

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SYDNEY T. BACCHUS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 06-4816RX  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER OF DISMISSAL

On January 8, 2007, a hearing was held in Tallahassee, Florida, pursuant to the authority granted in Sections 120.56, 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Sydney T. Bacchus, Ph.D., pro se  
Post Office Box 174  
Athens, Georgia 30603-0174

For Respondent: Jennifer Tschetter, Esquire  
Office of the General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0750

For Tom Scott: M. Catherine Lannon, Esquire  
Office of the Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

Whether Florida Administrative Code Rule 61G16-9.001 is an invalid exercise of legislatively delegated authority in

violation of Section 120.52(8), Florida Statutes, and whether certain statements of the Department of Business and Professional Regulation (DBPR or the Department) are "agency statements" defined as rules that should be adopted through the rulemaking process pursuant to Section 120.54, Florida Statutes.

PRELIMINARY STATEMENT

This case originated with the filing of a Petition for Formal Administrative Hearing to Determine the Invalidity of Existing Rules, filed November 29, 2006. On December 1, 2006, the case was assigned to the undersigned and noticed for hearing December 29, 2006. The Petition cited several different rules but did not clearly identify which of those rules Petitioner intended to be the subject of this proceeding. The Petition also appeared to challenge the failure of the Department to enact certain rules Petitioner contends it is required to adopt, as well as challenging statements made in a Notice to Cease and Desist and an Administrative Complaint as agency statements not adopted as rules. The Administrative Complaint is the subject of a separate request for hearing and, at the time of hearing in this case, had not been referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On December 5, 2006, the Department filed a Motion to Dismiss, Motion for Protective Order and Memorandum of Law, asserting that it was unclear what rules Petitioner was trying to

challenge and that Petitioner lacked standing to challenge the only rule referenced in the Order of Assignment by Chief Judge Cohen. The Motion also sought a protective order for the scheduled deposition of the person who was responsible for finding probable cause against Petitioner with respect to the Administrative Complaint. Finally, the Motion sought a sixty-day continuance based upon the previously scheduled surgery of Respondent's counsel. After response by Petitioner and a telephone hearing with the parties conducted December 5, 2006, an Order was issued granting the Motion to Dismiss, to the extent that the Petition failed to specify which rules were the subject of challenge and seeks to challenge agency statements made in the Administrative Complaint as unpromulgated rules; granted the protective order with respect to the pending deposition; and granted a continuance until January 8, 2006. Petitioner was directed to file an Amended Petition no later than December 20, 2006, specifically identifying which rules are the subject of her challenge.

On Thursday, December 14, 2006, Petitioner filed a Motion to Compel Answers to Interrogatories and to Obtain After the Fact Permission to Exceed 30 Interrogatories. On Monday, December 18, 2006, the Department filed an Emergency Motion to Quash Notice of Taking Deposition *Duces Tecum*, followed the next day with a Response to Petitioner's Motion to Compel Answers to Interrogatories. On December 19, 2006, Petitioner filed a

Response to Respondent's Emergency Motion to Quash Notice of Taking Deposition Duces Tecum, as well as Petitioner's Request for an Extension of Time to Prepare an Amended Petition and an Emergency Telephonic Hearing on Petitioner's Motion to Compel. On December 20, 2006, a motion hearing was conducted on all pending motions and an Order was entered denying the Petitioner's Motion to Compel; granting Petitioner's request to exceed 30 interrogatories, provided they were directed to issues in this case; granting the Department's Motion to Quash Subpoena Duces Tecum; and granting Petitioner until December 22, 2006, to file her Amended Petition.<sup>1/</sup>

On December 26, Petitioner filed her Amended Petition, which will be described more fully in the Findings of Fact below. From January 2, 2007, until January 5, 2007, the following Motions were filed: 1) Petitioner's Emergency Motion to Compel Discovery Responses and Request to Expand Time for Hearing (January 2, 2007); 2) Respondent's Motion to Dismiss Amended Petition (January 3, 2007); 3) Respondent's Motion to Quash Subpoena Duces Tecum and for Validation of Termination of Deposition (January 5, 2007); 4) Motion to Quash Subpoena of Tom Scott, Motion for Protective Order and Request for Attorneys Fees (filed on behalf of Tom Scott by the Department of Legal Affairs, January 5, 2007); and 5) Petitioner's Motion to Continue Deposition and for Sanctions (January 5, 2007).<sup>2/</sup> At the commencement of the

hearing January 8, 2006, Petitioner filed an additional Motion in Limine.

At the commencement of the hearing, Petitioner's Emergency Motion to Compel Discovery Requests was denied as premature, inasmuch as the discovery about which Petitioner complained was not yet due at the time she filed the Motion. Considerable argument was presented on the Respondent's Motion to Dismiss, which was granted, based upon the undisputed facts outlined below.

#### FINDINGS OF FACT

1. Petitioner, Dr. Bacchus, is a hydroecologist with a multidisciplinary degree. While Dr. Bacchus lives in Georgia, she alleges that a substantial amount of her income comes from conducting environmental consulting services in Florida. According to her Amended Petition, Dr. Bacchus is not licensed by the Department.

2. Respondent, Department of Business and Professional Regulation, is the state agency charged with the licensing and regulation of a variety of professions. The practice of geology is among the professions it regulates, pursuant to Chapters 455 and 492, Florida Statutes. Created within the Department is the Board of Geology.

3. Petitioner is the subject of an Administrative Complaint issued on or about September 27, 2006, charging her with the unlicensed practice of geology in violation of Section

492.112(1)(a), Florida Statutes (2005). The Administrative Complaint, which is attached as an Exhibit to the Amended Petition, does not cite to any rules. As of the date of hearing, the Administrative Complaint had not been referred to the Division of Administrative Hearings

4. Petitioner does not allege that she has any intention of seeking licensure from the Department.

Florida Administrative Code Rule 61G16-9.001

5. Florida Administrative Code Rule 61G16-9.001 is a rule adopted by the Board of Geology, as opposed to the Department of Business and Professional Regulation. The rule, entitled "Disciplinary Guidelines," identifies the range of penalties normally imposed by the Board of Geology against licensees for violations of provisions in Chapters 455 and 492. All of the possible violations addressed by the Disciplinary Guidelines are statutory violations.

6. The rule is lengthy and will not be repeated verbatim. The text of subsections (1) and (2) are tables of penalty ranges. Subsection (1) deals with violations of provisions in Chapter 492, whereas subsection (2) of the rule addresses violations of Chapter 455. Subsection (3) is entitled "The Usual Conditions" and outlines provisions that are included in all disciplinary orders; conditions imposed whenever fines and costs are imposed; conditions which may be imposed with probation; and conditions which may be imposed when a license is suspended.

7. Subsection (4) identifies the purpose of the Disciplinary Guidelines, and states:

(4) Purpose of guidelines -- The range of penalties set forth above is the range from which disciplinary penalties will be imposed upon licensees guilty of violations of the laws and rules. The purpose of these guidelines is to give notice of the range of penalties which will normally be imposed for specific violations. The guidelines are based upon a single count violation of the provision listed. Multiple counts of violations of the same provision, or unrelated provisions of the law or rules will be grounds for enhancement of penalties or imposition of additional penalties. [Emphasis supplied.]

8. Subsection (5) of the rule addresses aggravating and mitigating circumstances to be considered when imposing penalty, and subsection (6) identifies those instances when the Department may issue a Notice of Noncompliance.

9. The rule lists as its specific authority Sections 455.2273, 492.104(1), and 492.113(3), Florida Statutes. The laws implemented are Sections 455.227, 455.2273, 492.104(1), and 492.113(2), Florida Statutes.

10. Section 455.227, Florida Statutes, identifies "across-the board" acts that constitute grounds for which disciplinary action may be taken by professional licensing boards or by the Department, where no professional licensing board exists. The penalties that can be imposed are the refusal to certify, or certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of

practice; imposition of an administrative fine; issuance of a reprimand; placement of a licensee on probation; or corrective action.

11. Section 455.2273, Florida Statutes (2006), provides in pertinent part:

455.2273 Disciplinary Guidelines

(1) Each board, or the department where there is no board, shall adopt, by rule, and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board, or the department where there is no board, pursuant to this chapter, the respective practice acts, and any rule of the board or department.

12. Section 492.104(1), Florida Statutes (2006), provides:

The Board of Professional Geologists has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this chapter. Every licensee shall be governed and controlled by this chapter and the rules adopted by the board. The board is authorized to set, by rule, fees for application, examination, certificate of authorization, late renewal, initial licensure, and license renewal. These fees should not exceed the cost of implementing the application, examination, initial licensure, and license renewal or other administrative process and shall be established as follows:

(1) The application fee shall not exceed \$150 and shall not be refundable.

13. Section 492.113(2), Florida Statutes (2006), states that the Board of Geology shall specify what acts or omissions constitute a violation of section (1) of the section, which is entitled "Disciplinary Proceedings." Subsection (1) identifies



several different grounds for which disciplinary action may be taken against a licensee.

14. While Section 492.113(2) is listed as a law being implemented by Rule 61G16-9.001, the Rule does not specify any acts or omissions constituting a violation of Section 492.113(1), Florida Statutes. It simply paraphrases the statutory language of each statutory provision and gives a range of penalties for each violation.

Agency Statements as Rules

15. Petitioner also attempts to challenge agency statements and agency actions not adopted as rules. The Amended Petition states:

2. . . . Examples of the text and description of the statements and agency actions, pursuant to § 120.56(4)(a), F.S. and as defined in § 120.52, F.S., are provided in the Department's:

- a) Administrative Complaint against Petitioner, SYDNEY T. BACCHUS, Ph.D. (hereinafter "Dr. Bacchus") signed on September 27, 2006, attached and incorporated by reference hereto as Exhibit A;
- b) Undated Settlement Stipulation accompanying the above-referenced Administrative Complaint against Dr. Bacchus, attached and incorporated by reference hereto as Exhibit B.
- c) Cease and Desist Order against Dr. Bacchus signed on February 15, 2006, attached and incorporated by reference hereto as Exhibit C.
- d) Complaint No. 2005056737 against Dr. Bacchus signed on January 26, 2006 and threatening criminal charges, attached and incorporated by reference hereto as Exhibit D; and

e) Complaint No. 2003063556 against Dr. Bacchus signed on May 22, 2003 and threatening criminal charges, attached and incorporated by reference hereto as Exhibit E. [Emphasis Supplied.]

Failure to Adopt Rules

16. Petitioner apparently also seeks to address the failure of the Department to adopt rules identifying what acts constitute the unlicensed practice of geology. The Amended Petition states in pertinent part:

43. In 1987, the Board was authorized to govern and control every licensed professional geologist, pursuant to s. 4, ch. 87-403, Laws of Florida. The Board was not authorized to govern and control persons not licensed as a professional geologist.

44. In 1987, the Department was mandated to "specify, by rule what acts or omissions constitute a violation" of the "[P]ractice of geology," pursuant to subsection (2) s. 12, ch. 87-403 Laws of Florida.

\* \* \*

46. The Department has failed to specify, by rule, "what acts or omissions constitute a violation" of the "[P]ractice of geology," to allow an unlicensed person to "know" what constitutes the practice of geology. In the absence of such specificities, a person cannot "knowingly" engage in the unlicensed "[P]ractice of geology" or "knowingly employ unlicensed persons to practice geology, pursuant to subsection (1) s. 12, ch. 87-403 Laws of Florida. [Emphasis in original.]

17. Petitioner's Unilateral Pre-Hearing Statement does not mention Rule 61G16-9.001. Petitioner's statements identifying what she views as the scope of the proceeding state the following:

Brief General Statement of Petitioner's  
Position

The Department is regulating unlicensed members of the public under Chapters 492 and 455 Florida Statutes, using unpromulgated rules and rules that are an invalid exercise of delegated legislative authority. Such unlawful regulation violates the constitutional freedom of speech of unlicensed persons. The Department is impermissibly encroaching on the powers of the judiciary.

\* \* \*

Issue of Fact that Remain to be Litigated

1. Whether the Department is regulating unlicensed members of the public under Chapters 492 and 455 Florida Statutes, using unpromulgated rules and rules that are an invalid exercise of delegated legislative authority.

Issue of Law that Remain to be Litigated

1. Whether the Department exceeded its lawful delegation of authority to regulate the "practice of professional geology" in the manner in which it is being regulated in Florida.

2. Whether the Department has failed to give adequate notice to the public regarding what constitutes the unlicensed "practice of professional geology" in Florida.

3. Whether the Department's rules are over-broad, vague, and are in invalid exercise of delegated legislative authority. . . .

4. Whether the Department was required to promulgate rules to regulate the unlicensed "practice of professional geology" in Florida, but failed to promulgate those rules.

5. Whether the Department has been engaged in a pattern of action that constitutes an unpromulgated rule.

6. Whether the Department's recent regulation of the "practice of professional geology" in Florida constitutes selective enforcement.

18. Petitioner was questioned at length during the consideration of the Motion to Dismiss regarding the basis of her challenge. She indicated not that she was concerned with the application of Rule 61G16-9.001 against her, but that she wished to challenge the entire regulatory scheme:

THE COURT: . . . Doctor, all the disciplinary guideline rule does is name a statutory or rule violation. It paraphrases the statute itself. It doesn't provide any additional language to my knowledge and provides what penalty would be imposed should a licensee violate one of those statutory provisions. It doesn't -- and as I look at this, it doesn't even have any rule violations. Its statutory.

DR. BACCHUS: Yes, Your Honor, I understand that, and I understand that it is confusing, but in fact I had received two charges from the department over a period of -- beginning -- I received the first notice in 2003 for a complaint filed I believe the previous year, and then second complaint that I received early in 2006 for a complaint filed against me in 2005 basically alleging that I was producing documents that in fact were required to have the seal and signature of a licensed geologist.

So in fact the agency is regulating unlicensed persons using the language from 61G16 despite the fact that they are not referencing the rule citation. You know, I'm an unlicensed individual, complaints are being filed against me because I am producing documents that have only my name.

No reference to the title of professional geology, no insinuation that I am a geologist, a professional geologist, a licensed professional geologist, no reference to that whatsoever, yet complaints are being filed against me with the department and they are taking action against me.

THE COURT: But again, getting back to this rule. Even assuming -- and the merits of your administrative complaint are not before me and we're not going to talk about them.

DR. BACCHUS: Yes, Your Honor, I understand.

THE COURT: But even assuming that, even assuming that the department were going to take action against you based on whatever is charged in that administrative complaint, how is this rule -- you're not going to be -- this rule specifically says licensees.

DR. BACCHUS: Yes, Your Honor, I understand that, but that's not how its being applied by the Department. I understand that this hearing is not a hearing to be addressing my complaints, but as I understand, my complaints are relevant with regard to my standing for this issue before the court today. And in fact because of the actions of the department against me, you know, multiple complaints can be filed against me for any written document that I have produced in the past or any written document that is pending, peer-reviewed publications that are pending to be released, because I don't have a license, they are using that language without referencing that rule to take action against me, your Honor.

THE COURT: But again, you're saying they're not referencing that rule.

DR. BACCHUS: That's correct, Your Honor. They're not referencing that, but because there is no comparable rule that has been promulgated and adopted and is being implemented for unlicensed activities, there is only the statute they are referencing, only 492 and 455, and because there isn't a

comparable rule to 61G16 for unlicensed people, then by nature you have to look at what the licensed activity is to determine what the unlicensed activity is.

19. Similarly, with respect to the actions taken by the Department against her personally, Dr. Bacchus asserted that these actions, which she characterizes as agency statements, give her standing to file this rule challenge. However, she does not allege that the Department's actions necessarily give her standing to challenge the specific rule alleged in the Amended Petition:

THE COURT: So what is your position in terms of standing? These agency statements give you standing to challenge what?

DR. BACCHUS: To challenge the regulation of unlicensed practice of professional geology in Florida. Because the broad sweeping net they are casting, Your Honor, encompasses every form of speech, every form of written document that I produce, whether it is a peer-reviewed publication, whether it is a comment letter to a public agency proposed action, I would have to challenge every single act. I literally cannot act until I am able to know what constitutes the practice of professional geology and the statute does not tell me that.

20. Finally, with respect to what Dr. Bacchus describes as "illegal unpromulgated rules," Dr Bacchus described the unpromulgated rule as "this sweeping action, the fact that the statute does not define geological services, the statute does not define geological documents, yet the agency is taking action not only against me but against a myriad [of] other people for theoretically actions that constitute geological services."

CONCLUSIONS OF LAW

21. 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.

22. Dr. Bacchus' Amended Petition alleges three bases for challenge. For the reasons that follow, Petitioner has not stated a basis for proceeding as a matter of law.

23. Section 120.52, Florida Statutes (2006), defines certain terms as they are used in Chapter 120. The following statutory definitions are pertinent to this proceeding:

(2) "Agency action" means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request made under s. 120.54(7).

\* \* \*

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

\* \* \*

(15) "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: [Exceptions not relevant to this proceedings.]



24. Section 120.56, Florida Statutes (2006), provides in pertinent part:

(1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

\* \* \*

(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. [Emphasis supplied.]

25. DBPR is a licensing agency created pursuant to Section 20.165, Florida Statutes. Created within the Department's Division of Professions is the Board of Geology. § 20.165(4)(a)12., Fla. Stat. (2006) The responsibilities of both the

professional boards and the Department are outlined in Chapter 455, Florida Statutes, and the specific responsibilities with respect to the regulation of the practice of geology are contained in Chapter 492, Florida Statutes.

26. Generally speaking, action against unlicensed persons is addressed in Section 455.228, Florida Statutes (2006), which states in pertinent part:

455.228 Unlicensed practice of a profession; cease and desist notice; civil penalty; enforcement; citations; allocation of moneys collected.--

(1) When the department has probable cause to believe that any person not licensed by the department, or the appropriate regulatory board within the department, has violated any provision of this chapter or any statute that relates to the practice of a profession regulated by the department, or any rule adopted pursuant thereto, the department may issue and deliver to such person a notice to cease and desist from such violation. In addition, the department may issue and deliver a notice to cease and desist to any person who aids and abets the unlicensed practice of a profession by employing such unlicensed person. The issuance of a notice to cease and desist shall not constitute agency action for which a hearing under ss. 120.569 and 120.57 may be sought. For the purpose of enforcing a cease and desist order, the department may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violates any provisions of such order. In addition to the foregoing remedies, the department may impose an administrative penalty not to exceed \$5,000 per incident pursuant to the provisions of chapter 120 or may issue a citation pursuant to the provisions of subsection (3). If the department is required to seek enforcement of the order for a penalty pursuant to s. 120.569, it shall be entitled to collect its

attorney's fees and costs, together with any cost of collection.

Florida Administrative Code Rule 61G16-9.001

27. Petitioner does not have standing to challenge the provisions of Rule 61G16-9.001. Section 120.56, Florida Statutes, allows a person who is substantially affected by a rule or agency statement to initiate a challenge. To establish standing under the "substantially affected" test, a party must demonstrate that 1) the rule or policy will result in a real and 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); see also Office of Insurance Regulation v. AIU Insurance Co., 926 So. 479 (Fla. 1st DCA 2006) (insurance company did not demonstrate that application of the proposed rule will result in a real and sufficiently immediate injury in fact to afford standing to challenge the proposed rule); Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 243, 250 (Fla. 1st DCA 2002), superseded on other grounds, Department of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006).

28. Petitioner does not meet this standard. She has alleged in the Amended Petition and affirmed at hearing that she is not licensed by the Department. Rule 61G16-9.001, by its terms, only applies to licensees who are disciplined by the Board of Geology. Rule 61G16-9.001 cannot be applied to her. Under these circumstances, Petitioner cannot demonstrate that she will

suffer a real and immediate injury in fact as a result of the rule.

29. Neither is she within the zone of interest to be regulated. Rule 61G16-9.001 provides penalties for licensees who are found to be in violation of Chapter 455 or 492. While Petitioner argues that, by comparison, it affects her as an unlicensed person charged with practicing without a license, penalties for such violations are governed by Section 455.228 as opposed to Rule 61G16-9.001.<sup>3/</sup> Compare Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94, 99 (Fla. 1st DCA 1999).

30. Moreover, Rule 61G16-9.001 simply does not provide notice of what constitutes a violation of any provision of Chapter 455 or 492. It provides notice of what penalty may be imposed assuming a licensee is found guilty of violating a named statutory infraction. Under these circumstances, Petitioner has not and cannot allege or demonstrate standing to challenge Rule 61G16-9.001.

#### Agency Statements Defined as Rules

31. Petitioner's attempt to challenge the Department's actions against her as "agency statements" is also not permitted in a Section 120.56 proceeding. The Amended Petition at paragraph 2 attempts to describe agency statements and agency actions, and lists two notices of complaints against Dr. Bacchus; a Cease and Desist Order against Dr. Bacchus; an Administrative

Complaint against Dr. Bacchus; and a proposed settlement stipulation to resolve the Administrative Complaint.

32. Petitioner has confused agency action, which is defined in Section 120.52(2), Florida Statutes, with an agency statement, which is not specifically defined. Moreover, Petitioner has equated preliminary agency actions against her with the definition of a rule under Section 120.52(15). While she identifies in her Amended Petition "examples" of agency actions or statements, when asked directly what agency statement was at issue, she could not name an actual statement in the documents she identified, and she could not name any other agency statement alleged in her Amended Petition.<sup>4/</sup> Her inability to identify the "agency statement" she intended to challenge violates the requirements of Section 120.56(4)(a), Florida Statutes, and deprives the Department of adequate notice of what it is called upon to defend. Aloha Utilities, Inc. v. Public Service Commission, 723 So. 2d 919, 92-21 (Fla. 1st DCA 1999).

33. This case is very similar to the scenario presented in United Wisconsin Life Insurance Co. v. Department of Insurance, DOAH Case No. 01-3135RU (Final Order Issued November 27, 2001), affirmed, 831 So. 2d 239 (Fla. 1st DCA 2002); see also The Pool People, Inc. v. Board of Professional Engineers, 05-1637RU (Final Order issued December 1, 2005). Conclusions of law in the Final Order in United Wisconsin are equally pertinent here:

61. The first question to be resolved is whether any of the three statements challenged by United meet the definition of a "rule" as that term is defined in Section 120.52(15), Florida Statutes. If the statements alleged to be rules in the Complaint are not rules, then the inquiry needs to go no further.

62. In determining whether or not these statements amount to rules by definition, it is important to note as a threshold matter, that for the purposes of this order, the merit, or lack thereof, of the Department's position in the Complaint is not at issue here. In other words, whether the facts asserted in the complaint can be proven, and if so, whether they are violations of the Florida Insurance Code, are matters which await decision on another day.

63. Rulemaking is required only for an agency statement that is the equivalent of a rule, which is defined in Section 120.52(15), Florida Statutes. Environmental Trust, Inc. v. State Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998).

64. It would be inappropriate to speculate in this Order, as to whether the Department may have made statements reflecting generally applicable policies substantially affecting parties through other media which are similar to the allegations in the Complaint. What is clear, however, is that the matters alleged in the Complaint, which are the subject of this litigation, are not agency statements.

65. [The statutory provisions which form the basis for the Administrative Complaint], are, taken together, statutes which prohibit described conduct. They are penal in nature. Some of the sections . . . provide for criminal sanctions. They are announcements of policy enacted into law by the Florida Legislature. They represent the policy of the state. Because the Department is the agency charged with implementing these statutes, the Department is free to allege

facts which might prove to be violations of these statutes, without resort to explanatory rules.

66. It seems unlikely that the Florida Legislature intended that allegations under a prohibitory or penal statute could be subject to collateral attack through a Section 120.54, Florida Statutes, rule challenge. Such a procedure could result in two hearings each time a regulatory action was brought by an agency. In the pursuit of justice through the administrative process, simplicity and economy of resources are primary goals. Permitting collateral challenges in enforcement cases unreasonably derogate those goals.

67. In any event, the "statements" alleged in the Petition to be rules by definition, are not statements of the Department. They are pleadings pertaining to alleged violations of a Florida Statute. Therefore they are not rules by definition. It is further apparent that the proper forum for the resolution of the matters contained in the Complaint is a proceeding pursuant to Section 120.57(1), Florida Statutes.

34. The First District affirmed the Final Order, stating that United Wisconsin had no right to pursue a separate, collateral challenge to an alleged nonrule policy where an adequate remedy exists through a Section 120.57 hearing. The same result is required here. The provision alleged in the Administrative Complaint against Petitioner and referenced in her Amended Petition is a penal provision. The Department is not required to reference a separate rule in its prosecution of that case, and the fact that the Department has chosen to initiate action against her is not a basis for challenging that preliminary action as an unpromulgated rule.

35. Petitioner attempts to distinguish the United Wisconsin decision based upon the fact that she has had two, as opposed to one, Notices to Cease and Desist issued against her. However, the existence of two separate instances where Petitioner has been accused of violating a statutory provision does not make either statement a statement of general applicability. They are statements addressed to a specific party about specific instances of conduct that the Department believes are violations of a specified statutory provision. Such statements are not rules.

36. In reality, what Petitioner is attempting to challenge is the regulatory scheme related to the practice of geology. She is not the first to do so. See Clark v. Department of Professional Regulation, Board of Professional Geologists, 584 So. 2d 59 (Fla. 1st DCA 1991). However, the type of challenge she is attempting to bring is simply not within the narrow scope of a Section 120.56 rule challenge.

#### Failure to Promulgate Rules

37. Finally, Petitioner is attempting to challenge the Respondent's failure to specify by rule, what acts or omissions constitute a violation of the practice of geology. Petitioner cites to subsection (2), s.12, Chapter 87-403, Laws of Florida, as opposed to current Florida Statutes. The provision to which she cites is codified at Section 492.113(2), Florida Statutes, and directs the Board of Geology, as opposed to the Department which is the named respondent here, to adopt rules.



38. Notwithstanding that the directive in Section 492.113(2) is directed to the Board of Geology as opposed to Respondent, Petitioner is in the wrong forum to challenge petition an agency to adopt rules they are mandated to promulgate. Section 120.54(7), Florida Statutes, provides:

(7) PETITION TO INITIATE RULEMAKING.--

(a) Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter.

The petition shall specify the proposed rule and action requested. Not later than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

39. This provision requires that if Petitioner is seeking to have the Board adopt rules defining what constitutes the practice of geology, she must file a petition with the Board of Geology as opposed to the Division of Administrative Hearings. The undersigned has no authority to act on this portion of Petitioner's Amended Petition.

40. The Petitioner has filed a Proposed Final Order suggesting that this proceeding be dismissed "without prejudice with leave to amend by more clearly providing any relevant 'statements' by the Department and how no adequate remedy exists for her through a Section 120.57, F.S. proceeding." However, what Petitioner is attempting to do is allege new, different

"agency statements" from those alleged in the Amended Petition. To the extent that Petitioner seeks to challenge different agency statements from those identified in her Amended Petition, they would constitute a separate challenge.

#### CONCLUSION

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

ORDERED:

1. That the Motion to Dismiss the Amended Petition for Formal Administrative Hearing to Determine the Invalidity of Existing and Illegal Unpromulgated Rules is granted. The Amended Petition is dismissed and all relief sought in the Petition is denied.

2. Respondent's Motion to Quash Subpoena Duces Tecum and for Validation of Termination of Deposition filed January 5, 2007, is denied as moot.

3. The Motion to Quash Subpoena of Tom Scott, Motion for Protective Order and Request for Attorneys Fees filed on behalf of Tom Scott January 5, 2007, is denied as moot.

4. Petitioner's Motion to Continue Deposition and for Sanctions filed January 5, 2007, and Motion in Limine filed January 8, 2007, are denied as moot.

DONE AND ORDERED this 30th day of January, 2007, in  
Tallahassee, Leon County, Florida.

**S**

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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of January, 2007.

ENDNOTES

<sup>1/</sup> Petitioner originally requested until Friday, January 5, 2007, to file her Amended Petition. However, she did not want the formal hearing, scheduled to commence Monday, January 8, 2007, to be continued.

<sup>2/</sup> A conference call was arranged in order to address the first two of these motions, which was to take place Thursday afternoon, January 4, 2007. However, the parties called the Division and informed the undersigned's secretary that they were unable to appear for the scheduled call. Therefore these motions were considered at the beginning of the hearing.

<sup>3/</sup> Ironically, violation of Section 492.112(1)(a) is listed as a violation in the Rule for which a range of penalties is provided under subsection (1) of the Rule. The range of penalties is a fine up to \$500 plus costs, with probation or suspension for a first offense, to a fine of up to \$1,000 plus costs, and suspension or revocation for a subsequent violation. However, the introductory language for the subsection provides "Whenever the Board finds a licensee guilty of violating a provision of Chapter 492, the following Penalty guidelines will be followed." Given this limiting language and the nature of penalties described, it must be assumed that the rule is not intended to apply to persons such as Dr. Bacchus who are not, do not intend to be and have not

been licensed by the Board.

<sup>4/</sup> At hearing, she mentioned for the first time the existence of an agency statement that she asserted appears on the Department's webpage identifying conduct that would be considered the practice of geology. However, no such agency statement appears in her Amended Petition, and it appears that the information referenced that appears on the webpage is an entirely different agency statement than what she alleged was an unadopted rule in this case. Petitioner is free to challenge that statement assuming she can demonstrate standing to do so. However, inasmuch as it referenced an entirely different statement than what was alleged in her Amended Complaint, it was not within the scope of this proceeding.

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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.