STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA HOMETOWN DEMOCRACY, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 06-3968RU
DEPARTMENT OF STATE,	)	
Respondent.	)	

FINAL ORDER

On December 12, 2006, a hearing was held in Tallahassee, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes (2006). The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Ross Stafford Burnaman, Esquire
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For Respondent: Lee Ann Gustafson, Esquire
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STATEMENT OF THE ISSUE

Whether the agency statement listed on the Department of State's (DOS or the Department's) webpage under "Frequently Asked Questions" regarding translation of petitions for constitutional amendment is an unpromulgated rule.

PRELIMINARY STATEMENT

On October 12, 2006, Florida Hometown Democracy, Inc. (Hometown Democracy) filed a Petition for Administrative Determination of Agency Statement Defined as a Rule, asserting that the Department's statement regarding translation of petitions for constitutional amendments is an unpromulgated rule. On October 16, 2006, the case was assigned to the undersigned and on that same day was set for hearing November 14, 2006. On October 24, 2006, Respondent filed a Motion for Continuance requesting that the case be continued until January, stating that the State of Florida would be conducting a statewide election Tuesday, November 7, 2006, and that the staff for the Division of Elections would be involved in the certification process for the election through November 18, 2006. Petitioner opposed the continuance. On November 1, 2006, Respondent's request for continuance was granted based upon good cause shown, and the hearing was rescheduled for December 12, 2006.

The Petitioner filed four sets of Answers from Requests for Admissions, and in the Pre-Hearing Stipulation the parties have stipulated to certain facts that, to the extent they are relevant to resolve the issues raised in the Petition, have been incorporated into the findings of fact below.

The hearing was conducted December 12, 2006. Petitioner presented the testimony of Ion Sancho, Leslie Blackner, Denise Holh and Dawn Roberts, and Petitioner's Exhibits numbered 1-8

were admitted into evidence. Joint Exhibit 1 was also admitted. The Respondent presented no witnesses or exhibits. Official Recognition was granted without objection to Sections 20.10, 97.012, 100.371 and 101.161(2), Florida Statutes (2006); United States Code provisions 42 U.S.C. § 1973aa-1a, 42 U.S.C. § 1973(a), and 42 U.S.C. § 1973b(f)(4); 67 Federal Register 48871 - 48873 (July 26, 2002)(Excerpt from the Bureau of Census' Notice of Determination); Department of State Advisory Opinion DE-94-06; Spanish Guide to the Proposed Constitutional Amendments on the 2006 General Election Ballot: "Propuesta de Reforma Constitucional para Someter a Votacion el 7 de Noviembre de 2006," published by the Division of Elections; Florida Administrative Code Rules 1S-2.009 and 1S-2.0091; and the November 7, 2007 request by the Florida Attorney General to the Supreme Court of Florida regarding the citizens' initiative to amend the constitution in Petition Serial Number 05-22, filed in Case No. SC05-2183.

The parties were given until January 12, 2007, to file recommended orders, and the transcript used in this case was filed with the Division of Administrative Hearings on January 18, 2007.[1/] Both parties filed Recommended Orders which have been considered in the preparation of the Final Order.

FINDINGS OF FACT

1. DOS has general supervision and administration of Florida's election laws. As Florida's chief election officer,

the Secretary of State has a responsibility to obtain and maintain uniformity in the interpretation and implementation of the election laws. This function is accomplished through the Division of Elections.

2. Hometown Democracy is a Florida corporation and political action committee. It is the sponsor of a citizen's initiative to amend the Florida Constitution, with an approved petition serial number 05-18 (the Petition).

3. DOS is responsible for the content of the website at http://election.dos.state.fl.us/initiatives/faq.shtml.

4. The website contains a section entitled "Frequently Asked Questions." One of the questions (and answer) included on the website is the following:

> 5. Can we print our petition in Spanish?
>
> Yes. However, the Division of Elections does not proof it; that is the committee's responsibility.

5. On or about March 24, 1994, the Division of Elections issued Advisory Opinion DE94-06. In that Advisory Opinion, the Division stated in part:

> As to your second question, a Spanish translation of a previously approved initiative petition in English need not be submitted in writing to the Division for format review. The Division has neither the responsibility nor the authority to verify that the wording of the Spanish translation is the same as the English version. That responsibility rests with the sponsor of the initiative. To reduce potential differences in interpretation that could result from a language translation, however, it is

> suggested that the Spanish language version be printed on the reverse side of the approved English language form.

6. DOS provided the text of proposed constitutional amendments, including citizens' initiatives, to various Florida newspapers for publication prior to the 2004 general election. The citizens' initiatives were those for which the requisite number of signatures had been collected and which had been approved for placement on the ballot.

7. DOS has published the text of proposed constitutional amendments being placed on a statewide ballot in both English and Spanish, including citizens' initiatives where the sponsor has not submitted a Spanish version of the petition to the Department of State for review.

8. On or about September 22, 2005, Floridians for Stem Cell Research and Cures, Inc., submitted a Spanish version of a citizens' initiative, serial number 05-22, to the Division of Elections.

9. On December 13, 2005, the Division of Elections responded to the Floridians for Stem Cell Research and Cures, Inc., that it would not undertake review of the format of the Spanish version of citizens' initiative serial number 05-22.

10. The Department of State has adopted Florida Administrative Code Rule 1S-2.009, "Constitutional Amendment by Initiative Petition." The Rule was adopted to implement Sections 100.371 and 101.161, Florida Statutes, and has been in existence

in some form since 1979. Relevant portions of the current version of the Rule state:

> 1S-2.009 Constitutional Amendment by Initiative Petition.
>
> (1) Submission of Initiative Petition. Any proposed initiative amendment to the State Constitution to be placed on the ballot shall be submitted by the sponsoring political committee to the Division of Elections for approval as to format prior to circulation of the proposed initiative amendment. Such submission shall be in writing and shall include a copy or a facsimile of the proposed form to be circulated. No initiative petition form for signatures may be circulated unless approved by the Division of Elections.
>
> (2) Requirements and Approval of Initiative Form. The Division shall review the initiative petition form solely for sufficiency of the format and shall render a decision within the seven (7) days following receipt. The Division shall not review the petition form for legal sufficiency. The format of the petition form is deemed sufficient only if the petition form:
>
> (a) Is printed on separate cards or individual sheets of paper. The minimum size of such forms shall be 3 inches by 5 inches and the maximum shall be 8 1/2 inches by 11 inches.
>
> (b) Is clearly and conspicuously entitled at the top of the form "Constitutional Amendment Petition Form."
>
> (c) Includes adequate space for the signee's name, legal residential street address, city, county, date of birth, signature, and date of signature.
>
> (d) Contains the ballot title that shall not exceed 15 words and the ballot summary of the proposed amendment or other public measure that shall not exceed 75 words in length as prescribed in subsection (4).
>
> (e) Conspicuously contains the full text of the amendment being proposed including the article and section being created or

amended, preceded by a ballot title and ballot summary. If the text must be printed on both sides of the form, it shall be clearly indicated that the text is continued or begins on the other side.

(f) Contains space for only one elector's signature. The Division will not approve petition forms providing for multiple signatures per page.

(g) Is marked, in accordance with Section 106.143, F.S., governing political disclaimers, with "paid political advertisement" or contains the abbreviation "pd. pol. adv." and identifies the name of the sponsoring political committee, and the name of the entity paying for the advertisement if different from the name of the sponsoring political committee.

(h) Contains space, in accordance with Section 106.19(3), F.S., for the name and address of a paid petition circulator, in the event the petition form is gathered by a paid petition circulator.

11. In 2006, Rule 1S-2.009 was amended to include the following subsection:

(7) Changes. Any change to a previously approved petition form shall be submitted to the Division of Elections for review. No person or entity other than the sponsoring political committee of the previously approved petition form can submit a change or changes to the previously approved petition form. The Division of Elections must approve any material change to a previously approved petition form. A material change constitutes a change in the wording of the text of the proposed amendment, the ballot title, or ballot summary, or a change in punctuation or layout, or a change to the political disclaimer. Any material change submitted for approval to a previously approved initiative petition constitutes a request for approval of a new petition form and shall be assigned a different serial number upon approval by the Division of Elections. [Emphasis supplied.]

12. The description of a "material change" contained in subsection (7) does not include a translation of a previously approved citizens' initiative. After the adoption of subsection (7), a political action committee seeking to circulate a translation of a previously submitted citizens' initiative would need to submit the translation to the Division because it would constitute a change, but a translation, standing alone, would not constitute a material change.

13. Hometown Democracy hired a professional translation service to prepare a certified Spanish translation of the Hometown Democracy Petition. Hometown Democracy made an inquiry of the Division of Elections to determine the accuracy of the Spanish translation of the Petition. On August 30, 2006, Hometown Democracy submitted the Spanish translation of the Petition, seeking approval to circulate it for signatures of registered voters and for verification by Supervisors of Elections in order to qualify for the general election ballot.

14. On or about September 8, 2006, the Director for the Division of Elections responded to Hometown Democracy's August 30, 2006, letter and stated in part:

> The format of the Spanish version of this petition appears to follow the format of the originally approved petition, with no evident material change. No review of the legal sufficiency of the text of the proposed amendment has been nor will be undertaken by the Division of Elections.

15. The Division has never approved a Spanish translation of an approved citizens' initiative petition form.

16. As of the date of hearing, there has been no challenge to the accuracy of the translation secured by Hometown Democracy.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

18. Petitioner has the burden of demonstrating by a preponderance of the evidence that the agency statement is a rule as defined by Section 120.52(15), Florida Statutes (2006). §120.56(4)(b), Fla. Stat. (2006) The burden then shifts to the agency to prove that rulemaking is not practicable or feasible. Id.

19. The Department of State has general supervision and administration of Florida's election laws. § 15.13, Fla. Stat. (2006). Section 97.012(14), Florida Statutes (2006), authorizes the Secretary to:

> (14) Bring and maintain such actions at law or in equity by mandamus or injunction to enforce the performance of any duties of a county supervisor of elections or any official performing duties with respect to chapters 97-102 and chapter 105 or to enforce compliance with a rule of the Department of State adopted to interpret or implement any of those chapters.

20. Section 100.371, Florida Statutes (2006), provides in pertinent part:

> (1) Constitutional amendments proposed by initiative shall be placed on the ballot for the general election, provided the initiative has been filed with the Secretary of State no later than February 1 of the year the general election is held. A petition shall be deemed to be filed with the Secretary of State upon the date the secretary determines that the petition has been signed by the constitutionally required number of electors.
>
> (2) The sponsor of an initiative amendment shall, prior to obtaining any signatures, register as a political action committee pursuant to s. 106.03 and submit the text of the proposed amendment to the Secretary of State, with the form on which the signatures will be affixed and shall obtain the approval of the Secretary of State of such form. The Secretary of State shall adopt rules pursuant to s. 120.54 prescribing the style and requirements of such form. Upon filing with the Secretary of State, the text of the proposed amendment and all forms filed in connection with this section must, upon request, be made available in alternative formats.

21. Section 101.161, Florida Statutes (2006), provides in pertinent part:

> (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. . . . Except for amendments and ballot language proposed by joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words

> in length, of the chief purpose of the measure. . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.
>
> (2) The substance and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s. 120.54. The Department of State shall give each proposed constitutional amendment a designating number for convenient reference. This number designation shall appear on the ballot. Designating numbers shall be assigned in the order of filing or certification and in accordance with rules adopted by the Department of State. The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on.

22. Section 120.52(15), Florida Statutes (2006), defines a "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency. . . ." An agency statement or policy is a rule if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law. Jenkins v. State, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003); Department of Revenue v. Novoa, 745 So. 2d 378, 380 (Fla. 1st DCA 1999); Department of Transportation v. Blackhawk Quarry Company of Florida, Inc., 528 So. 2d 447, 449 (Fla. 5th DCA 1988).

23. To challenge an agency statement as a rule, Petitioner

must demonstrate that its substantial interests are affected by the agency statement. To do so, Petitioner must show that 1) the rule or policy will result in a real or immediate injury in fact; and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Florida Board of Medicine, 917 So. 2d 358 (Fla. 1st DCA 2005); Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 243 (Fla. 1st DCA 2002), superseded on other grounds, Department of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006).

24. Petitioner has demonstrated standing to bring this proceeding. Petitioner is a political action committee seeking to have its citizen's initiative placed on the ballot. The ability to use a Spanish translation in pursuit of signatures is significant to the initiative's success. The process used for determining what steps must be taken in order to comply with the requirements of Section 100.371 is within the zone of interest to be regulated in this instance.

25. However, Petitioner has not demonstrated that the agency statement is a rule as contemplated by Section 120.52(15). In The Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998), the Department determined that the amount represented by a factoring scheme used by petitioners in connection with requests for reimbursement for cleaning up petroleum contaminations would be denied. The Department had a rule in place concerning the

necessary qualifications for reimbursement, but the rule did not expressly address the factoring scheme at issue in the petitioners' requests for reimbursement. The petitioners challenged the Department memoranda outlining its factoring and markup policy. Ultimately, the First District Court of Appeal determined that the Department's actions were justified on the basis of the controlling statute and existing rule. The Court stated:

> An agency statement that is the equivalent of a rule must be adopted in the rulemaking process. See, e.g., Christo v. Statement Department of Banking and Fin., 649 So. 2d 318 (Fla. 1st DCA 1995); Florida League of Cities v. Administration Comm'n, 586 So. 2d 397 (Fla. 1st DCA 1991). This requirement, carried forward in section 120.54(1), Florida Statutes (Supp. 1996), prevents an administrative agency from relying on general policies that are not tested in the rulemaking process, but it does not apply to every kind of statement an agency may make. Rulemaking is required only for an agency statement that is the equivalent of a rule, which is defined as a statement of "general applicability."
>
> 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 continually attack the government for its failure to have a rule that precisely addresses the facts at issue.

26. The same can be said here. In this case, the Department has the statutory responsibility to provide ballot language in alternative formats upon filing, i.e., at the point

when the Secretary determines that the petition has been signed by the constitutionally required number of electors. § 100.371(1), Fla. Stat. (2006). This requirement is consistent with Section 101.2515, Florida Statutes, which provides:

> Upon the request of a supervisor of elections made no later than 60 days prior to the date of a general election, the Department of State shall provide a written translation of a statewide ballot issue in the language of any language minority group specified in the provisions of s. 203 of the Voting Rights Act of 1965, as amended, as applicable to this state.

Both provisions address matters that are ready for placement on the ballot as opposed to initiatives still in the signature-collection process. There is no requirement that the Department address the issue of translation at an earlier point in the process.

27. Likewise, DOS's current rule specifies that all changes (which would include translations) to an initiative must be submitted for review, but that only material changes must actually be approved. Rule 1S-2.009(7) expressly defines what constitutes a material change, and translation of an initiative where the English version has been approved previously is not listed as a material change. Therefore, the statement on the DOS website is consistent with the existing rule.

28. When the statement is viewed in context, it is clear that it simply confirms DOS's position regarding the parameters of its statutory responsibility, consistent with its existing rule. The agency statement does not require compliance with any standard, it simply states that DOS does not proof translations.

It creates no rights while adversely affecting others, and it does not have the direct and consistent effect of law. To require an agency to promulgate a rule in each instance where the agency confirms that a function is beyond its responsibilities would serve no purpose and is not contemplated by Sections 120.52(15) and 120.54(1).

CONCLUSION

Upon consideration of the facts found and conclusions of law reached, it is

ORDERED:

That the Petition for Administrative Determination of Agency Statement Defined as a Rule be dismissed.

DONE AND ORDERED this 25th day of January, 2007, in Tallahassee, Leon County, Florida.

S

LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2007.

ENDNOTE

[1/] Copies of the transcript were apparently delivered to counsel for both parties on January 2, 2007. However, the transcript was not filed on the docket for this case. Upon learning that the

transcript was not filed as believed, counsel for Petitioner delivered his copy of the transcript to the Clerk's office for duplication and filing.

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 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.