STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS B. JARAMILLO, JR.,)
)
Petitioner,)
)
vs.) Case No. 10-1139RX
)
DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Respondent.)
____________________________________)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on June 7, 2010, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Howard J. Hochman, Esquire
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For Respondent: Robyn Blank Jackson, Esquire
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Division of Legal Services
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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 69B-211.042(17)(b)1. constitutes an invalid exercise of delegated

legislative authority pursuant to Section 120.52(8)(b) and (c), Florida Statutes (2010), for the reasons stated in the Corrected and Amended Petition for Administrative Determination of the Invalidity of Administrative Rule.

PRELIMINARY STATEMENT

On March 8, 2010, Luis B. Jaramillo, Jr., filed a Petition for Administrative Determination of the Invalidity of Administrative Rule, in which he challenged the validity of a rule of the Department of Financial Services ("Department"). Specifically, Mr. Jaramillo challenged the validity of Florida Administrative Code Rule 69B-211.042(17)(b)1. as an invalid exercise of delegated legislative authority pursuant to 120.52(8)(b) and (c), Florida Statutes (2010).[1] On May 28, 2010, Mr. Jaramillo filed a Motion for Leave to File Corrected and Amended Petition for Administrative Determination of the Invalidity of Administrative Rule, to which he attached the proposed corrected and amended petition. In an Order entered June 3, 2010, the motion was granted, and the Corrected and Amended Petition for Administrative Determination of the Invalidity of Administrative Rule was substituted for the original petition.[2]

Pursuant to notice, the final hearing was conducted on June 7, 2010. Mr. Jaramillo testified in his own behalf and presented the testimony of Martha Franco; Mr. Jaramillo did not

offer any exhibits into evidence. The Department presented the testimony of Amelia Spears, and the Department's Exhibits 2 through 5 and 8 through 9 were offered and received into evidence. Joint Exhibits 1 and 6 were offered and received into evidence. In their Prehearing Stipulation, the parties identified the following statutes as the relevant statutes implemented by Florida Administrative Code Rule 69B-211.042(17)(b)1.: Sections 112.011, 624.308, 626.171, 626.201, 626.207, 626.211, 626.611, and 626.621, Florida Statutes. At the final hearing, the Petitioner made an ore tenus motion for official recognition of the statutes listed above, which was granted.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on June 21, 2010. After an extension of time was granted, the parties timely filed their proposed findings of fact and conclusions of law, which have been considered in the preparation of the Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for licensing public adjusters. See §§ 626.022(1); 626.112(1)(a) and (3); 626.171(a), Fla. Stat.

2. Mr. Jaramillo is currently employed as an estimator by FRI Public Adjusters, d/b/a Epic Group Public Adjusters, where he has worked off and on since 1995. He earns approximately $42,000.00 per year. A public adjuster apprentice working for this firm earns $150,000.00 to $200,000.00 per year, and a public adjuster could earn up to $500,000.00.

3. Mr. Jaramillo pled guilty to, and was convicted in the federal District Court of the Southern District of Florida of, the felony of conspiracy to possess with intent to distribute cocaine.

4. The conviction was entered on June 2, 1999, and Mr. Jaramillo was sentenced to 87 months in federal prison. Mr. Jaramillo's supervised release was terminated on November 25, 2009.

5. On January 7, 2009, Mr. Jaramillo submitted to the Department an application for a new public adjuster apprentice license. He disclosed his criminal conviction in the application.

6. On February 4, 2009, the Department sent Mr. Jaramillo a letter in which it advised him that it could not process his application because of certain deficiencies. Such a letter is known in the Department as a "deficiency letter."

7. In the February 4, 2009, deficiency letter, the Department stated that, in order for his application to be

considered complete, Mr. Jaramillo needed to provide the Department certified documents relating to his arrest and conviction, including a document showing that his civil rights had been restored, and with a copy of a $50,000.00 surety bond.

8. In a letter to the Department dated April 8, 2009, Mr. Jaramillo enclosed, among other things, a copy of his Restoration of Civil Rights Application, dated March 31, 2009, and a copy of his application for a $50,000.00 surety bond. On or about June 17, 2009, Mr. Jaramillo provided the Department with a copy of a Public Adjuster’s Surety Bond in the amount of $50,000.00.

9. In a second deficiency letter, dated June 24, 2009, the Department again requested that Mr. Jaramillo "provide evidence that [his civil rights] have been restored with a certified copy of [an] applicable law enforcement agency form attesting that civil rights have been restored."

10. In a third and final deficiency letter, dated September 3, 2009, the Department again requested evidence that Mr. Jaramillo's civil rights had been restored. Mr. Jaramillo did not, and could not, provide such evidence because his civil rights had not yet been restored.

11. Because Mr. Jaramillo did not provide documentation that his civil rights had been restored, the Department

considered his application incomplete, and the application was closed on April 10, 2010, due to inactivity.

12. The Department has not, as of the date of the final hearing, denied Mr. Jaramillo's application, although it prepared a draft denial letter dated January 14, 2010. The Department does not deny licensure applications that are incomplete because having a denial of such an application on an applicant's record could have an adverse impact on his or her chances of having a future application granted.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.56(1), and 120.57(1), Florida Statutes.

14. Section 120.56(1), Florida Statutes, provides: "Any person substantially affected by a rule or a proposed rule may seek and administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Section 120.56(3)(a), Florida Statutes, provides that any "substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule."

15. The findings of fact herein are sufficient to establish that Mr. Jaramillo has been substantially affected by

Florida Administrative Code Rule 69B-211.042(17)(b)1., in that his application for licensure as a public adjuster apprentice has been deemed incomplete and closed by the Department. Even though Mr. Jaramillo's application has not been denied, the Department's failure to consider the application substantially affects his ability to obtain employment as a public adjuster apprentice. Mr. Jaramillo, therefore, has standing to challenge Florida Administrative Code Rule 69B-211.042(17)(b)1.

16. Florida Administrative Code Rule 69B-211.042(17)(b)1. provides:

> (17) Effect of Loss or Restoration of Civil Rights.
>
> * * *
>
> (b)1. A person who has been convicted of a felony shall not be eligible for licensure until such person has received a restoration of civil rights.

17. Pursuant to Section 120.54(3)(a), Florida Statutes, Mr. Jaramillo has the "burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised."

18. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," <u>Black's Law Dictionary</u> 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. <u>See</u> <u>Gross v. Lyons</u>, 763 So. 2d 276, 280 n.1 (Fla. 2000)(relying on <u>American</u>

Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

19. Mr. Jaramillo has challenged the validity of Florida Administrative Code Rule 69B-211.042(17)(b)1., on the grounds that it constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b) and (c), Florida Statutes, which provides:

> 8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
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> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1[.]
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> * * *
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an

> agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

See also § 120.536(1), Florida Statutes

20. The Legislature has explicated the limitations on the extent of an agency's authority to adopt rules in the "flush left" paragraph in Section 120.52(8) and in Section 120.536(1), Florida Statutes, which require not only that an agency adopting a rule have a grant of rulemaking authority but also that the rulemaking authority granted by statute extend no further than the implementation or interpretation of "the specific powers and duties granted by the enabling statute."

21. In interpreting the provisions of the "flush left" paragraph in Section 120.52(8) and in Section 120.536(1), Florida Statutes, the First District Court of Appeal observed in Southwest Florida Water Management District v. Save the Manatee Club, Inc., et al., 773 So. 2d 594, 599 (Fla. 1st DCA 2000), that

> [t]he new law gives the agencies authority to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the

> use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all details were contained in the statute itself.
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> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not.

22. The court in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696, 701 (Fla. 1st DCA 2001), observed that the question of an agency's exceeding its grant of rulemaking authority and the question of a rule enlarging or modifying the specific provisions of law implemented are interrelated but present two different issues for consideration in determining whether a rule is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b) and Section 120.52(8)(c), Florida Statutes. In this case, however, the two questions are inextricably intertwined and can better be addressed together.

23. Section 120.52(17), Florida Statutes, defines "rulemaking authority" as "statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule.'" Section 120.52(9), Florida Statutes,

defines "law implemented" as "the language of the enabling statute being carried out or interpreted by an agency through rulemaking."

24. The Department has cited Section 624.308, Florida Statutes, as the specific rulemaking authority for Florida Administrative Code Rule 69B-211.042. That statute provides in pertinent part: "(1) The department [of Financial Services] and the [Financial Services] commission may each adopt rules pursuant to ss. 120.536(1) and 120.24 to implement provisions of law conferring duties upon the department or the commission, respectively." § 624.308(1), Fla. Stat.

25. The parties have stipulated that the laws implemented by Florida Administrative Code Rule 69B-211.042(17)(b)1. are the following:

a. Section 112.011(1), Florida Statutes, which provides in pertinent part:

> (b) Except as provided in s. 775.166, a person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person whose civil rights have been restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction

> for a crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought.

b. Section 626.171, Florida Statutes, which provides in pertinent part:

> (1) The department shall not issue a license as agent, customer representative, adjuster, service representative, managing general agent, or reinsurance intermediary to any person except upon written application therefor filed with it, qualification therefor, and payment in advance of all applicable fees. Any such application shall be made under the oath of the applicant and be signed by the applicant. . . .

c. Section 626.201, Florida Statutes, which provides:

> (1) The department or office may propound any reasonable interrogatories in addition to those contained in the application, to any applicant for license or appointment, or on any renewal, reinstatement, or continuation thereof, relating to the applicant's qualifications, residence, prospective place of business, and any other matter which, in the opinion of the department or office, is deemed necessary or advisable for the protection of the public and to ascertain the applicant's qualifications.
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> (2) The department or office may, upon completion of the application, make such further investigation as it may deem advisable of the applicant's character, experience, background, and fitness for the license or appointment. Such an inquiry or investigation shall be in addition to any examination required to be taken by the

> applicant as hereinafter in this chapter provided.
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> (3) An inquiry or investigation of the applicant's qualifications, character, experience, background, and fitness must include submission of the applicant's fingerprints to the Department of Law Enforcement and the Federal Bureau of Investigation and consideration of any state criminal records, federal criminal records, or local criminal records obtained from these agencies or from local law enforcement agencies.

d. Section 626.207, Florida Statutes, which provides in pertinent part:

> (1) The department shall adopt rules establishing specific waiting periods for applicants to become eligible for licensure following denial, suspension, or revocation pursuant to s. 626.611, s. 626.621, s. 626.8437, s. 626.844, s. 626.935, s. 634.181, s. 634.191, s. 634.320, s. 634.321, s. 634.422, s.634.423, s. 642.041, or s. 642.043. The purpose of the waiting periods is to provide sufficient time to demonstrate reformation of character and rehabilitation. The waiting periods shall vary based on the type of conduct and the length of time since the conduct occurred and shall also be based on the probability that the propensity to commit illegal conduct has been overcome. The waiting periods may be adjusted based on aggravating and mitigating factors established by rule and consistent with this purpose.

e. Section 626.211, Florida Statutes, which provides in pertinent part:

> (4) If upon the basis of the completed application and such further inquiry or

investigation the department deems the applicant to be lacking in any one or more of the required qualifications for the license applied for, the department shall disapprove the application and notify the applicant, stating the grounds of disapproval.

f. Section 626.611, Florida Statutes, which provides in pertinent part:

> **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:
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> * * *
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> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
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> * * *
>
> (14) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country which involves moral turpitude, without regard to whether a judgment of

conviction has been entered by the court having jurisdiction of such cases.

g. Section 626.621, Florida Statutes, which provides in pertinent part:

> **Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.**--The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may 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 under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626,611:
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> * * *
>
> (8) Having been found guilty of or having pleaded guilty or nolo contendere to a felony or a crime punishable by imprisonment of 1 year or more under the law of the United States of America or of any state thereof or under the law of any other country, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

26. Even though the grant of rulemaking authority in Section 624.308(1), Florida Statutes, might seem, on first reading, to be a general grant of authority, it is a specific grant of rulemaking authority, as required by Section 120.52(8),

Florida Statutes, when considered in the context of the laws implemented by Florida Administrative Code Rule 69B-211.042. The rule, in its entirety, deals with the effect of law enforcement records on applications for licensure for any of the professions governed by Chapter 626, Florida Statutes, including public adjusters. The specific laws implemented by the rule deal explicitly with the Department's authority to determine whether applicants have the qualifications for licensure and set out in detail those qualifications with respect to applicants who have criminal records.

27. Section 626.171(2)(j), Florida Statutes, allows the Department to request any information, in addition to that required by the statute, that the Department "deems proper to enable it to determine the . . . qualifications" for licensure under Chapter 626, Florida Statutes, and Section 626.201(3), Florida Statutes, specifically allows the Department to consider an applicant's criminal records.

28. Sections 626.611(14) and 626.621(8), Florida Statutes, govern the Department's consideration of an applicant's criminal history. Specifically, the Department is <u>required</u> to deny an application for licensure to any applicant who has been convicted of a felony involving moral turpitude. <u>See</u> § 626.611(14), Fla. Stat. Additionally, the Department is given the discretion to deny an application for licensure to any

applicant who has been convicted of a felony. See § 626.621(8), Fla. Stat.

29. The Department has classified felonies into three categories in Florida Administrative Code Rule 69B-211.042(21). The felony for which Mr. Jaramillo was convicted, conspiracy to possess with intent to distribute cocaine, is classified by the Department as a Class A felony that is considered by the Department to be a crime of moral turpitude. See Fla. Admin. Code R. 69B-211.042(21)(vv) and (fff).[3]

30. Because Mr. Jaramillo's felony conviction is considered by the Department to involve a crime of moral turpitude, the Department is required to evaluate Mr. Jaramillo's application pursuant to the mandatory provisions in Section 626.611(14), Florida Statutes, rather than pursuant to the discretionary provisions of Section 626.621(8), Florida Statutes. Under these circumstances, it is appropriate to consider only whether Florida Administrative Code Rule 69B-211.042(17)(b)1. constitutes an invalid delegation of legislative authority with respect to Section 626.611(14), Florida Statutes.

31. The requirement that the Department deny an application for licensure to a person convicted of a felony involving moral turpitude is limited by Section 112.011(1)(b), Florida Statutes, which prohibits an agency from disqualifying a

person who has been convicted of a crime from licensure if that person's civil rights have been restored. This means that, notwithstanding the provisions of Section 626.611(14), Florida Statutes, the Department could not deny his application solely on the basis of his conviction if his civil rights were restored. Cf. Sandlin v. Criminal Justice Standards Comm'n, 531 So. 2d 1344, 1346-47 (Fla. 1988)(In order to reach a constitutional result, a statute purporting to bar all felons from practicing profession must be limited to barring only felons who have not been pardoned.); Padgett v. Estate of Gilbert, 676 So. 2d 440 (Florida 1st DCA 1996)(extends rationale and holding of Sandlin to cases in which felon's civil rights have been restored). The Department recognizes this limitation in Florida Administrative Code Rule 69B-211.042(17)(c), which provides that "[a]n applicant will not be disqualified for licensure solely because of a prior conviction it the applicant has received a restoration of civil rights."

32. Conversely, a person whose civil rights have not been restored is not protected by Section 112.011(1)(b), Florida Statutes. Because Mr. Jaramillo has not had his civil rights restored, he is not protected by Section 112.011(1)(b), Florida Statutes, and the Department is not barred from denying Mr. Jaramillo's application for licensure pursuant to Section 626.611(14), Florida Statutes, solely because he was

convicted of a felony involving moral turpitude.[4] It follows, therefore, that the Department has the authority to adopt a rule declaring that a person who has been convicted of a felony involving moral turpitude is ineligible for licensure until his or her civil rights have been restored.

33. For the reasons stated, the Department did not exceed the rulemaking authority granted by Section 624.308, nor did it "enlarge[], modif[y] or contravene[] the specific provisions of Section 626.611(14), Florida Statutes, in adopting Florida Administrative Code Rule 69B-211.042(17)(b)1. Florida Administrative Code Rule 69B-211.042(17)(b)1. is not, therefore, an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b) and (c), Florida Statutes, with respect to Section 626.611(14), Florida Statutes. No conclusion is reached, however, regarding the validity of Florida Administrative Code Rule 69B-211.042(17)(b)1. with respect to the discretionary authority granted to the Department to deny an application for licensure pursuant to Section 626.621(8), Florida Statutes, because of a felony conviction.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Corrected and Amended Petition for Administrative Determination of the Invalidity of Administrative Rule filed by Luis B. Jaramillo, Jr., is dismissed.

DONE AND ORDERED this 1st day of September, 2010, in Tallahassee, Leon County, Florida.

PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 2010.

ENDNOTE

[1]/ All references to the Florida Statutes are to the 2010 edition unless otherwise indicated.

[2]/ The constitutional issues raised in the Corrected and Amended Petition for Administrative Determination of the Invalidity of Administrative Rule have not been addressed herein because an administrative law judge of the Division of Administrative Hearings does not have jurisdiction to decide the constitutionality of existing rules. See Department of Environmental Regulation v. Leon County, 344 So. 2d 297 (Fla. 1st DCA 1977).

[3]/ No challenge to the validity of Florida Administrative Code Rule 69B-211.042(21) has been raised in this proceeding.

[4]/ It is noted that Florida Administrative Code Rule 69B-211.042(17)(b)1. does not require the denial of an application for licensure because civil rights have not been restored; it only declares that an applicant whose civil rights have not been restored is ineligible for licensure until these rights have been restored. In this respect, Mr. Jaramillo is benefited by Florida Administrative Code Rule 69B-211.042(17)(b)1. because,

pursuant to Section 626.611(14), Florida Statutes, the Department could deny his application, in which event Mr. Jaramillo would incur the disabilities attendant on the denial of an application for licensure should he reapply in the future.

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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second 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.