

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COMMUNITY HEALTH CHARITIES OF)	
FLORIDA; THE AMERICAN LIVER)	
FOUNDATION; CYSTIC FIBROSIS)	
FOUNDATION; CROHN'S AND COLITIS)	
FOUNDATION; PREVENT BLINDNESS)	
FLORIDA; CHILDREN'S TUMOR)	
FOUNDATION; MARCH OF DIMES;)	
LUPUS FOUNDATION OF AMERICA,)	
FLORIDA ET AL.,)	
)	
Petitioners,)	
)	
vs.)	Case No. 07-3547
)	
DEPARTMENT OF)	
MANAGEMENT SERVICES,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Notice was provided and on November 13 and 14, 2007, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2007). The hearing location was at the offices of the Division of Administrative Hearings, the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing was held before by Charles C. Adams, Administrative Law Judge.

APPEARANCES

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For Respondent: Matthew F. Minnow, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioners " . . . provide[d] direct services in a local fiscal agent's area (so that they may) . . . receive the same percentage of undesignated funds as a percentage of designated funds they receive . . . ", Section 110.181 (2)(e), Florida Statutes (2006), in relation to the 2006 Florida State Employees' Charitable Campaign (the 2006 Campaign).

PRELIMINARY STATEMENT

Petitioners sought consideration of the matter set forth in the Statement of the Issue in a Petition for Formal Hearing filed with the Respondent, Department of Management Services, among other issues in relation to Respondent's rules and policy statements alleged to be rules by definition.

Respondent dismissed the petition on grounds of legal sufficiency. In turn, Petitioners filed an Amended Petition for a Formal Administrative Hearing. In dismissing the Amended Petition Respondent dismissed the Petition without prejudice in stating:

To the extent your amended petition could be construed as a rules challenge, filing of the amended petition with the Department was improper . . . [and it should have been] filed with the Division of Administrative Hearings.

Petitioners sought review of Respondent's jurisdictional order by filing with the District Court of Appeal of Florida, First District. In Community Health Charities of Florida v. State of Fla. Dep't of Management Services, 961 So. 2d 372 (Fla. 1st DCA 2007), the court found the Amended Petition acceptable in its form and held that the case determining Petitioner's rights to receive "undesignated funds," as well as the challenges to Respondent's rule defining "direct services" and alleged non-rule policies need not be bifurcated. The court granted a writ with instructions that Respondent comply with provisions set out in Section 120.569(2)(a) and (2)(c), Florida Statutes (2005). This led to the referral of the case to the Division of Administrative Hearings (DOAH). It was assigned as DOAH Case No. 07-3547 for all purposes.

Respondent referred the Amended Petition for Formal Administrative Hearing to the DOAH on August 1, 2007. In the referral letter accompanying the Amended Petition, Respondent pointed out that the claims in the Amended Petition might need to be resolved within seven (7) days of the date upon the which

the request for hearing was made. As authority Respondent cited to Section 110.181(3)(b), Florida Statutes (2006), which states:

Department action which adversely affects the substantial interests of a party may be subject to a hearing. The proceeding shall be conducted in accordance with chapter 120, except that the time limits set forth in s. 496.405(7), shall prevail to the extent of any conflict.

Section 496.405(7), Florida Statutes (2006), states in pertinent part:

Within 7 days after receipt of a notification that the registration requirements are not satisfied, the charitable organization or sponsor may request a hearing. The hearing must be held within 7 working days after the receipt of the request, and any recommended order, if one is issued, must be rendered within 3 working days of the hearing. The final order must then be issued within 2 working days after the recommended order. If a recommended order is not issued, the final order must be issued within 5 working days after the hearing. The proceedings must be conducted in accordance with chapter 120, except that the time limits and provisions set forth in this subsection prevail to the extent of any conflict.

As explained in the August 2, 2007 letter from Petitioners' counsel, Petitioners did not concede that Section 496.405(7), Florida Statutes (2006), and its time limitations had application to the present case, in that the dispute in the matter involved the right to receive "undesignated funds," as contrasted with any decision concerning "registration

requirements" associated with the Department of Agriculture and Consumer Services under Chapter 496, Florida Statutes (2006), a somewhat different process.

On August 3, 2007, a pre-hearing conference was held by telephone. During the conference the subject of a hearing date was discussed. It was also determined that Petitioners should file a further amendment to their petition clarifying the pleading concerning Respondent's alleged unadopted rules.

On August 6, 2007, a Notice of Hearing was sent setting October 8 through 12, 2007, as hearing dates. On August 6, 2007, an Order of Prehearing Instructions was entered.

On August 10, 2007, a Second Amended Petition for Formal Administrative Hearings was filed, to include its appendix.

In preparation for the hearing, the parties engaged in discovery. To the extent that disputes arose in the case preparation, orders were entered in response, as reflected in the case docket sheet.

Petitioners moved to reset the final hearing from the October 8 through 12, 2007 hearing dates. That motion was granted and the case reset and heard on November 13 and 14, 2007.

On October 19, 2007, Petitioners filed an unopposed motion to amend their Second Amended Petition for Formal Administrative

Hearing, while providing the text for the Third Amended Petition for Formal Administrative Hearing.

On October 23, 2007, Respondent filed a Motion for More Definite Statement in relation to the Third Amended Petition for Formal Administrative Hearing.

On October 26, 2007, an order was entered allowing Petitioners to amend their petition by substituting their Third Amended Petition for Administrative Hearing for the Second Amended Petition for Administrative Hearing.

On November 6, 2007, Petitioners filed a response to the pending Respondent's Motion for More Definite Statement.

On November 8, 2007, an order was entered in which the response to the Motion for More Definite Statement was found to clarify the Third Amended Petition, and the clarification was accepted as sufficient response to the Motion for Definite Statement. In effect the clarifying response became part of the Third Amended Petition for Formal Administrative Hearing.

On November 8, 2007, Petitioners filed a Motion to Allow Witnesses to Appear at Hearing by Telephone. On November 9, 2007, an order granting that motion was entered following the telephone conference to consider the motion.

On November 9, 2007, in response to the Order of Prehearing Instructions the parties filed a Joint Prehearing Statement.

On November 13, 2007, when the hearing commenced Respondent asked that official recognition be made of Section 110.181, Florida Statutes (2006); Florida Administrative Code Chapter 60L-39, in effect between August 29 and December 31, 2006; and Florida Administrative Code Rules 60L-39.0015 and 39.005 in effect on January 23, 2007. The motion was granted.

Other preliminary matters including oral motions made by the Respondent and argument on Respondent's pending Third Motion to Compel Production of Documents pertaining to its second request for production of documents were presented and resolved, as explained in the hearing transcript filed on November 29, 2007.

At hearing Joint Exhibits numbered 1 through 7 were admitted.

At hearing Petitioners presented the testimony of Gwen Cooper and Jane Brand. Petitioners' Exhibits numbered 1 through 38 were admitted. Petitioners' Exhibit numbered 3, is the same as Joint Exhibit numbered 1, and Petitioners' Exhibits numbered 15 through 20 are the same as admitted as Joint Exhibits numbered 2 through 7. In series Petitioners' Exhibits numbered 12A and 12B are separate exhibits.

Respondent presented the testimony of Beth Meredith, Dr. Kenneth S. Armstrong, Jr., Barton Cooper, and Tom Clemons. Respondent's Exhibits numbered 1A, 1B, 3, 5 through 13, 18, 19

and 22 through 24 were admitted. Respondent's Exhibits numbered 1, 25A and 25B were denied admission.

All exhibits described have been forwarded with the record upon entry of the Recommended Order.

Originally the parties were allowed to file post-hearing submittals within 30 days of the filing of the transcript. On December 26, 2007, Petitioners filed an Unopposed Motion to Extend the Time for Filing Posthearing submittals until January 18, 2008. That motion was granted orally and is memorialized here. In addition Petitioners' Unopposed Motion to Exceed the page limit for posthearing submittals was filed on January 17, 2008. It too was orally granted and memorialized here. The timely submitted Proposed Orders have been considered in preparing the Recommended Order.

FINDINGS OF FACT

Stipulated Facts

1. The Florida Legislature created the Florida State Employees' Charitable Campaign in 1993 ("Campaign"). § 110.181(1)(a), Fla. Stat. (2006). The Act requires the Department to "establish and maintain" an annual Campaign, which "is the only authorized charitable fundraising drive directed toward state employees within work areas during work hours, and for which the state will provide payroll deduction." § 110.181(1)(a), Fla. Stat. (2006). State employees are

provided annually with a pledge card that allows them to direct their donations to particular charities. Each employee is given a booklet containing a list of those charities that have qualified to participate in the Campaign. Each employee can either pick from the pre-qualified list, or the employee can give "undesignated funds" that go to no particular charity.

2. The Act requires the creation of a Statewide Steering Committee ("Committee") of seven members appointed by the Administration Commission, and two members appointed by the Department Secretary, all serving staggered terms.

§ 110.181(4), Fla. Stat. In addition to the Committee, the Act calls for the creation of several other steering committees, one "in each fiscal agent area," whose purpose is to "assist in conducting the campaign and to direct the distribution of undesignated funds" ("local steering committees").

§ 110.181(2)(d), Fla. Stat.

3. The Department is required to select through the competitive procurement process a "fiscal agent" or agent whose duties are limited to "receiv[ing], account[ing] for, and distribut[ing] charitable contributions among the participating charitable organizations." § 110.181(2)(a), Fla. Stat. United Way of Florida, Inc., served as the state wide fiscal agent during the 2006 Campaign.

4. Petitioners are 21 charities that were approved by the Committee and participated in the 2006 Campaign. Petitioner Community Health Charities is a "federation" or "umbrella" agency within the meaning of Rule 60L-39.0015(j), Florida Administrative Code, representing each of the other Petitioners in the 2006 Florida State Employees' Charitable Campaign ("2006 Campaign" or "FSECC"). Each Petitioner is either a charity or a federation within the meaning of the Act that participates in the annual statewide campaign and has a direct interest in the proper administration of the Act, including the distribution of designated and undesignated charitable funds generated thereby.

Additional Facts

5. Section 110.181(3), Florida Statutes, grants rulemaking authority to the Respondent in association with the time and manner for charitable organizations to participate in the Campaign. This process is undertaken upon the recommendations of the Committee.

6. In accordance with those opportunities Respondent had adopted administrative rules to implement Section 110.181, Florida Statutes. Among the rules in the Florida Administrative Code were the following: 60L-39.001 (scope and purpose); 60L-39.002 (general requirements); 60L-39.003 (Statewide Steering Committee); 60L-39.004 (Eligibility Criteria for Participation by Charitable Organizations); 60L-39.005 (Application

Procedures); and 60L-39.006 (Duties and Responsibilities of the Fiscal Agent). None of these rules defined the term "direct services" in a "local fiscal agent's area", referred to in Section 110.181(2)(e), Florida Statutes (2006), as that statute controls the opportunity for a charitable organization to receive undesignated funds from the 2006 Campaign. This has been explained as the "first tier distribution" of undesignated charitable contributions made by state employees.

7. After the 2006 Campaign commenced, Respondent adopted a rule that defined the term "direct services." Florida Administrative Code Rule 60L-39.0015(1)(i) provided that definition. The rule was effective January 23, 2007. It defined the term "direct services" as:

Direct services. Identifiable and specific services available in the local fiscal agent's area without any intervention between the services offered and persons served.

8. The 2006 Campaign began in the summer of 2006. December 22, 2006, was the deadline for applying for first tier undesignated funds. Application was made upon a form created for use in the 2006 Campaign. Petitioner's Exhibit numbered 2.

9. On October 17, 2006, by e-mail, Petitioners were made aware of the direct local services certification form and its guidelines, contained in one document, Petitioners' Exhibit numbered 2. Explanations were provided. The e-mail came from

John Kuczwanski, Committee Chairman. This document referenced distribution of the first tier undesignated funds for the 2006 Campaign. It said in pertinent part:

As a result of recent changes to the FSECC Law (s. 110.181(2)(d) and (e), Florida Statutes), the Statewide FSECC Steering Committee is in the process of implementing rules and a process by which federations and unaffiliated/independent organizations will submit information, regarding provision of direct local services in each fiscal agent United Way area, in order to receive a pro-rata share of undesignated funds. The final process and rules will take effect in 2007, and will become a part of the 2007 FSECC application cycle and are a result of input during our rules promulgation process.

Because these formal rules will not be implemented until 2007, an interim process will be in place for the 2006 FSECC. As such, the following process will be utilized by federations and unaffiliated/independent organizations to determine where direct local services are being provided, and thereby eligibility for a pro-rata share of 2006 undesignated funds.

Attached is a spreadsheet, which you must complete and submit to the Statewide FSECC Steering Committee **no later than close of business on Friday, December 22, 2006.**

Instructions for Federations: On the attached spreadsheet, please enter the requested information for your federation and each of your member agencies (that have been approved to participate in the 2006 FSECC) that provide direct local services in the appropriate Fiscal Agent United Way sections. Each section identifies which county(ies) are included in that fiscal agent area. Only enter agencies in the

fiscal agent section(s) in which that agency provides direct local services, as defined on the spreadsheet.

10. The attached spreadsheet (form), in relevant part contained the following:

**2006 Florida State Employees' Charitable Campaign
Direct Local Services Certification Form Guidelines
DEADLINE: December 22, 2006 [Forms received after the deadline will result
in ineligibility for a pro-rata share of undesignated funds.]**

Federation Name:
OR Unaffiliated/Independent Organization Name:
Contact Person:
Email Address:
Telephone Number:

INSTRUCTIONS: Please enter the requested information below for each of your federation's member agencies (that have been approved to participate in the 2006 FSECC) that provide direct local services in the appropriate United Way Fiscal Agency sections below. Unaffiliated/independent organizations should provide the requested information in the appropriate sections for the areas in which your organization provides direct local services.

Name of Organization	Organization Address	Address(es) where the direct service(s) were delivered in the previous calendar year (2005)	Description of the type of direct service(s) delivered ["Direct services" is defined as identifiable and specific services available in the local fiscal agent's area without any intervention between the services offered and persons served.]	# of people served/Population served
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* * *

The form goes on to describe the areas served by the United Way fiscal agents, as examples United Way of the Big Bend, with its respective counties and the United Way of Brevard County, with its respective counties. It was contemplated that the charities seeking participation in distribution of first tier undesignated funds identify the organization by name, its address, addresses where direct services were delivered in the previous calendar

year, etc., in relation to all of the United Way fiscal agent areas. Petitioners and other charities seeking participation in the first tier distribution of undesignated funds were expected to proceed without further direction from the Committee or Respondent when completing the 2006 Direct Local Services' Certification Form.

11. Concerning the rule adoption process referred to in the e-mail, on October 16, 2007, the Committee had met to review proposed rules under consideration that supported the process of charitable campaigns recognized in Section 110.181, Florida Statutes. Prior to that date, the Respondent had held meetings and conducted workshops related to rule development. As a result, Florida Administrative Code Rule 60L-39.015, and an amendment to Florida Administrative Code Rule 60L-39.005, were adopted and became effective January 23, 2007.

12. The amendment within Florida Administrative Code Rule 60L-39.005(5), incorporated by reference Form DMS-ADM-102, effective January 23, 2007, the same date the overall Florida Administrative Code Rule 60L-39.005 was amended. The incorporated form differed in appearance when compared to the 2006 Direct Local Services Certification Form with guidelines that had been provided in relation to the 2006 Campaign. The difference was that the Form incorporated by reference was titled "Agency Direct Local Services Certification Form". It

spoke of a March 1 deadline with no specific year. It spoke of a need to provide the federation name, contact person and telephone number. It carried the same headings in the five columns related to the provision of the information about direct services in the 27 United Way fiscal agent areas. In its instructions it stated:

Each federation is required to submit this form for all member agencies that provide direct local services, as defined in Rule 60L-39.0015(i), Florida Administrative Code, in the appropriate local fiscal agent sections below and provide with their annual application package. Independent or unaffiliated agencies must provide this form with their annual application.

13. Gwen Cooper, president and CEO of Community health Charities of Florida (CCH), helped the members of the federation, the other Petitioners in this cause, complete the 2006 Direct Local Services Certification Form with guidelines. This included contacts by telephone and e-mails to address the proper response to the form on the part of the member charities. In addition, Ms. Cooper prepared a different form, designed to assist the member charities in presenting needed information. That form called for a deadline of December 5, 2006, for submission to her of information provided by the member charities on the form prepared by Ms. Cooper. The return information was then edited and utilized in her preparation of the 2006 Campaign Direct Local Services Certification Form with

guidelines that had been made available by the Committee on October 17, 2006. An example of the instructions for a member charity as filled out by the charity on the form created by Ms. Cooper is Respondent's Exhibit numbered 6 pertaining to the Leukemia & Lymphoma Society, Palm Beach Chapter. The completed Direct Local Services Certification Forms with guidelines for the 2006 Campaign for all CHS member charities is Petitioners' Exhibit numbered 12A.

14. Importantly, the instructions provided in the Cooper form directed to the CHC member charities, stated:

INSTRUCTIONS: Please enter the requested information below for each fiscal agent regional area where your agency provides direct local services. Simply recording the office in that region is not enough. Please keep your descriptions concise and general. There is no need to give lengthy details for each region. If you know the number of people served in that region, please record it. If not, please provide an estimate or put NA. If you do not provide services in a particular regions (sic), please put NA in the Description column. If you have more than one office in a particular region, please list all the offices. We will review all submissions and call with questions. Feel free to add lines as needed. This record is for services rendered in Calendar Year 2005.

As can be seen, this was a departure from the instructions provided by the Committee in the 2006 Campaign Direct Local Services Certification Form with guidelines previously

described, Petitioners' Exhibit numbered 12A representing the completed form for all CHC member charities.

15. The Committee met on February 14, 22, and 28, 2007, to consider the 2006 Campaign Direct Local Services Certification Forms with guidelines completed by Petitioners and other charitable groups.

16. Dr. Kenneth Armstrong, Jr., Executive Director of the United Way of the Big Bend, attended the February 14, 2007, Committee meeting. At the meeting he presented the Committee members with a document intended to express his opinion concerning the basis for deciding whether Petitioners and other charitable organizations were entitled to receive first tier undesignated funds. Petitioners' Exhibit numbered 4. In this document, Dr. Armstrong critically comments on the entitlement of Petitioners, unaffiliated and independent charitable agencies to receive first tier undesignated funds. In his written remarks, he opposes the right for some Petitioners to receive the first tier undesignated funds, while explaining his reasons. These suggestions were favorably received by Respondent's counsel who advised the Committee during the meeting. In particular, counsel stated that he found Dr. Armstrong's approach created an " . . . incisive analysis of the kind of activities that could not reasonably be considered direct services . . . ". While the Committee was left to arrive at its

own decision concerning Petitioners' entitlement to receive first tier undesignated funds, Dr. Armstrong's ideas given credence by Respondent's counsel were accepted as part of that process.

17. The work was not completed on February 14, 2007, and the Committee reconvened on February 22, 2007, to continue consideration of the 2006 Campaign Direct Local Services Certification Forms.

18. The Committee met again on February 28, 2007, to consider the 2006 Campaign Direct Local Services Certification Forms. By then the forms had been divided among the Committee members, with each Committee member being responsible for review and recommendation in relation to his or her part of the assignment. The discussion in the session was at best abbreviated concerning the decision to include or reject a charity in a locale in relation to receiving first tier undesignated funds. One Committee member left the meeting and his portion of the assignment was dealt with by the remaining Committee members reviewing the annotations of the missing member indicating denial or approval of a given charity. There were other notes as well on these materials assigned to the Committee member who left the meeting. The remaining Committee members approved the recommendations by the missing Committee member.

19. On March 8, 2007, the Committee made its decision and e-mailed Petitioners concerning its position on the "2006 FSECC Direct Local Services Certification" spreadsheets (forms). The e-mail is Petitioners' Exhibit numbered 10. The reference line in the e-mail is "Distribution of 2006 FSECC undesignated funds -- Direct Local Services Certification". The reason for this preliminary decision was:

After three meetings, the FSECC Statewide Steering Committee has completed its review and voted on all **2006** FSECC Direct and Local Service Certification spreadsheets previously submitted for its consideration. Attached is the final spreadsheet that lists all charitable organizations that were approved by the Committee and deemed, based on the information submitted, to be providing direct local services in at least one United Way fiscal agent area. Charitable organizations not included on the attached list were not deemed to be providing direct local services, based on the information submitted. Direct local services, as defined on the certification form and in Rule, are "identifiable and specific services available in the local fiscal agent's area without any intervention between the services offered and persons served."

The 59 charitable organizations included on the attached list will receive a pro-rata share (based on their local designation percentages in 2006) of the 2006 undesignated funds, in the Fiscal Agent United Way areas within which they were deemed to be providing direct local services, as indicated on the attached by an "X" in specific United Way fiscal agent columns.

Thank you,

The FSECC Statewide Steering Committee

20. The above-quoted language in the e-mail notification that refers to the certification form is understood to mean the 2006 Campaign Direct Local Services Certification Form with guidelines. The comment in the e-mail concerning the "rule" where it says "identifiable and specific services available in the local fiscal agent's area without any intervention between the services offered and persons served" is taken directly from Florida Administrative Code Rule 60-39.0015(1)(i), effective January 23, 2007, with its definition of "direct services."

21. As the March 8, 2007, e-mail summarizes, CHC had 16 member originations approved. At the time the preliminary decision was communicated, the Committee had approved approximately 18.64 percent of Petitioners' individual submissions. The basis of the denial of the remaining submissions seeking receipt of first tier undesignated funds was not explained. This led to the original petition challenging the decision to deny rights to receive first tier undesignated funds filed on March 30, 2007. The history of the case beyond that point has been explained in the Preliminary Statement, to include the basis for proceeding before DOAH.

22. On August 24, 2007, after the case had been referred to DOAH for hearing, Respondent published notice in the Florida Administrative Weekly, Volume 33 No. 34, to this effect:

The Florida **Department of Management Services** announces a public meeting to which all persons are invited. DATE AND TIME: September 10, 2007, 9:00 a.m. - 12:00 Noon
PLACE: 4050 Esplanade Way, Room 101, Tallahassee, Florida

GENERAL SUBJECT MATTER TO BE CONSIDERED:

1. Review and Approval of Local Steering Committee Members.
2. Community Health Charities lawsuit and re-visit on direct services determinations.

A copy of the agenda may be obtained by contacting: Erin Thoresen, Department of Management Services, 4050 Esplanade Way, Suite 235, Tallahassee, FL 32399-0950, (850)922-1274.

If any person decides to appeal any decision made by the Board with respect to any matter considered at this meeting or hearing, he/she will need to ensure that a verbatim record of the proceeding is made, which record includes the testimony and evidence from which the appeal is to be issued.

* * *

Respondent's Exhibit numbered 24.

23. The notice by its terms did not explain in any detail what might be achieved during the course of the meeting to consider the pending "lawsuit" and revisit issues in relation to direct services determinations. The "lawsuit" related to the pending administrative proceeding in DOAH Case No. 07-3547.

Barton Cooper, CHC Director of Corporate Development, attended the meeting with Petitioners' counsel. No presentation was made by Petitioners, as they were uncertain of Respondent's intentions when the meeting was advertised in the Florida Administrative Weekly, and understood that litigation was ongoing before DOAH. Nonetheless, Mr. Cooper expressed his appreciation for the Committee's willingness to revisit the issue of the remaining Petitioners' entitlement to receive first tier undesignated funds. On this occasion the Committee conducted an additional review of material provided by Petitioners. Those materials were constituted of Petitioners' Exhibit numbered 12A, the original December 22, 2006, Direct Local Services Certification Forms for the rejected applicants for first tier undesignated funds and Exhibit 2 to the Amended Petition for Formal Administrative Hearing filed March 30, 2007, with the Respondent. (Exhibit 2 became Petitioners' Exhibit numbered 12B, admitted at the final hearing.) This exhibit provides additional information concerning member charities within CHC and supporting argument for their inclusion in the distribution of first tier undesignated funds. As a consequence of the Committee's efforts, approximately 77 percent of Petitioners' applications made originally were approved, leaving 21 Petitioners denied the ability to receive first tier

designated funds in one or more of the United Way fiscal agent areas.

24. On September 12, 2007, the Committee made known its "Amended and Revised FSECC Direct Services Determinations for the 2006 Campaign" in correspondence directed to Petitioners. Petitioners' Exhibit numbered 13. In explanation, the written communication stated:

On September 10, 2007 the Statewide Steering committee decided to re-visit issues on direct services determinations. In accordance with Exhibit 2 of the Second Amended Petition for Formal Administrative Hearing, the participating Community Health Charities, within the fiscal area listed, were revisited. The Direct Local Services Certification Forms submitted on behalf of your organization and/or your member agencies were reexamined for compliance with the eligibility criteria for a receipt of undesignated funds based upon the provision of direct services. Direct services are defined as "[i]dentifiable and specific services available in the local fiscal agent's area without any intervention between the services offered and persons served." Rule 60L-39.0015(1)(i), Florida Administrative Code. Applicant organizations named above that did not meet the criteria for direct services were denied by the FSECC Statewide Steering Committee.

This explanation referred to the definition of direct services found within Florida Administrative Code Rule 60-39.0015(1)(i), effective January 23, 2007. It also mentioned reliance upon Exhibit numbered 2 to the Second Amended Petition for Formal Administrative Hearing (Exhibit 2 accompanied the Amended

Petition for Formal Administrative Hearing as well). The memorandum decision pointed out a spreadsheet attached describing those charities whose application forms had been reexamined on September 10, 2007, noting approvals and disapprovals.

25. The attachment to the September 12, 2007, amended revised FSECC Direct Local Services determination for the 2006 Campaign breaks out the agencies approved as to locations within United Way fiscal agents areas, those approved earlier and those approved by actions taken on September 10, 2007. Those approvals are noted by marking the letter "X" in the column for each agency earlier approved or approved on September 10, 2007, as to each charity and every United Way fiscal agent area.

26. Concerning the remaining requests to receive first tier undesignated funds by those 21 Petitioners, information necessary to decide entitlement is found within the 2006 Campaign Direct Local Services Certification Form with guidelines (Petitioners' Exhibit numbered 12A); the explanations found within Exhibit 2 to the Amended Petition for Formal Administrative Hearing, which became Petitioners' Exhibit numbered 12B and a series of exhibits admitted at hearing, Petitioners' Exhibit numbered 21 through 38. Those latter exhibits provide explanations pertaining to the 21 disappointed Petitioners, expanding what is known about the charities, their

services, the manner that the services are provided, who receives the services and where the services are received, together with the address(es) of the respective organizations.

27. In addition, the depositions of Paul Andrew Ledford of Florida Hospice and Palliative Care (Joint Exhibit numbered 2); Susanne Homant, National Association of Mentally Ill in Florida (Joint Exhibit numbered 3); Deborah Linton, Association for Retarded Citizens of Florida, Inc. (Joint Exhibit numbered 4); Suzanne Earle, Children's Tumor Foundation (Joint Exhibit numbered 5); Pamela Byrne, Leukemia & Lymphoma Society (Joint Exhibit numbered 6) and Tracy Tucker, Cystic Fibrosis Foundation (Joint Exhibit numbered 7) afford additional insight on the subject of who is served, where they are served etc., pertaining to the subject.

28. Without recounting the details from the various sources previously described, all that information is accepted for purposes of this Recommended Order, as to the facts represented in the exhibits.

29. Based upon information provided in the aforementioned exhibits, the Association for Retarded Citizens/Florida, CHC, Florida Hospices and Palliative Care and the National Alliance for the Mentally Ill of Florida do not provide direct services in fiscal agent areas without intervention between the services offered and persons served in any location.

30. Based upon information provided in the aforementioned exhibits, ALS Association provides direct services in the Heart of Florida United Way fiscal agent area, contrary to the impression held by the Committee before the final hearing.

31. Based upon information provided in the aforementioned exhibits, the Cystic Fibrosis Foundation provides direct services in the United Way fiscal agent areas in Lake and Sumter, Okaloosa-Walton, Santa Rosa, and Volusia-Flagler, for reasons comparable to the practice of the Committee when making its earlier determinations.

32. Based upon information provided in the aforementioned exhibits, the Lupus Foundation of America, Southeast Florida Chapter, provides direct services in the United Way fiscal agent areas in Broward and Palm Beach counties.

33. Of the unapproved requests for first tier undesignated funds made by remaining Petitioners in other specific United Way fiscal agent areas, the facts do not support those requests.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569, and 120.57(1), Florida Statutes (2007).

35. To the extent that Petitioners seek to receive first tier undesignated funds, as participating charitable

organizations, where they were not previously approved they must prove their entitlement. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

36. Facts found in this case are upon a preponderance of evidence consistent with the record created at final hearing. § 120.57(1)(j), Fla. Stat. (2007).

37. The case was heard de novo, not as a matter of review of prior agency action. § 120.57(1)(k), Fla. Stat. (2007). The preliminary agency action announced by the Committee on March 8, 2007, that denied or limited the respective Petitioners' opportunity to participate in receiving first tier undesignated funds began the process when challenged. It was left to be determined at the disputed fact hearing de novo the factual basis for resolving the remaining disputes in the case. Gopman v. Department of Education, 908 So. 2d 1118 (Fla. 1st DCA 2005); Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Servs., 573 So. 2d 19 (Fla. 1st DCA 1990); Capeletti Brothers, Inc. v. Department of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978); Fla. Dep't of Transp. v. J.W.C. Co., supra.; McDonald v. Department of Banking and Finance, 346

So. 2d 569 (Fla. 1st DCA 1977); and State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977).

38. Section 110.181(1)(a), Florida Statutes (2006), creates the authority for the 2006 Campaign through Respondent where it states:

The Department of Management Services shall establish and maintain, in coordination with the payroll system of the Department of Financial Services, an annual Florida State Employees' Charitable Campaign. Except as provided in subsection (5), this annual fundraising drive is the only authorized charitable fundraising drive directed toward state employees within work areas during work hours, and for which the state will provide payroll deduction.

39. Section 110.181(1)(c), Florida Statutes (2006), identifies entities who may participate in the 2006 Campaign where it states:

(c) Participation in the annual Florida State Employees' Charitable Campaign must be limited to any nonprofit charitable organization which has as its principal mission:

1. Public health and welfare
2. Education;
3. Environmental restoration and conservation;
4. Civil and human rights; or
5. Any nonprofit charitable organization engaged in the relief of human suffering and poverty.

Petitioners qualify to participate in the overall 2006 Campaign.

40. Distribution of charitable contributions among the several charities is achieved through fiscal agents. Those fiscal agent are selected through competitive procurement. They receive, account for and distribute the contributions among the several charities. § 110.181(2), Fla. Stat. (2006).

41. Part of the distribution concerns itself with what has been referred to as first tier undesignated funds. The present dispute concerns itself with that distribution. Section 110.181(2)(e), Florida Statutes (2006), explains distribution of so-called first tier undesignated funds and the undesignated funds remaining following that distribution. Those remaining funds have been referred to as second tier undesignated funds. In particular, Section 110.181(2)(e), Florida Statutes (2006), states:

(e) Participating charitable organizations that provide direct services in a local fiscal agent's area shall receive the same percentage of undesignated funds as the percentage of designated funds they receive. The undesignated funds remaining following allocation to these charitable organizations shall be distributed by the local steering committee.

42. To further assist Respondent in the conduct of the campaigns, to include the 2006 Campaign, Respondent is granted rulemaking authority in accordance with Section 110.181(3)(a), Florida Statutes (2006) which states:

(3) RULEMAKING AUTHORITY; ADMINISTRATIVE REVIEW. --

(a) In accordance with the recommendations of the steering committee, the department shall adopt rules relating to the time and manner for charitable organizations' participation in the campaign, selection and responsibilities of the fiscal agent, determination of eligible expenses, and such other rules as may be necessary to administer the campaign.

43. Persons whose substantial interests are affected by Respondent's actions, here in reference to the first tier undesignated funds related to the 2006 Campaign may be heard in accordance with Chapter 120, Florida Statutes. This opportunity is recognized in Section 110.181(3)(b), Florida Statutes (2006). Petitioners' substantial interest are affected entitling them to the hearing that was conducted.

44. Another participant in the process is the Florida State Employees' Charitable Steering Committee, referred to in this case as the Committee. The Committee is established in accordance with Section 110.181(4), Florida Statutes (2006), which states:

(4) FLORIDA STATE EMPLOYEES' CHARITABLE CAMPAIGN STEERING COMMITTEE.-A Florida State Employees' Charitable Campaign steering committee shall be established with seven members appointed by members of the administration commission, and two members appointed by the secretary of the department from among applications submitted from other agencies or departments. The committee, whose members shall serve staggered terms,

shall meet at the call of the secretary. Members shall serve without compensation, but shall be entitled to receive reimbursement for travel and per diem expenses as provided in s. 112.061.

45. Among the duties assigned the Committee is that of the publication of information related to the application process when participating in the 2006 Campaign. This is in accordance with Florida Administrative Code Rule 60L-39.003(2), which states:

(2) The FSECC Steering Committee shall arrange publication of information about the application process - including deadlines, address for obtaining materials, and criteria for eligibility - in sufficient time to prepare applications and supporting documentations.

46. Florida Administrative Code Rule 60L-39.003(2), in its reference to the publication of information about the application process, is understood to include publication of information about the 2006 Campaign Direct Local Services Certification Form with guidelines setting a deadline of December 22, 2006, for receipt of that application related to a request to receive first tier undesignated funds. In this context, Florida Administrative Code Rule 60L-39.003(5) requires the Committee to notify Petitioners of its decision on the applications to receive those funds.

47. The 2006 Campaign Direct Local Services Certification Form with guidelines is contrasted with Form DMS-ADM-102 incorporated by reference in Florida Administrative Code Rule 60L-39.005(5), effective January 23, 2007. The former is similar in its terms to the incorporated form recognized by the rule that was adopted but is not part of an adopted rule. It is an unadopted rule by definition.

48. The 2006 Campaign Direct Local Services Certification Form with guidelines utilized by Petitioners provided by the Committee and utilized by Petitioners in their requests to receive first tier undesignated funds had not been adopted as a rule upon its due date of December 22, 2006, in relation to its one time use. Form DMS-ADM-102 (Direct Local Services Certification Form) while substantially the same became effective on January 23, 2007, with the amendment to Florida Administrative Code Rule 60L-39.005. Form DMS-ADM-102 incorporated by reference was effective upon any submission that was due on January 23, 2007, and thereafter. As a result the submission of information on the earlier form concerning the request to participate in the distribution of first tier undesignated funds for the 2006 Campaign could not properly be perceived as an act in accordance with an existing rule. In this instance it would be inappropriate to proceed as if the applications for first tier undesignated funds were made

pursuant to Form DMS-ADM-102 by using that form retroactively, earlier than January 23, 2007. § 120.54(1)(f), Fla. Stat. (2006).

49. Florida Administrative Code Rule 60L-39.0015(1)(i), defining the term "direct services" to mean "identifiable and specific services available in the local fiscal agent's area without any intervention between the services offered and persons served," was effective January 23, 2007. Its effective date predates the initial meeting of the Committee that took place on February 14, 2007, intended to review and decide upon applications made by Petitioners, among others, in requesting distribution of first tier undesignated funds in the 2006 Campaign. As such, the Committee was obligated to utilize the rule definition of "direct services" in arriving at its decision on applications to receive first tier undesignated funds related to the 2006 Campaign. To act upon the "direct services" rule was not to proceed by using a rule retroactively. It was to proceed on the basis of the law previously established in an existing rule.

50. Referring to the 2006 Campaign Direct Local Services Certification Form with guidelines utilized by the Petitioners in applying for first tier undesignated funds in the 2006 Campaign, the form did not by its design interfere with the ability of the Committee to act consistently with Section

110.181(2)(e), Florida Statutes (2006), and Florida Administrative Code Rule 60L-39.0015(1)(i), in the determination of any direct services provided in a local fiscal agent area. In fact, under one column described in the type of direct services delivered, the form utilized the definition of "direct services" set out in the rule. The form used corresponds with the practice of gaining information concerning the nature of services offered, where the services were provided, to whom those services were provided, in addition to information concerning the charity as to its name and address, all pertaining to the various fiscal agent areas. Use of the form as a means to assist the Committee in its review and preliminary decision does not deny Petitioners the opportunity to provide additional information de novo concerning compliance with the definition of "direct services" set out in Florida Administrative Code Rule 60L-39.0015(1)(i) to support their request to receive first tier undesignated funds in the 2006 Campaign.

51. On March 8, 2007, the Committee announced its preliminary decision denying some applications by Petitioners while approving others. That agency action was challenged by Petitioners, eventually leading to the disputed fact hearing.

52. On September 12, 2007, the Committee modified its earlier decision based upon a process not recognized in law. To the contrary, Section 120.569(2)(a), Florida Statutes (2007), reminds the agency, understood to include actions by the Committee, to take no action while proceedings were pending pursuant to Section 120.57(1), Florida Statutes (2007), as they were. However, the results of that unauthorized session benefited Petitioners to some extent, without compromising their opportunities to proceed to the hearing de novo to resolve their remaining concerns. Petitioners are not understood to complain about the favorable results in the session conducted outside normal procedures.

53. The issues in this case are susceptible to resolution without resort to experts. For that reason it is appropriate to act concerning Petitioners remaining requests to receive first tier undesignated funds without assistance from experts.

54. Petitioners have proven that they are providing "direct services" as referred to in Section 110.181(2)(e), Florida Statutes (2007), and as defined in Florida Administrative Code Rule 60L-39.0015(1)(i), for the following charities, in the following fiscal agent areas:

1. ALS Association provides direct services in the Heart of Florida United Way fiscal agent service area;

2. Cystic Fibrosis Foundation provides direct services in the United Way fiscal agent areas in Lake and Sumter, Okaloosa-Walton, Santa Rosa, and Volusia-Flagler; and

3. Lupus Foundation of America, Southeast Florida Chapter provides direct services in the United Way fiscal agent areas in Broward and Palm Beach counties.

Otherwise, Petitioners have failed to prove entitlement to receive first tier undesignated funds to the extent that Respondent had denied their opportunities.

Agency Statements Alleged to be Unadopted Rules

55. Pursuant to the Third Amended Petition for Formal Administrative Hearing, the following constitute actions by Respondent challenged as unadopted rules:

26.(c) Third, the agency and steering committees utilized non-rule policy in allocating the undesignated funds in that they relied on general statements of policy not adopted as rules and on criteria regardless of whether Petitioners provided "direct services"; and

56. By the Third Amended Petition for Formal Administrative Hearing in the Statement of Relief Requested at

B. it asks that:

(B) The Administrative Law Judge conduct a formal hearing pursuant to section 120.57(1), Florida Statutes, to determine all disputed issues of material fact specified in paragraph 26, above;

This Request for Relief is presented after the statement of authority found at paragraph 29. Within the Third Amended Petition for Formal Administrative Hearing paragraph 29 states:

29. Specific authorities that require reversal or modification of the Agency's action are chapter 120, Florida Statutes, including section 120.54(1)(a), .56, .57, and .595; rule 28-106.201, Florida Administrative Code; and various constitutional norms, including due process, equal protection, and separation of powers.

57. In the Petitioners' Response to Department's Motion for More Definite Statement additional reference is made to non-rule policy challenged in this case, where it is stated:

5. The Department's utilization of non-rule policy and the addition of requirements not found in the statute is not contained in the a single page or a single document that provided the textual basis of Petitioner's claims. Instead, the Department engaged in a running dialogue beginning before the commencement of the 2006 Campaign through its conclusion. Illustrations of statements of general applicability that were inconsistent with section 110.181 and amount to non-rule policy include:

a. Direct Local Services Certification Procedure, email from Beth Meredith (Oct. 17, 2006). The e-mail, written by Beth Meredith of the United Way of Florida, Inc., (fiscal agent to the campaign), attached a memorandum from the then Chairman of the Committee, John Kuczwanski ('Kuczwanski memorandum'). It was sent to all applicants, and explains that the Committee 'is in the process of implementing rules and a process' for the distribution of undesignated funds. The memorandum declares:

Because these formal rules will not be implemented until 2007, an interim process will be in place for the 2006 FSECC. As such, the following process will be utilized by federations and unaffiliated/independent organizations to determine where direct local services are being provided, and thereby eligibility for a pro-rata share of 2006 undesignated funds.

b. The Kuczwanski memorandum requires use of a spreadsheet, which was not adopted for use until January 27, 2007, and which itself contains criteria not required by the statute. Moreover, the memorandum contains numerous statements of general applicability that were not adopted by rulemaking, including the alternation of the statutory phrase 'direct service' to include 'local' and of the statutory formula for distributing undesignated funds.

c. Agency Direct Local Services Certification Form (DMS-ADM-102). This is the form that DMS required each participating charity to complete in order to obtain undesignated funds. The Form purports to define 'direct service' by imposing requirements that have no textual basis in section 110.181, Florida Statutes, or applies a rule that was not in effect during the 2006 Campaign. For instance, the Form, which itself is non-rule policy because it was not adopted by rule in effect during the 2006 Campaign, purports to qualify eligibility for undesignated funds by requiring that each list an 'organizational address' in the fiscal agent area; by requiring that services be 'delivered' in the fiscal agent area; by defining 'direct service(s) delivered' using the text that does not appear in section 110.181, Florida Statutes, or rule that was in effect during the 2006 Campaign; by associating the phrase '# of people served/Population served' when neither

element has textual foundation or rational basis to the distribution of undesignated funds.

In addition the Form contains impermissible alterations of the Act. For one, the Form expressly applies the definition adopted in rule 60L-39.0015(1)(i), when that rule was not in effect during the 2006 Campaign. Also, the Form declares that undesignated funds will be distributed on a 'pro-rata' basis, which is contrary to the distribution formula prescribed in section 110.181, Florida Statutes.

d. Petitioners were instructed to submit a Direct Local Services Form, which was transmitted by Gwen Cooper to the Department on behalf of Petitioner on December 21, 2006. The Form suffers from the criticisms listed in the preceding paragraph.

e. At the Committee meeting on February 14, 2007, Department Assistant General Counsel, Gerard York, referred to United Way of the Big Bend Response to Federations' and Unaffiliated/Independent Agencies' Submissions Regarding Local Direct Services for the FSECC Statewide Steering Committee (Feb. 17, 2007) ('United Way Response') as "a very good analytical framework in which to decide what is and what is not a direct service. And the good news, at least from a lawyering perspective, from my perspective, is that everything in the United Way of the Big Bend's analysis is a perfectly valid application of the rule definition we have in front of us as to what is a direct service." Transcript of FSECC Statewide Steering Committee meeting at 5 (Feb. 14, 2007), the United Way Response was used to deny Petitioners undesignated funds.

None of the reasons expressed in the United Way Response that the Committee relied on to deny undesignated funds find textual basis in the Act or rule that was

effective during the 2006 Campaign. Moreover, the United Way Response purports to require "local" direct services as a condition of eligibility for undesignated funds when the alteration appears to be the product of the drafter rather than the Department through its delegation of rulemaking of authority.

f. Handwritten margin notes by Committee Members Robert Tornillo and Beth Meredith appear on the Direct Local Services Certification Form submitted by CHC. The Committee accepted the notes of the Members at its meeting of February 28, 2007, to deny Petitioners' applications for undesignated funds. There is little if any explanation for the entries, however, circumstances confirm the notes are the result of applying non-rule policy. Indeed the entries follow the instruction, quoted above, of Gerard York at the Committee meeting of February 14, 2007 and appear to have been 'rubber stamped' by the Committee.

g. On its face, the Amended and Revised FSECC Direct Service Determinations for the 2006 Campaign from FSECC Statewide Steering Committee to CHC (Sept. 12, 2007), confirms that the Committee applied the definition of "direct services" adopted in rule 60L-39.0015, which was not effective during the 2006 Campaign.

h. The transcripts of FSECC Statewide Steering Committee meetings of February 14, February 22, February 28, and September 10, 2007 are replete with statements that are inconsistent with the plain and ordinary meaning of the phrase "direct services" and as will show the Committee's observance of policy announced in a rule that did not become effective until January 23, 2007.

i. In addition to the transcripts noted above, the final Committee reports that memorialized its action after the meeting on

February 28 and September 10, 2007 provide confirmation that the Department violated the statute and engaged in non-rule policy. These reports--Final Decision on 2006 FSECC Direct Local Services Certification Submissions, transmitted by email from Beth Meredith (Mar. 8, 2007) and Amended and Revised FSECC Direct Service Determinations for the 2006 Campaign from FSECC Statewide Steering Committee to CHC (Sept. 12, 2007)--bear out that the Department and Committee relied on statements defined as "rules" and that were recorded in the transcripts.

58. Although no specific citation is made to Section 120.57(1)(e), Florida Statutes (2007), in the Third Amended Petition for Formal Administrative Hearing, the expectation is relief pursuant to that provision. In addition there is a reference in paragraph C. to Section 120.56(4), Florida Statutes, in the Statement of Relief Requested, where it states:

C. The Administrative Law Judge determine pursuant to section 120.56(4), Florida Statutes, that the Department, the Statewide Steering Committee, a Local Area Steering Committee, or the fiscal agent made any statement that constitutes a "rule" under section 120.52(15), Florida Statutes, that was improperly retroactively applied to the 2006 Campaign or otherwise was not properly adopted by the Department pursuant to section 120.54, Florida Statutes. Such statements include those that:

1. Resulted in denial of Petitioner's proper percentage of undesignated funds as prescribed in section 110.181(2)(e), Florida Statutes;

2. Resulted in the Local Area Steering Committee's distributing funds that remained after distribution of undesignated funds in a manner constituting in an invalid exercise of delegated legislative authority;

3. Caused charities to be denied receipt of undesignated funds when they were eligible because they provided direct services; and

4. Resulted in the Statewide Steering Committee's erroneously rendering decisions regarding the distribution of undesignated funds.

59. Under the circumstances in this case, Petitioners' challenges to agency statements are properly considered under Section 120.57(1)(e), Florida Statutes (2007), in connection with the Recommended Order. There is no necessity to separately consider the agency statements through a challenge pursuant to Section 120.56(4), Florida Statutes (2007). See United Wisconsin Life Ins. Co. v. Dept of Ins., 831 So. 2d 239 (Fla. 1st DCA 2002). This treatment is seen as compliant with the decision in Community Health Charities of Florida, supra.

60. Section 120.57(1)(e), Florida Statutes (2007), states:

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to

authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not 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;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (i), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the courts finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

61. Before Respondent must demonstrate compliance with the criteria set out in Section 120.57(1)(e)2.a. through 2.f., Florida Statutes (2007), Petitioners must prove that the alleged agency statements constitute rules as defined in Section 120.52(15), Florida Statutes (2007), which states in pertinent part:

(15) "Rule" means each agency statement of general applicability and implements, interprets, or prescribes law or policy or describes the procedures 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.
. . . .

62. With the exception of the form provided to Petitioners, which is described as the 2006 Florida State Employees' Charitable Campaign Direct Local Services Certification Form with Guidelines with a December 22, 2006, deadline, none of the other material that has been referred to in the challenge to alleged agency statements constitute rules by definition. The other items relate to efforts by the Committee, with involvement by Respondent's counsel and others, to review and decide upon the submissions made by Petitioners, participating charitable organizations, in an effort to receive first tier undesignated funds from the 2006 Campaign. Attempts at compliance with existing law or policy on these other occasions, aside from the form are not distinct, separate and

apart from existing statutes or rules. While the argument may be engaged that the Committee misinterpreted existing statutes and rules, they do not constitute an independent effort to create new requirements by implementation, interpretation or prescription. Therefore they are not rules by definition.

63. Addressing the features of the form, it must meet the criteria established in Section 120.57(1)(e)2.a. through 2.e., Florida Statutes (2007), when measured against the expectations in Section 110.181(2)(e), Florida Statutes (2006), as an instrument designed to effectuate the purposes in deciding upon the distribution of first tier undesignated funds in the 2006 Campaign. To the extent that it refers to a "pro rata share of undesignated funds," as contrasted with the statutory expectation of receipt of "the same percentage of undesignated funds," the form modifies and contravenes the law. For that reason it would be inappropriate for the Committee in its deliberations to expect a determination of eligibility to a pro rata share of undesignated funds. In turn consideration of that issue de novo is upon the language referring to "the same percentage of undesignated funds" found in the statute and not based upon determination of eligibility in relation to "a pro rata share of undesignated funds."

64. Columns calling for "name of organization, organization address and address(es), etc." are acceptable under the statutory criteria previously described.

65. In the column entitled "Description of type of direct service(s) delivered", it is language found in Florida Administrative Code Rule 60L-39.0015(1)(i), effective January 23, 2007, defining "direct services," that was properly utilized by the Committee in its sessions that were first convened on February 14, 2007, and thereafter. Likewise, it is an appropriate method for establishing information for use in the hearing de novo in understanding the nature of the direct services provided by Petitioners, as supplemented through additional information placed in the hearing record. This does not transgress the boundaries of Section 110.181(2)(e), Florida Statutes (2006), in its reference to "direct services."

66. The column in the form which refers to "# of people served/Population served" creates alternatives allowing the participating charity to elect an alternative in describing persons served. It is not confusing to the extent of being vague. It is not arbitrary or capricious. It is not by its design contrary to expectations found within Section 110.181(2)(e), Florida Statutes (2006), and Florida Administrative Code Rule 60L-39.0015(1)(i).

67. With the exception of the language found in the form referring to "a pro rata share of undesignated funds" the features in the form are acceptable. Respondent through the Committee properly could use the document and the trier of fact in the hearing de novo could also use the document with confidence that it does not do violence to established provisions of law.

Attorneys' Fees and Costs

68. Separate from the opportunities to receive attorneys' fees and costs consistent with the court's decision in Community Health Charities of Florida, supra, to be determined apart from this Recommended Order, Petitioners make a claim for attorneys' fees and costs pursuant to Sections 57.111 and 120.595, Florida Statutes (2007).

69. To proceed in accordance with Section 57.111, Florida Statutes (2007) Petitioners would have to prevail in the present action based upon a final judgment or order, an event that has not happened in relation to the merits of this case.

70. The reference to Section 120.595, Florida Statutes (2007), is understood to be associated with Section 120.595(4), Florida Statutes (2007), dealing with challenges to agency action pursuant to Section 120.56(4), Florida Statutes (2007), that has not been considered for reasons explained.

71. In summary, Petitioners are not entitled to attorneys' fees and costs unrelated to the appellate case.

RECOMMENDATION

Upon consideration, it is

RECOMMENDED:

That a final order be entered that allows Petitioners to receive first tier undesignated funds in relation to the 2006 Campaign to the extent identified and denies any additional relief requested in the Third Amended Petition for Formal Administrative Hearing.

DONE AND ENTERED this 29th day of February, 2008, in Tallahassee, Leon County, Florida.

S

CHARLES C. ADAMS
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.