STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMY CAT, INC., d/b/a CYPRESS MANOR, and ABKEY, LTD, d/b/a FUDDRUCKERS RESTAURANT,	)	
Petitioners,	)	
vs.	)	Case No. 08-0212RU
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, an evidentiary hearing was conducted in this case pursuant to Section 120.56, Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on January 25, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Harold F. X. Purnell, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent's pronouncement that special restaurant licenses issued prior to January 1, 1958, that have not remained in "continuous operation" are thereby (as a result of their lack of "continuous operation") rendered invalid pursuant to Section 561.20(5), Florida Statutes, and therefore not subject to delinquent renewal pursuant to Section 561.27, Florida Statutes (Challenged Statement) is a rule that violates Section 120.54(1)(a), Florida Statutes, as alleged by Petitioners.

PRELIMINARY STATEMENT

On January 10, 2008, Abkey, Ltd., d/b/a Fuddruckers (Abkey) and Amy Cat, Inc. d/b/a Cypress Manor (Amy Cat) filed a petition with DOAH pursuant to Section 120.56(4), Florida Statutes, seeking an administrative determination that the Challenged Statement violates Section 120.54(1)(a), Florida Statutes, and further seeking an award of attorney's fees pursuant to Section 120.595(4), Florida Statutes. The matter was docketed as DOAH Case No. 08-0212RU. On January 14, 2008, Abkey and Amy Cat (hereinafter referred to collectively as "Petitioners") filed a motion requesting that DOAH Case No. 08-0212RU be consolidated with three other cases that had previously been consolidated: DOAH Case Nos. 07-2508 (involving the proposed denial of Abkey's application for delinquent renewal of its SR license); 07-4602

(involving the proposed denial of an application for delinquent renewal of the SR license of Nick Maneros, II, Inc., d/b/a Maneros of Hallandale); and 07-4692 (involving the proposed denial of Amy Cat's application for delinquent renewal of its SR license). On January 16, 2008, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DABT) filed a response to the motion, in which it stated the following:

> For the purpose of judicial economy and being that the parties and issues are similar, the Respondent defers to the discretion of the Court regarding [the] pending motion [to consolidate].

On January 18, 2008, the undersigned issued an order, which provided as follows:

> 1. DOAH Case No. 07-0212RU is consolidated, for purposes of hearing, with DOAH Case Nos. 07-2508, 07-4602, and 07-4692 pursuant to Florida Administrative Code 28-106.108.
>
> 2. The hearing in these four consolidated cases will be held on January 25, 2008, as more specifically described in the Notice of Hearing issued in DOAH Case Nos. 07-2508, 07-4602, and 07-4692 on December 5, 2007.

As noted above, the final hearing in DOAH Case Nos. 07-2508, 07-4602, 07-4692, and 08-0212RU was held on January 25, 2008, as scheduled. One witness, Eileen Klinger, the chief of DABT's Bureau of Licensing, testified at the hearing. In addition to Ms. Klinger's testimony, 20 exhibits (Petitioners'

Exhibits 1 through 19, and Respondent's Exhibit 1) were offered and received into evidence.

The deadline for the filing of proposed final orders in DOAH Case No. 07-0212RU was set at 15 days from the date of the filing with DOAH of the hearing transcript.

The hearing Transcript (consisting of one volume) was filed with DOAH on February 8, 2008.

On February 22, 2008, Petitioners filed an unopposed motion requesting an extension of the deadline for the filing of proposed final orders. By order issued February 25, 2008, the motion was granted, and the parties were given until March 14, 2008, to file their proposed final orders.

The parties timely filed their proposed final orders on March 14, 2008. They also, on that same date, filed a post-hearing stipulation, agreeing that "Petitioners' SR licenses in the above cases are per general law and not pursuant to any special or local act."

The parties were subsequently given the opportunity to present oral argument in support of their respective positions in this case. Such argument was presented by telephone conference call on April 14, 2008.

The parties were also given the opportunity to file post-oral argument supplements to their Proposed Final Orders, provided they did so no later than April 29, 2008. To date no such supplements have been filed.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. There are various types of DABT-issued licenses authorizing the retail sale of alcoholic beverages. Among them are quota licenses, SRX licenses, and SR licenses. All three of these licenses allow the licensee to sell liquor, as well as beer and wine.

2. Quota licenses, as their name suggests, are limited in number. The number of quota licenses available in each county is based upon that county's population.

3. SRX and SR licenses are "special" licenses authorizing the retail sale of beer, wine, and liquor by restaurants. There are no restrictions on the number of these "special" licenses that may be in effect (countywide or statewide) at any one time.

4. SRX licenses are "special restaurant" licenses that were originally issued in or after 1958.[2]

5. SR licenses are "special restaurant" licenses that were originally issued prior to 1958.

6. For restaurants originally licensed after April 18, 1972, at least 51 percent of the licensed restaurant's total

gross revenues must be from the retail sale of food and non-alcoholic beverages.[3]

7. Restaurants for which an SR license has been obtained, on the other hand, do not have to derive any set percentage or amount of their total gross revenues from the retail sale of food and non-alcoholic beverages.

8. DABT-issued alcoholic beverage licenses are subject to annual renewal.[4]

9. License holders who have not timely renewed their licenses, but wish to remain licensed, may file an Application for Delinquent Renewal (on DABT Form 6015).

10. Until recently, it was DABT's longstanding policy and practice to routinely grant applications for the delinquent renewal of SR and other alcoholic beverage licenses, regardless of the reason for the delinquency.

11. DABT still routinely grants applications to delinquently renew alcoholic beverage licenses other than SR licenses, but it now has a "new policy" in place with respect to applications for the delinquent renewal of SR licenses. The "new policy" is to deny all such applications based upon these SR licenses' not having been in "continuous operation," action that, according to DABT, is dictated by operation of Section 561.20(5), Florida Statutes, a statutory provision DABT now

claims it had previously misinterpreted when it was routinely granting these applications.

12. Relying on Section 561.20(5), Florida Statutes, to blanketly deny all applications for the delinquent renewal of SR licenses was the idea of Eileen Klinger, the head of DABT's Bureau of Licensing. She directed her licensing staff to implement the "new policy" after being told by agency attorneys that this "was the appropriate thing [from a legal perspective] to do."

13. As applicants applying to delinquently renew their SR licenses (which were both originally issued in 1956), Petitioners are substantially affected by DABT's "new policy" that SR licenses cannot be delinquently renewed because they have not been in "continuous operation," as that term is used in Section 561.20(5), Florida Statutes. Their applications for the delinquent renewal of their licenses would have been approved had the status quo been maintained and this "new policy" not been implemented.

14. Abkey filed its application (on DABT Form 6015) for the delinquent renewal of its SR license (which had been due for renewal on March 31, 2005) on February 21, 2007. On the application form, Abkey gave the following "explanation for not having renewed during the renewal period": "Building was sold. Lost our lease."

15. On April 2, 2007, DABT issued a Notice of Intent to Deny Abkey's application. DABT's notice gave the following reason for its intended action:

> The request for delinquent renewal of this license is denied. Florida Statute 561.20(5) exempted restaurant licenses issued prior to January 1, 1958 from operating under the provisions in 561.20(4) as long as the place of business was in continuous operation. This business failed to renew its license on or before March 31, 2005, therefore it did not comply with the requirements and is no longer valid.

16. Amy Cat filed its application (on DABT Form 6015) for the delinquent renewal of its SR license (which had been due for renewal on March 31, 1999) on December 6, 2006. On the application form, Amy Cat gave the following "explanation for not having renewed during the renewal period": "Building was closed."

17. On June 8, 2007, DABT issued a Notice of Intent to Deny Amy Cat's application. DABT's notice gave the following reason for its intended action:

> The request for delinquent renewal of this license is denied. Florida Statute 561.20(5) exempted restaurant licenses issued prior to January 1, 1958 from operating under the provisions in 561.20(4) as long as the place of business was in continuous operation. This business failed to renew its license on or before March 31, 1999, therefore it did not comply with the requirements and is no longer valid.

SR licenses will not be allowed to be moved from the location where the license was originally issued.

CONCLUSIONS OF LAW

18. The instant challenge is being made pursuant to Section 120.56(4), Florida Statutes, which provides, in pertinent part, as follows:

> (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.
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> (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).
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> (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. [DOAH] 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. . . .

19. Section 120.54(1)(a), Florida Statutes, the statutory provision that Petitioners claim in their challenge DABT has violated, provides as follows:

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

"When section 120.54(1)(a) is read together with section 120.56(4), it becomes clear that the purpose of a section 120.56(4) proceeding is to force or require agencies [that desire to continue to rely on agency statements defined as rules] into the rule adoption process. It provides [these agencies] with incentives to promulgate [these statements as] rules through the formal rulemaking process." Osceola Fish Farmers Association, Inc., v. Division of Administrative Hearings, 830 So. 2d 932, 934 (Fla. 4th DCA 2002).

20. "An agency statement constituting a rule may be challenged pursuant to Section 120.56(4), Florida Statutes, only on the ground that 'the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.'" Zimmerman v. Department of Financial Services, Office of Insurance Regulation, No. 05-2091RU, slip op. at 11 (Fla. DOAH August 24, 2005)(Summary Final Order of Dismissal); see also Southwest

Florida Water Management District v. Charlotte County, 774 So. 2d 903, 908-09 (Fla. 2d DCA 2001)("The basis for a challenge to an agency statement under this section [Section 120.56(4), Florida Statutes] is that the agency statement constitutes a rule as defined by section 120.52(15), Florida Statutes (Supp. 1996), but that it has not been adopted by the rule-making procedure mandated by section 120.54. In the present case, the challenges to the existing and proposed agency statement on the grounds that they represent an invalid delegation of legislative authority are distinct from a section 120.56(4) challenge that the agency statements are functioning as unpromulgated rules."); Florida Association of Medical Equipment Services v. Agency for Health Care Administration, No. 02-1314RU, slip op. at 6 (Fla. DOAH October 25, 2002)(Order on Motions for Summary Final Order)("[I]n a Section 120.56(4) proceeding which has not been consolidated with a proceeding pursuant to Section 120.57(1)(e), the issue whether a rule-by-definition is substantively invalid for reasons set forth in Section 120.52(8)(b)-(g), Florida Statutes, should not be reached. That being so, the ultimate issues in this case are whether the alleged agency statements are rules-by-definition and, if so, whether their existence violates Section 120.54(1)(a)."); and Johnson v. Agency for Health Care Administration, No. 98-3419RU, 1999 Fla. Div. Adm. Hear. LEXIS 5180 *15 (Fla. DOAH May 18, 1999)(Final Order of

Dismissal)("It is apparent from a reading of subsection (4) of Section 120.56, Florida Statutes, that the only issue to be decided by the administrative law judge in a proceeding brought under this subsection is 'whether all or part of [the agency] statement [in question] violates s. 120.54(1)(a),' Florida Statutes . . . .").

21. The sole remedy available under Section 120.56(4) for such a violation is prospective injunctive relief. See Zimmerman, slip op. at 11 ("The statute [Section 120.56(4), Florida Statutes] is forward-looking in its approach. It is designed to prevent future agency action based on statements not adopted in accordance with required rulemaking procedures, not to provide a remedy for final agency action (based on such statements) that has already been taken."). If a violation is found, the agency must, pursuant to Section 120.56(4)(d), "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." See Agency for Health Care Administration v. HHCI Ltd. Partnership, 865 So. 2d 593, 596 (Fla. 1st DCA 2004). In addition, "unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds," it must also pay the challenger's reasonable

costs and attorney's fees pursuant to Section 120.595(4),

Florida Statutes, which provides as follow:

> CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).
>
> (a) Upon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.
>
> (b) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to payment of an award or reimbursement for payment of an award under any provision of law.

22. Not every "agency statement" is a "rule" as defined by Section 120.52(15), Florida Statutes, which provides as follows:

> "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:
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> (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.
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> (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.
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> (c) The preparation or modification of:
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> 1. Agency budgets.
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> 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.
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> 3. Contractual provisions reached as a result of collective bargaining.
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> 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

Only agency statements of "general applicability," that is, those statements which are intended by their own effect to create or adversely effect rights, to require compliance, or to otherwise have the direct and consistent effect of law, fall within this definition. See Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region, 969 So. 2d 527, 530 (Fla. 1st DCA 2007); Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997); Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996); Balsam v.

Department of Health and Rehabilitative Services, 452 So. 2d 976, 977-978 (Fla. 1st DCA 1984); and McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

23. Such statements qualify as "rules" even if they have not been reduced to writing. See Schluter, 705 So. 2d at 86 ("[W]e find no support for Judge Benton's argument that an agency's policy statement must be in writing before it can be considered a nonadopted rule."); Department of Health, Board of Pharmacy v. Rx Network of South Florida, LLC, Nos. 02-2976, 02-2977, 02-2978PL, and 02-2980PL, 2003 Fla. Div. Adm. Hear. LEXIS 1024 *93 (Fla. DOAH January 10, 2003)(Recommended Order)("The unwritten form of an agency statement does not prevent the statement from satisfying the statutory definition of a rule in Section 120.52(15)."); and Florida Association of Insurance Agents and Professional Insurance Agents of Florida v. Department of Insurance, No. 01-1427RU, 2001 Fla. Div. Adm. Hear. LEXIS 2732 *43 (Fla. DOAH August 21, 2001)(Final Order)("Because the focus is on effect rather than form, a statement need not be in writing to be a rule-by-definition.").

24. The "agency statement" Petitioners are challenging in the instant case provides that SR licenses (that is, special restaurant licenses issued prior to January 1, 1958) that have not remained in "continuous operation" are thereby rendered invalid pursuant to Section 561.20(5), Florida Statutes, and

therefore not subject to delinquent renewal pursuant to Section 561.27, Florida Statutes (Challenged Statement). This is (as DABT itself described it in its Proposed Final Order) a "new policy,"[5] the product of DABT's having determined that its prior practice of routinely granting applications for the delinquent renewal of SR licenses was inconsistent with a proper interpretation of Section 561.20(5), which for the past approximately 50 years has provided as follows:

> Provisions of subsections (2) and (4) as amended by chapter 57-773, Laws of Florida, shall take effect January 1, 1958, and shall apply only to those places of business licensed to operate after January 1, 1958, and shall in no manner repeal or nullify any license issued under provisions of law which are now operating or will operate prior to the effective date January 1, 1958; and all such places of business shall be exempt from the provisions of this law so long as they are in continuous operation.

25. Section 1 of Chapter 57-773, Laws of Florida, amended Subsection (2) of Section 561.20, Florida Statutes, to read as follows:

> No such limitation of the number of licenses as herein provided shall prohibit the issuance of a special license to any bona fide hotel, motel, or motor court of not less than fifty (50) guest rooms or to any bona fide restaurant containing all necessary equipment and supplies for and serving full course meals regularly and having accommodations at all times for service for two hundred (200) or more patrons at tables occupying more than four thousand (4000) square feet of space,

providing, however, that any restaurant granted special license hereunder shall be prohibited from selling alcoholic beverages in packages for consumption off the premises, and from operating as a package store, and providing further that the Beverage Director shall suspend any such license if such restaurant ceases to be a bona fide restaurant as required as a prerequisite for obtaining such license, and providing that no intoxicating beverage shall be sold under such license after the hours of serving food has ceased; provided however, that any licenses heretofore or hereafter issued to any hotel, motel, motor court, or restaurant under the provisions of general law shall not be moved to a new location, such license being valid only on the premises of such hotel, motel, motor court or restaurant; provided, further, that licenses issued to hotels, motels, motor courts or restaurants under the general law and held by such hotels, motels, motor courts, or restaurants on May 24, 1947, shall be counted in the quota limitation contained in sub-section (1) herein; and provided further that any license issued for any hotel, motel, motor court or restaurant under the provisions of this law shall be issued only to the owner of said hotel, motel, motor court or restaurant, or, in the event the hotel, motel, motor court, or restaurant is leased, to the lessee of the hotel, motel, motor court, or restaurant and the license shall remain in the name of said owner or lessee so long as the license is in existence. Any special license now in existence heretofore issued under the provision of this law cannot be renewed except in the name of the owner of the hotel, motel, motor court, or restaurant, or, in the event the hotel, motel, motor court, or restaurant is leased, in the name of the lessee of the hotel, motel, motor court, or restaurant, in which the license is located and must remain in the name of said owner or lessee so long as the license

> is in existence. Any license issued under this section shall be marked "Special."

After various subsequent amendments, Subsection (2) of Section 561.20 now reads, in pertinent part (that is, with respect to restaurants), as follows:

> (a) No such limitation of the number of licenses as herein provided [in Subsection 1] shall henceforth prohibit the issuance of a special license to:
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> * * *
>
> 4. Any restaurant having 2,500 square feet of service area and equipped to serve 150 persons full course meals at tables at one time, and deriving at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages; however, no restaurant granted a special license on or after January 1, 1958, pursuant to general or special law shall operate as a package store, nor shall intoxicating beverages be sold under such license after the hours of serving food have elapsed; or
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> * * *
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> However, any license heretofore issued to any . . . restaurant . . . under the general law shall not be moved to a new location, such license being valid only on the premises of such . . . restaurant. Licenses issued to . . . restaurants under the general law and held by such . . . restaurants on May 24, 1947, shall be counted in the quota limitation contained in subsection (1). . . . Any special license now in existence heretofore issued under the provisions of this law cannot be renewed except in the name of the owner of the . . . restaurant or, in the event the . . . restaurant is leased, in the name of the lessee of the . . . restaurant in which the

> license is located and must remain in the name of the owner or lessee so long as the license is in existence. Any license issued under this section shall be marked "Special," and nothing herein provided shall limit, restrict, or prevent the issuance of a special license for any restaurant . . . which shall hereafter meet the requirements of the law existing immediately prior to the effective date of this act, if construction of such restaurant has commenced prior to the effective date of this act and is completed within 30 days thereafter, or if an application is on file for such special license at the time this act takes effect; and any such licenses issued under this proviso may be annually renewed as now provided by law. Nothing herein prevents an application for transfer of a license to a bona fide purchaser of any . . . restaurant by the purchaser of such facility or the transfer of such license pursuant to law.
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> * * *

26. Section 2 of Chapter 57-773, Laws of Florida, amended Subsection (4) of Section 561.20, Florida Statutes, to read as follows:

> The limitations herein prescribed shall not affect or repeal any existing or future local or special act relating to the limitation by population and exceptions or exemptions from such limitation by population of such licenses within any incorporated city or town or county that may be in conflict herewith.

A second sentence, which reads as follows, has since been added to Subsection (4) of Section 561.20:

> Any license issued under a local or special act relating to the limitation by population shall be subject to all requirements and

> restrictions contained in the Beverage Law that are applicable to licenses issued under subsection (1).

27. As noted by the Third District Court of Appeal in Davidson v. Coral Gables, 119 So. 2d 704, 707 (Fla. 3d DCA 1960), prior to the effective date of Chapter 57-773, Subsection (4) of Section 561.20, Florida Statutes, read as follows:

> The limitations herein prescribed shall be cumulative to and shall not affect or repeal any existing or future local or special act relating to the limitation by population of such licenses within any incorporated city or town or county that may be in conflict herewith.

The Davidson court further observed:

> The earlier law [the pre-Chapter 57-773 version of Subsection (4) of Section 561.20] stated that the limitations (and that would include exceptions to limitations) which the Beverage Law prescribed were cumulative and did not affect existing population limitations, imposed by cities, which might be in conflict therewith. It is important to note that the earlier law did not state, as does the present law [Subsection (4) of Section 561.20, as amended by Chapter 57-773], that the limitations therein shall not affect or repeal "exceptions or exemptions from such limitations by population" by cities under their charters which are in conflict therewith. Thus in the Abood case, a limitation exception provided in the state law, allowing licenses in restaurants meeting certain requirements, was held to prevail over a city's limitations which did not make such an exception.
>
> The present law presents a different situation. First, the word cumulative, which had appeared in the earlier law, was

> left out, and, more important, where the earlier law had said that the state regulations would not affect or repeal city limitations imposed by population, this amendment added that a city's regulations as to exceptions and exemptions to population limitations were not thereby affected or repealed.

Id. at 707-08; see also Miami Beach v. State, 129 So. 2d 696, 700 (Fla. 3d DCA 1961)("[T]he State Beverage Law provides that its restrictions as to population and its exceptions to population quotas, such as the created special licenses for hotels or restaurants, shall not prevail over contrary provisions relating thereto in municipalities. This was expressly provided for in § 561.20(4), Fla. Stat., ... As was pointed out by this court in Davidson v. City of Coral Gables, Fla. App. 1960, 119 So.2d 704, supra, the holding in the earlier case of Abood v. City of Jacksonville, Fla. 1955, 80 So.2d 443, that the provision of the State Beverage Law for a special license in restaurants should prevail over a contrary regulation within the City of Jacksonville, was no longer applicable because of the subsequent amendment to the beverage law, now appearing as subsection 4 of § 561.20, Fla. Stat., F.S.A. At the time the Abood case was decided, subsection 4 of § 561.20 of the Beverage Law provided the limitations of the state law would not affect or repeal any conflicting local or special act 'relating to the limitation by population . . . of

such licenses within any incorporated city.' Effective January 1, 1958, subsection 4 of § 561.20 was amended to read that it would not affect or repeal such conflicting local provisions of incorporated cities which related not only to the limitations by population but to 'exceptions or exemptions from such limitation by population of such licenses within any incorporated city.' By virtue of that change in 1958 in subsection 4 of § 561.20, it was held in the Davidson case that the exception to population limitation created by the State Beverage Law which provided for special liquor licenses for restaurants meeting certain stated requirements could not be used as a basis for forcing the City of Coral Gables to issue such a license to a restaurant applicant, when the city had made provision for special licenses for hotels but had not provided for such special licenses for restaurants.").

28. The third and final section of Chapter 57-773, Laws of Florida, initially just provided that "[t]his act shall take effect January 1, 1958," but it was subsequently amended by Chapter 57-1991, Laws of Florida, to read as follows:

> This act shall take effect January 1, 1958, and shall apply only to those places of business licensed to operate after January 1, 1958, and shall in no manner repeal or nullify any license issued under provisions of law which are now operating or will operate prior to the effective date January 1, 1958; and all such places of business shall be exempt from the provisions

> of this law so long as they are in continuous operation.

This section of Chapter 57-773, as amended by Chapter 57-1991, is now codified verbatim in Subsection (5) of Section 561.20, Florida Statutes, except that the phrase, "Provisions of subsections (2) and (4) as amended by chapter 57-773, Laws of Florida" has been substituted for "This act," and there is a semi-colon, instead of a comma, after the third and last reference to January 1, 1958.

29. DABT's "new policy" of routinely denying applications for the delinquent renewal of SR licenses is premised on its recently revised view of the meaning and effect of the language in Subsection (5) of Section 561.20, Florida Statutes, "exempt[ing] [these licenses] from operating under the provisions [of Subsection (4) of the statute] as long as the place of business was in continuous operation." DABT now takes the position that, in light of this statutory language, if a "business [has] failed to [timely] renew [its] SR license," it is not in compliance with the "continuous operation" requirement of Subsection (5) and such non-compliance automatically makes the business' license "no longer valid" and therefore nonrenewable.

30. This "new policy" of DABT's, founded on its freshly arrived-at interpretation of the provisions of Section 561.20,

Florida Statutes, is a "statement of general applicability," as that term is used in Section 120.52(15), Florida Statutes. By its own effect, it adversely affects the rights of SR licensees seeking to delinquently renew their licenses, such as Abkey and Amy Cat, whose licenses would have been renewed under the "old policy" it replaced. Furthermore, it does not fall within any of the exceptions set forth in Section 120.52(15)(a) through (c), Florida Statutes. It therefore is a "rule," as defined in Section 120.52(15). See Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 196 (Fla. 1st DCA 1991)("In Balsam v. Department of Health and Rehabilitative Services, 452 So.2d 976, 977-978 (Fla. 1st DCA 1984), this court held that any agency statement is a rule if it purports in and of itself to create certain rights and adversely affect others, or if it serves by its own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law. The limitations, conditions and requirements contained in the letter of April 4, 1988, adversely affect the substantive rights of others. The letter implements, interprets or prescribes law or policy, describes procedure or practice requirements of the agency, and imposes requirements or information not specifically required by statute or by existing rule. The letter, therefore, constitutes a rule within the meaning of the law . . . .").

31. DABT argues that this "challenged agency statement does not constitute a rule" because it merely repeats, and does not "add[] to, take[] away [from] or otherwise alter" what Section 561.20(5), Florida Statutes, already requires. It is true that an agency statement "which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport[s] to create rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rule making." St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989); see also National Foundation to Prevent Child Sexual Abuse, Inc., v. Department of Law Enforcement, No. 07-4898RU, 2007 Fla. Div. Adm. Hear. LEXIS 648 *40 (Fla. DOAH November 27, 2007)(Summary Final Order)("Significantly, the Challenged Statement does not, by its own terms, establish any new fee requirements or procedures. Rather, it attempts merely to summarize, for the benefit of interested members of the public, existing requirements and procedures that have been established elsewhere . . . ."); Reynolds v. Board Of Trustees of the Internal Improvement Trust Fund, No. 03-4478RU, 2004 Fla. ENV

LEXIS 222 *15-16 (Fla. DOAH February 20,2004)(Final Order)("Lastly, regarding the first statement challenged, the history surrounding driving on the beach and regulation by the BOT indicates that the Legislature has limited BOT's jurisdiction to regulate driving on the beach by Section 161.58, Florida Statutes. The challenged statement is [a] re-statement of the scheme of statutory regulation, and not a statement of BOT policy."); and Aloha Utilities, Inc. v. Public Service Commission, No. 97-2485RU, 1998 Fla. Div. Adm. Hear. LEXIS 5497 *29 (Fla. DOAH 1998)(Final Order)("Statements simply reiterating statutory or rule requirements also are not rules under Sections 120.52(15) and 120.74(1)(d), Florida Statutes (1997)."). The Challenged Statement in the instant case, however, gives Section 561.20(5) a meaning that is not readily apparent from a literal reading of the statute. Nowhere in Section 561.20(5) does it specifically state that the necessary consequence of an SR licensee's failure to satisfy the statute's "continuous operation" proviso is the automatic invalidation of its license, regardless of the existence or contents of any local or special act governing the sale of alcoholic beverages in the city, town, or county where the licensee's business is located. To accept DABT's argument that the Challenged Statement is a mere reiteration of Section 561.20(5) would require the undersigned to disregard the language of the statute

and add words not placed there by the Legislature. This the undersigned cannot do.

32. Although the Challenged Statement is a "rule," as defined in Section 120.52(15), Florida Statutes, it has not been adopted in accordance with the rulemaking procedures set forth in Section 120.54, Florida Statutes (nor has the rulemaking process even commenced). DABT has neither argued, nor presented evidence, that engaging in such rulemaking is now, or has at any time been, either infeasible or impracticable. Accordingly, the existence of the Challenged Statement violates Section 120.54(1)(a) and therefore, pursuant to Section 120.56(4)(d), Florida Statutes, DABT must "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action."

33. There having been no showing made that the Challenged Statement "is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds." Petitioners are entitled, pursuant to Section 120.595(4)(a), Florida Statutes, to recover a reasonable sum for the attorneys' fees and costs they have incurred in the prosecution of this action. See Security Mutual Life Insurance Co. v. Department of Insurance, 707 So. 2d 929, 930 (Fla. 1st DCA 1998).

ORDER

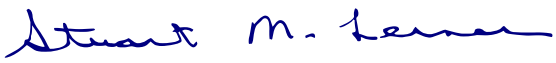
Based on the foregoing, it is

ORDERED:

The relief requested by Petitioner in its amended petition filed with DOAH pursuant to Section 120.56(4), Florida Statutes (to wit: an administrative determination that the Challenged Statement violates Section 120.54(1)(a), Florida Statutes, and an award pursuant to Section 120.595(4), Florida Statutes) is granted.

The undersigned reserves jurisdiction to determine, if necessary, the amount of attorneys' fees and costs Petitioners should be awarded. Should the parties be unable to amicably resolve this issue, Petitioners shall file with DOAH a written request that the undersigned resolve the matter. No such request filed more than 60 days of the date of this Final Order will be considered.

DONE AND ORDERED this 30th day of April, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2007.

ENDNOTES

[1] Unless otherwise noted, all references in this Final Order to Florida Statutes are to Florida Statutes (2007).

[2] See Fla. Admin. Code R. 61A-3.0141(1)("The suffix 'SRX' shall be made a part of the license numbers of all such [special restaurant] licenses issued after January 1, 1958.").

[3] See Fla. Admin. Code R. 61A-3.0141(3).

[4] See Fla. Admin. Code R. 61A-3.0101(1).

[5] See Schluter, 705 So. 2d at 83 ("The word 'policy,' used in each of the three statements, is not a term of art. It has a commonly understood meaning. It is defined by one source as 'a principle, plan, or course of action, as pursued by a government, organization, individual, etc.' Webster's New World Dictionary 1102 (2d college ed. 1980). We therefore affirm the ALJ's order as to his determination that the final three policies constituted invalid, nonadopted rules.").

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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.