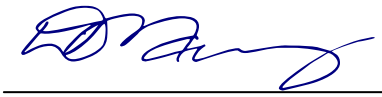
62. The scope of this proceeding is limited to a determination that the agency statement is an invalid rule within the meaning of Subsection 120.52(8)(a). The agency statement challenged in this proceeding satisfies the statutory definition of a rule, Respondent violated the rulemaking procedures prescribed in Section 120.54, and the evidence did not overcome the presumption that rulemaking is feasible.

ORDER

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

ORDERED that, pursuant to Subsection 120.56(4)(c), the challenged agency statement violates Subsection 120.54(1)(a).

DONE AND ORDERED this 11th day of January, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 2007.

ENDNOTES

1/ The relevant provisions of § 11.062 have remained unchanged from at least 2001 to the date of the hearing.

2/ The statute does not prohibit the use of salaries, travel expenses, and per diem by department employees to lobby the legislative and executive branches of government. Section 11.062 provides:

> 11.062. Use of state funds for lobbying prohibited; penalty
>
> (1) No funds, exclusive of salaries, travel expenses, and per diem, appropriated to, or otherwise available for use by, any executive, judicial, or quasi-judicial department shall be used by any state employee or other person for lobbying purposes, which shall include the cost for publication and distribution of each publication used in lobbying; other printing; media; advertising, including production costs; postage; entertainment; and telephone and telegraph. Any state employee of any executive, judicial, or quasi-judicial department who violates the provisions of this section shall have deducted from her or his salary the amount of state moneys spent in violation of this section.
>
> (2)(a) A department of the executive branch, a state university, a community college, or a water management district may not use public funds to retain a lobbyist to represent it before the legislative or executive branch. However, full-time employees of a department of the executive branch, a state university, a community college, or a water management district may register as lobbyists and represent that employer before the legislative or executive branch. Except as a full-time employee, a person may not accept any public funds from a department of the executive branch, a

state university, a community college, or a water management district for lobbying.

(b) A department of the executive branch, a state university, a community college, or a water management district that violates this subsection may be prohibited from lobbying the legislative or executive branch for a period not exceeding 2 years.

(c) This subsection shall not be construed to prohibit a department of the executive branch, a state university, a community college, or a water management district from retaining a lobbyist for purposes of representing the entity before the executive or legislative branch of the Federal Government. Further, any person so retained is not subject to the prohibitions of this subsection.

(d) A person who accepts public funds as compensation for lobbying in violation of this subsection may be prohibited from registering to lobby before the legislative or executive branch for a period not exceeding 2 years.

(e) A person may file a written complaint with the Commission on Ethics alleging a violation of this subsection. The commission shall investigate and report its finding to the President of the Senate, the Speaker of the House of Representatives, and the Governor and Cabinet. Based upon the report of the Commission on Ethics or upon its own finding that a violation of this subsection has occurred, a house of the Legislature may discipline the violator according to its rules, and the Governor or the Governor and Cabinet, as applicable, may prohibit the violator from lobbying before the executive branch for a period not exceeding 2 years after the date of the formal determination of a violation. The Commission on Ethics shall adopt rules

necessary to conduct investigations under this paragraph.

3/ Neither party asserts that CCRC-MR is a judicial or quasi-judicial department of government within the meaning of Section 11.062. Compare DFS Report of Investigation, Exhibit 55 with Petitioners' Legal Memorandum in support of Rule Challenge Petition Pursuant to 120.56(4).

4/ The statement that CCRCs were moved to the executive branch of government is inconsistent with the legislative history of Ch. 27. In 1985, CCRCs were organized as agencies in the judicial branch of government. The legislature revised that structure in 1997. While the draft legislation in 1997 moved CCRCs from the judicial to the executive branch of government, the legislature deleted the provision that placed CCRCs within the executive branch of government from the final version of the bill enacted into law. See discussion and citations to legislative history in Petitioners' Legal Memorandum attached to the rule-challenge petition.

5/ The argument may have relevance in a proceeding conducted pursuant to Subsection 120.57(1)(e). In a proceeding conducted pursuant to Subsection 120.56(4), however, evidence that the agency head does not enforce an agency statement in a particular case demonstrates the exercise of prosecutorial discretion but does not prove that the agency statement fails the test of general applicability. By analogy, prosecutorial discretion not to pursue a criminal prosecution does not prove that the criminal statute lacks general applicability.

6/ The definitions in Subsections 11.045 and 11.45 do not define the term "executive agency" and are limited, respectively, to Subsections 11.045 and 11.40 through 11.515. Expanding those statutory definitions to include the definition of an executive agency for the purposes of §11.062 interprets law within the meaning of Subsection 120.52(15).

7/ § 20.02(2), Fla. Stat.

8/ See n. 4, supra.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Amended 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.