

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGE MARSHALL SMITH,)
)
 Petitioner,)
)
 vs.) Case No. 07-4746RU
)
 ALEX SINK, AS AGENCY HEAD)
 AND CHIEF FINANCIAL OFFICER)
 AND DEPARTMENT OF)
 FINANCIAL SERVICES,)
)
 Respondents.)
 _____)

SUMMARY FINAL ORDER

PRELIMINARY STATEMENT

On October 15, 2007, George Marshall Smith (Petitioner) filed a Petition to Determine the Invalidity of Agency Statements against Alex Sink, as Agency Head and Chief Financial Officer and the State of Florida, Department of Financial Services (Respondents) pursuant to Sections 120.54(1) and 120.56(4), Florida Statutes (2007). In addition, the petition referenced Section 120.57(1)(e), Florida Statutes (2007).

Petitioner seeks a determination concerning the alleged invalidity of Agency Statements defined as rules. In particular, Petitioner alleges:

* * *

v. The Department's Agency Statements Defined as Rules as applied to the Petitioner and others similarly situated subject to this Petition can be summarized as follows:

1. Ownership interests in viatical settlement contracts sold in 2002 and 2003 are considered securities;
2. Ownership interests in viatical settlement contracts in 2002 and 2003 are not exempt from registration as securities;
3. Ownership interests in viatical settlement contracts sold in 2002 and 2003 are required to be registered pursuant to Section 517.07, Florida Statutes;
4. Individuals selling ownership interests in viatical settlement contracts in 2002 and 2003 are required to [sic] licensed pursuant to Chapter 517.12, Florida Statutes;
5. Ownership interests in viatical settlement contracts sold in 2002 and 2003 are deemed by the Department to be "securities which were required to be registered" as referenced in Section 626.611(16), Florida Statutes;
6. The Department is authorized to initiate enforcement actions and penalize individuals who sold ownership interests in viatical settlement contracts which are and were required to be registered as securities and which were sold prior to July 1, 2005.
7. The Department may apply Rules 1 through 6 above retroactively before July 1, 2005.

8. The Department may or must provide "official notice" of administrative complaints filed against Petitioner and other individuals alleged to have violated the above rules by writing letters to persons and entities such individuals do business with. A true copy of one such letter is attached hereto as EXHIBIT "1"^[1/]

9. The Department may or must invoice and charge for copies of documents sent to persons and entities pursuant to the letters referred to in number 8 above.

Upon the filing of the petition with the State of Florida, Division of Administrative Hearings (DOAH), the case was assigned as Case No. 07-4746RU, reflected in the style to this action.

The premise for proceeding with the petition is based upon the assertion that

. . . Agency statements relating to an administrative complaint filed against Mr. Smith . . . as applied by the Department, violate the rule-making requirements of Section 120.56(4), Florida Statutes.

The Administrative Complaint described was an action In the Matter of: George Marshall Smith, Case No. 89790-07-AG brought by Alex Sink, Chief Financial Officer of the State of Florida, dated and signed on August 22, 2007, by Karen Chandler, Deputy Chief Financial Officer. The Administrative Complaint is attached as Exhibit "1" to the petition.

Separately George Marshall Smith requested a proceeding to contest the Administrative Complaint in accordance with Sections 120.569 and 120.57, Florida Statutes. That case was forwarded to DOAH upon the request. It is pending hearing in Department of Financial Services, Petitioner vs. George Marshall Smith, Respondent, DOAH Case No. 07-4701PL.

Ultimately, Petitioner herein seeks entry of a Final Order: (c) ". . . determining that the Agency's Statements described in this Petition, constitute unpromulgated rules as defined in Section 120.52(15), Florida Statutes . . .", that the Agency Statements; (d) ". . . are an invalid exercises of delegated legislative authority" and (e) "that the Department cease its reliance upon . . . " the Agency Statements.

On December 5, 2007, Respondents filed Department's Motion for Summary Final Order pursuant to Section 120.56(4)(c), Florida Statutes, and Florida Administrative Code Rule 28-106.204(4). On December 7, 2007, Respondents filed Respondents' Notice of Additional Authority for Respondents' Motion for Summary Final Order. On that same date Respondents filed Departments' Amended Motion for Summary Final Order.

On December 17, 2007, Petitioner filed Petitioner's Response to the Motion for Summary Final Order by Respondent Florida Department of Financial Services.

On December 17, 2007, Petitioner filed Petitioner's Motion/Request for Oral Argument on the Pending Motion for Summary Final Order. Having considered the arguments set forth in the written submissions, oral argument is not needed.

On December 21, 2007, Respondents filed Department's Notice of Filing Additional Authority.

FINDINGS OF FACT

1. The previously described Agency Statements allegedly defined as rules constitute efforts by Petitioner to paraphrase information found in the Administrative Complaint in Case No. 89790-07-AG. When contrasting the allegations within the petition at paragraphs 12.1. through 12.5., they are comparable to paragraphs within the Administrative Complaint which state:

General Allegations

* * *

4. At all times material hereto, you, GEORGE MARSHALL SMITH, offered for sale and sold viatical settlement purchase agreements on behalf of Mutual Benefits Corporation ("MBC").

5. The viatical settlement purchase agreements you, GEORGE MARSHALL SMITH, offered for sale and sold on behalf of MBC were securities, as defined under section 517.021(20)(q), Florida Statutes (2003).

6. The viatical settlement purchase agreements that you, GEORGE MARSHALL SMITH, offered for sale and sold on behalf of MBC were not registered with the State of Florida Department of Banking and Finance,

as required by Section 517.07, Florida Statutes, and were not exempt from such registration requirements, either under the provisions of sections 517.051 or 517.61, Florida Statutes.

7. You, GEORGE MARSHALL SMITH, were not registered in this state to sell securities, as required by Section 517.12, Florida Statutes.

* * *

20. On or about September 17, 2002, you, GEORGE MARSHALL SMITH, sold D.M. and V.M. of The Villages, Florida, five viatical settlement purchase agreements issued by MBC. The total purchase price of the viatical settlement purchase agreements was over \$70,000.

* * *

IT IS THEREFORE CHARGED that you, GEORGE MARSHALL SMITH, have violated or are accountable under the following provisions of the Florida Insurance Code and Rules of the Chief Financial Officer which constitute grounds for the suspension or revocation of your license(s) and eligibility for licensure:

* * *

(d) Sale of an unregistered security that was required to be registered, pursuant to chapter 517. [Section 626.611(16), Florida Statutes (2003)];

* * *

31. On or about March 18 and April 7, 2003, you, GEORGE MARSHALL SMITH, sold G.A. and E.A. of Lady Lake, Florida, eight viatical settlement purchase agreements issued by MMBC. The total purchase price of the

viatical settlement purchase agreements was at least nearly \$88,000.

* * *

IT IS THEREFORE CHARGED that you, GEORGE MARSHALL SMITH, have violated or are accountable under the following provisions of the Florida Insurance Code and Rules of the Chief Financial Officer which constitute grounds for the suspension or revocation of your license(s) and eligibility for licensure:

* * *

(d) Sale of an unregistered security that was required to be registered, pursuant to Chapter 517. [Section 626.611(16), Florida Statutes (2003)];

* * *

42. On or about June 9 and September 9, 2003, you, GEORGE MARSHALL SMITH, sold D.C. and W.C. of the Villages, Florida, five viatical settlement purchase agreements issued by MBC. The total purchase price of the viatical settlement purchase agreements was \$135,000.

* * *

IT IS THEREFORE CHARGED that you, GEORGE MARSHALL SMITH, have violated or are accountable under the following provisions of the Florida Insurance Code and Rules of the Chief Financial Officer which constitute grounds for the suspension or revocation of your license(s) and eligibility for licensure:

* * *

(d) Sale of an unregistered security that was required to be registered, pursuant to chapter 517. [Section 626.611(16), Florida Statutes (2003)];

2. Chapter 2005-237, Laws of Florida, effective July 1, 2005, added at Section 1., a definition within Section 517.021, Florida Statutes, as follows:

517.021 Definitions.--When used in this chapter, unless the context otherwise indicates, the following terms have the following respective meanings:

* * *

(w) A viatical settlement investment.

(23) "Viatical settlement investment" means an agreement for the purchase, sale, assignment, transfer, devise, or bequest of all or any portion of a legal or equitable interest in a viaticated policy as defined in chapter 626. The term does not include:

(a) The transfer or assignment of an interest in a previously viaticated policy from a natural person who transfers or assigns no more than one such interest in 1 calendar year.

(b) The provision of stop-less coverage to a viatical settlement provider, financing entity, or related provider trust, as those terms are defined in s. 626.9911, by an authorized or eligible insurer.

(c) The transfer or assignment of a viaticated policy from a licensed viatical settlement provider to another licensed viatical settlement provider, a related provider trust, a financing entity, or a special purpose entity, as those terms are defined in s. 626.9911, or to a contingency insurer provided that such transfer or

assignment is not the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter.

(d) The transfer or assignment of a viaticated policy to a bank, trust company, savings institution, insurance company, dealer, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or qualified institutional buyer as defined in United States Securities and Exchange Commission Rule 144A, 17 C.F.R. 230.144A(a, or to an accredited investor as defined by Rule 501 of Regulation D of the Securities Act Rules, provided such transfer or assignment is not for the Securities Act Rules, provided such transfer or assignment is not for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter.

(e) The transfer or assignment of a viaticated policy by a conservator of a viatical settlement provider appointed by a court of competent jurisdiction who transfers or assigns ownership of viaticated policies pursuant to that court's order.

3. Chapter 2005-237, Laws of Florida at Sections 7., 8., 10., 11., and 14. state in pertinent part:

Section 7. Subsection (10) of section 626.015, Florida Statutes, is amended to read:

626.015 Definitions.--As used in this part:

(10) "Life agent" means an individual representing an insurer as to life insurance and annuity contracts, or acting as a viatical settlement broker as defined in s. 626.9911, including agents appointed to transact life insurance, fixed-dollar

annuity contracts, or variable contracts by the same insurer.

Section 8. Paragraph (b) of subsection (1) of section 626.112, Florida Statutes, is amended to read:

626.112 License and appointment required; agents, customer representatives, adjusters, insurance agencies, service representatives, managing general agents.--

(1)

(b) Except as provided in subsection (6) or in applicable department rules, and in addition to other conduct described in this chapter with respect to particular types of agents, a license as an insurance agent, service representative, customer representative, or limited customer representative is required in order to engage in the solicitation of insurance. For purposes of this requirement, as applicable to any of the license types described in this section, the solicitation of insurance is the attempt to persuade any person to purchase an insurance product by:

1. Describing the benefits or terms of insurance coverage, including premiums or rates of return;
2. Distributing an invitation to contract to prospective purchasers;
3. Making general or specific recommendations as to insurance products;
4. Completing order or applications or insurance products; ~~or~~
5. Comparing insurance products, advising as to insurance matters, or interpreting policies or coverages; or

6. Offering or attempting to negotiate on behalf of another person a viatical settlement contract as defined in s. 626.9911.

* * *

Section 10. Subsection (2) of section 626.331, Florida Statutes, is amended to read:

626.331 Number of appointments permitted or required.-

(2) An agent shall be required to have a separate appointment as to each insurer by whom he or she is appointed as an agent. An agent must appoint himself or herself before performing the functions of a viatical settlement broker.

Section 11. Subsection (17) is added to section 626.611, Florida Statutes, to read:

626.611 Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.--The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

(17) In transactions related to viatical settlement contracts as defined in s. 626.9911:

(a) Commission of a fraudulent or dishonest act.

(b) No longer meeting the requirements for initial licensure.

(c) Having received a fee, commission, or other valuable consideration for his or her services with respect to viatical settlements that involved unlicensed viatical settlement providers or persons who offered or attempted to negotiate on behalf of another person a viatical settlement contract as defined in s. 626.9911 and who were not licensed life agents.

(d) Dealing in bad faith with viators.

* * *

Section 14. Section 626.9911, Florida Statutes, is amended to read:

626.9911 Definitions.--As used in this act, the term:

* * *

(11) "Viatical settlement investment" has the same meaning as specified in s.517.021.

4. The petition also discusses similar administrative complaints against persons other than Mr. Smith brought by the Department, a point upon which there is agreement, evidence the case, Department of Financial Services v. Bradley Wayne Kline, Case No. 849567-07-AG. Final order (filed 12/21/07), pertaining to the Recommended Order in DOAH Case No. 07-1218PL.

5. In association with paragraphs 12.8 and 12.9 alleged to constitute Agency Statements defined as rules, evidence to support that allegation is as reflected in Exhibit "2" to the petition which states:

FLORIDA DEPARTMENT OF FINANCIAL SERVICES

ALEX SINK
CHIEF FINANCIAL OFFICER

September 06, 2007

JACKSON NATIONAL LIFE INSURANCE COMPANY
BETH WRIGHT
PO BOX 24068
LANSING MI 48909-4068

Re: GEORGE MARSHALL SMITH
License Number DO34447

Dear Sir or Madam:

This letter serves as official notice that the Department filed an Administrative Complaint against the above referenced individual on 08/22/2007.

If you wish to receive a copy of the above referenced Administrative Complaint, you may return a copy of this letter with our request to the Department of Financial Services, Document Processing Section, PO Box 5320, Tallahassee FL 32314-5320 or fax your request to (850) 488-3429. They will retrieve the document(s) and invoice you as to the amount owed. Once the fee is received, the document(s) will be sent to you.

If you have any questions concerning this matter, you should contact our legal division at (850) 413-3137.

Bureau of Licensing

FLDFS BUREAU OF LICENSING
200 EAST GAINES STREET*TALLAHASSEE, FLORIDA
32399-0319*(850) 413-3137
HTTP//WWW.FLDFS.COM

This example is perceived as the form of "official notice" of an Administrative Complaint filed against George Marshall Smith and others similarly situated and the practice of invoicing and charging for copies of documents sent to persons who inquire about Administrative Complaints in this case or others of a similar nature.

CONCLUSIONS OF LAW

6. The authority to consider the Department's Motion for Summary Final Order and its amendment is found in Section 120.57(1)(h), Florida Statutes (2007), which states:

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

7. Based upon case materials submitted to DOAH in association with the dispute and there being no genuine issue as to any material fact left to be resolved, before considering the matter of law, a determination has been made concerning the Motion for Summary Final Order and its amendment.

8. In this case Petitioner may proceed with his challenge pursuant to Section 120.56(4), Florida Statutes (2007), in addressing those items set forth in Paragraph 12.1 through 12.9 as a collateral proceeding separate from the case Department of Financial Services, Petitioner vs. George Marshall Smith, Respondent, DOAH Case No. 07-4701PL. The latter case is an action in accordance with Section 120.57(1), Florida Statutes (2007). The decision in United Wisconsin Life Ins. Co. v. Dept. of Ins., 831 So. 2d 239 (Fla. 1st DCA 2002) does not bar that opportunity. The present case is unlike United Wisconsin, wherein the court describes the issues in that case as matters of first impression and considers facts unique to that case. The opinion discussed allegations in the underlying Administrative Complaint related to that case, whether the allegations were unpromulgated rules, already decided in the related Section 120.57 case and the lack of necessity to proceed according to Section 120.56(4). The present dispute has proceeded with the Section 120.56(4) claims in advance of the related case pursuant to Section 120.57(1). Dissimilar from

United Wisconsin, here no disposition had been achieved in the disciplinary case, in accordance with Section 120.57(1)(e), concerning the question of whether the allegations within the Administrative Complaint under attack constituted unpromulgated rules contrary to the prohibition set forth in Section 120.54(1), Florida Statutes (2007), before proceeding with the case pursuant to Section 120.56(4). The court in United Wisconsin noted the disposition of the question of whether the allegations found in the underlying Administrative Complaint in that case constituted unpromulgated rules was pending on appeal and could be resolved without the necessity of a collateral challenge pursuant to Section 120.56(4), Florida Statutes. That does not reflect the sequence of events in the present case. The opposite is true and in the interest of efficiency the matter can be resolved on this occasion, related to the question of the proper characterization of the Agency Statements allegedly defined as rules, in advance of the scheduled hearing in DOAH Case No. 07-4701PL.

9. Section 120.56(4), Florida Statutes (2007), states in pertinent part:

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

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include

the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

* * *

(f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under any other section of this chapter. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have

been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

10. As referred to in Section 120.56(4), Florida Statutes (2007), Section 120.54(1), Florida Statutes (2007), states in pertinent part:

120.54 Rulemaking.--

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

* * *

11. The term "rule" is defined at Section 120.52(15), Florida Statutes (2007), where it states:

(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:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

12. To meet the requirements for standing set forth in Section 120.56(4)(a), Florida Statutes (2007), that is to show that Petitioner is substantially affected by the alleged agency statements defined as rules, Petitioner must prove a real and sufficiently immediate injury in fact by the imposition of those statements, within the zone of interest protected or regulated by the statements. See Florida Board of Medicine vs. Florida Academy of Cosmetic Surgery, 808 So. 2d 243 (Fla. 1st DCA 2002).

13. The challenged Agency Statements fall within two categories, those reflected in paragraphs 12.1 through 12.7 in association with the Administrative Complaint in Case No. 89790-07-AG and those paragraphs 12.8 and 12.9 outside the experience of the Administrative Complaint.

14. The allegations at paragraph 12.1 through 12.7. paraphrasing the aforementioned provisions within the Administrative Complaint have substantial effect on Petitioner

sufficient to allow consideration of the challenge to the Agency Statements. But they are not rules as defined at Section 120.52(15), Florida Statutes (2007). They are pleadings within the Administrative Complaint intended to explain the interpretation provided by the agency concerning the meaning of provisions within Chapters 517 and 626, Florida Statutes, in effect when the alleged misconduct took place as described in the Administrative Complaint. Effort at enforcing the regulatory statutes by this means does not constitute the establishment of agency statements defined as rules, without benefit of compliance with procedures required by Section 120.54(1)(a), Florida Statutes (2007). Repetition of the practice in drafting administrative complaints in other disciplinary cases does not change the character of the act, thus mandating establishment of the agency's statements or policies as rules by proper adoption. Resolution of the dispute between the parties concerning authority to proceed against the licenses held by George Marshall Smith under terms set forth in the Administrative Complaint must be achieved through the formal hearing in DOAH Case No. 07-4701PL, as contemplated by Section 120.57(1), Florida Statutes (2007). See Environmental Trust, Inc. vs. State Dept of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998). By its design the Administrative Complaint is not an instrument that " . . . imposes any requirement or

solicits any information not specifically required by statute . . . " § 120.52(15), Fla. Stat. (2007). Whether the reading afforded those statutory provisions within the Administrative Complaint is appropriate will be settled when the statutes are interpreted in the disciplinary hearing, whose outcome will not bring about creation of requirements that were not there before.

15. Concerning the challenges made, as reflected in paragraphs 12.8. and 12.9. to the petition, Petitioner lacks standing to pursue the challenge. He is not substantially affected by the letter directed to Jackson National Life Insurance Company concerning the pendency of an Administrative Complaint placed against Respondent, nor is Respondent substantially affected by the letter's reference to an invoice to be provided should the company seek a copy of the Administrative Complaint calling upon or obligating the company to pay for those copies pursuant to the invoice. These arrangements between the Department and the company in the notification concerning the Administrative Complaint and the necessity to pay for copies are matters unrelated to a real and sufficiently immediate injury that would befall Petitioner. Unlike the company, the zone of interest created in receiving notice and requesting a copy of the Administrative Complaint on the part of the company are not sufficiently related to Petitioner's concerns.

16. Although standing has not been found, should Petitioner have standing to challenge the agency statements reflected in paragraphs 12.8 and 12.9 within the petition, the Department of Financial Services had statutory authority to disseminate the notice pursuant to Section 624.307(4), Florida Statutes (2007). Authority to charge for copies of the Administrative Complaint is allowed in accordance with Section 624.501(19)(a), Florida Statutes (2007). The letter to the insurance company with these details concerning the existence of the Administrative Complaint placed against Respondent and the opportunity to request a copy or any similar arrangement in relation to other persons charged by Administrative Complaint is not a rule as defined at Section 120.52(15), Florida Statutes (2007), for reasons already explained.

17. In the Petition reference was made to Section 120.57(1)(e), Florida Statutes (2007), which 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.

* * *

Any opportunity to pursue claims under that provision are proper subjects for DOAH Case No. 07-4701PL.

18. In that the Agency Statements challenged have not been found to be rules, no consideration is given to Petitioner's

claims that the Agency's statements constitute invalid exercises of delegated legislative authority, nor could they be pursuant to Section 120.56(4), Florida Statutes (2007).

19. Petitioner is not entitled to the reimbursement of costs and attorney's fees in association with his challenge to the Agency's Statements. § 120.595(4), Fla. Stat. (2007).

Upon consideration the Petition to Determine the Invalidity of Agency Statements is dismissed.

DONE AND ORDERED this 25th day of January, 2008, in Tallahassee, Leon County, Florida.

S

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2008.

ENDNOTE

1/ The copy attached to the petition is labeled as EXHIBIT "2."

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.