STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

METRO TRAFFIC SCHOOL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-1563RP
	)	
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,	)	
	)	
Respondent.	)	
_____	)	

SUMMARY FINAL ORDER

This case involves a challenge to a proposed rule and is resolved upon consideration of cross motions for summary final order filed by Petitioner, Metro Traffic School (Metro), and Respondent, Department of Highway Safety and Motor Vehicles (the Department).

APPEARANCES

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STATEMENT OF THE ISSUES[1/]

I. Whether Metro has standing in this case; and

II. Whether Florida Administrative Code Proposed Rule 15A-10.009 is an invalid exercise of the Department's delegated legislative authority within the meaning of section 120.52(8), Florida Statutes.[2/]

PRELIMINARY STATEMENT

On July 19, 2011, a telephonic hearing was held on the parties' cross motions for summary final order. During the hearing, the parties agreed that the attachments to the cross motions, including the entire public hearing record for the proposed rule, together with the deposition of Dana Reiding filed in this case, could be considered as the stipulated record for purposes of ruling on the cross motions. The parties also stipulated that a determination whether the challenged change to the proposed rule was merely a technical change or a substantive change was an issue that could be determined as a matter of law.

FINDINGS OF FACT

1. Private probation services providers are authorized by section 948.15, Florida Statutes, to provide probation services to persons who have been placed on probation by a county court for certain misdemeanors, including misdemeanors in which the use of alcohol is a significant factor.

2. Driving under the influence programs (DUI programs) are authorized by Florida law to provide substance abuse courses to persons who have been arrested for driving under the influence. The Department is responsible for the regulation and licensing of all DUI programs in Florida. See § 322.292, Fla. Stat.

3. Metro is an entity licensed by the Department to operate DUI programs.

4. Some private probation services providers or their affiliates have an ownership interest in DUI programs.

5. Metro is not owned in whole or in part by a private probation services provider or affiliate. There are, however, DUI programs owned by private probation services providers serving some of the same counties where Metro operates its DUI programs.

6. In 2009, the Florida Legislature added subsection 5 to section 322.292, providing:

> (5) A private probation services provider authorized under s. 948.15 may not refer probationers to any DUI program owned in whole or in part by that probation services provider or its affiliates. The department shall establish rules to administer this subsection.

7. On August 13, 2010, the Department published the following preliminary text of the proposed rule development in Volume 32, Number 32, of the Florida Administrative Law Weekly:

THE PRELIMINARY TEXT OF THE PROPOSED RULE DEVELOPMENT IS:

15A-10.009 Program Jurisdiction.
(1) through (3) No change.
(4) DUI programs who are also authorized as a private probation services provider under Section 948.15, F.S., shall not distribute a list of DUI programs in their service area or self-refer persons who are probationers to any DUI program owned in whole or in part by that private probation services provider or its affiliates. The DUI program shall document that the probationer was advised of their right to choose a licensed DUI program.

8. Following an August 31, 2010, rule development workshop, on November 24, 2010, the Department published the full text of the proposed rule in Volume 36, Number 47, of the Florida Administrative Law Weekly in a Notice of Proposed Rule, as follows:

THE FULL TEXT OF THE PROPOSED RULE IS:

15A-10.009 Program Jurisdiction
(1) through (3) No change.
(4) DUI programs that are also authorized as private probation services providers under Section 948.15, F.S., shall not distribute a list of DUI programs in their service area or self-refer persons who are probationers to any DUI program owned in whole or in part by that private probation services provider or its affiliates. The DUI program shall document in writing, signed by the probationer, prior to the commencement of any services, that the probationer was advised of their right to choose any licensed DUI program that serves the county of their residence, employment or school attendance and that the probationer has not been referred by the private probation

> services provider to their DUI program. No DUI program information will be visible in any common areas of a private probation services facility, including the probation offices, hallways and any other area open to clients. This includes all forms of media including but not limited to: posters, brochures, pamphlets, and signage.

9. The "purpose and effect" paragraph published with the notice of proposed rule on November 24, 2010, provides:

> PURPOSE AND EFFECT: The purpose of the proposed rule action is to add a paragraph to the current rule to prohibit DUI programs which are also authorized as private probation services providers from distributing a list of DUI programs in their service area or to self-refer persons who are probationers to a DUI program owned in whole or in part by that private probation services provider or its affiliates; also requires DUI programs to document that the probationer was advised of their right to choose a licensed DUI program.

10. On December 21, 2010, a public hearing was held on the proposed rule. A transcript of that hearing is attached as Exhibit A-5 to the Department's motion for summary final order.

11. On March 4, 2011, the Department published a notice of change in Volume 37, Number 9, of the Florida Administrative Law Weekly, which provided:

> Notice is hereby given that the following changes have been made to the proposed rule in accordance with subparagraph 120.54(3)(d)1., F.S., published in Vol. 36, No. 47, November 24, 2010 issue of the Florida Administrative Weekly.
> (1) through (3) No change.

(4) A ~~DUI programs that are also authorized as~~ private probation services provider, authorized ~~providers~~ under Section 948.15, F.S., shall not distribute a list of DUI programs in their service area or ~~self-~~refer ~~persons who are~~ probationers to any DUI program owned in whole or in part by that private probation services provider or its affiliates. The DUI program shall document in writing, signed by the probationer, prior to the commencement of any services, that the probationer was advised of their right to choose any licensed DUI program that serves the county of their residence, employment or school attendance and that the probationer has not been referred by the private probation services provider to their DUI program. No advertising materials for a DUI program, including posters, brochures, pamphlets, or signs, shall ~~information will~~ be visible in any common areas of a private probation services facility, including the probation offices, hallways and any other area open to clients. Interior directional and exterior business signs are allowed. ~~This includes all forms of media including but not limited to: posters, brochures, pamphlets and signage.~~

12. Under the proposed rule as changed, a private probation services provider would be allowed to post interior directional and exterior business signs in its common areas for DUI programs in which the private probation services provider has an ownership interest. Non-affiliated DUI program materials would not be allowed to be posted.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding. §§ 120.56(1) and (2), 120.569(1), and 120.57(1), Fla. Stat.

STANDING

14. Section 120.56(2)(a) provides that "[a] substantially affected person may seek an administrative determination of the invalidity of a proposed rule by filing a petition seeking such a determination with the division . . . within 20 days after the date of publication of the notice required by s. 120.54(3)(d)[the notice required for substantive changes to a proposed rule])." As noted in the Order Denying Motion to Dismiss entered in this case on April 20, 2011, the petition filed in this case on March 24, 2011, was timely filed within 20 days from the Notice of Change published March 4, 2011.

15. As the Petitioner challenging a proposed rule, Metro "must establish both that application of the rule will result in a 'real and sufficiently immediately injury in fact' and that the alleged interest is arguably within the zone of interest to be protected or regulated." See, e.g., Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002) (discussing standing requirements for challenge to a rule or proposed rule). As explained below, Metro has met its burden of establishing its standing to bring this case.

16. The Department contends that Metro lacks standing because Metro is not "substantially affected" by the proposed

rule. In support, the Department argues that Metro does not provide private probation services and the only entities "encompassed" by the proposed rule are those that provide both DUI programs and private probation services. The Department also argues that the March 4, 2011, published changes to the proposed rule are non-substantive as to Metro and, thus, Metro is not substantively affected by the proposed rule.

17. The Department's contention that Metro is not substantially affected because the changes only affect programs providing both a DUI program and private probation services ignores the fact that one of the challenged changes to the proposed rule provides an exception allowing interior directional and exterior business signs for DUI programs owned by private probation service providers. The challenged changes do not provide for such signage for DUI programs, such as Metro, that are not owned by private probation service providers. In other words, the Department's argument fails to consider the advantage that the proposed rule changes would give co-owned DUI programs over Metro.

18. The Department's argument that the changes to the proposed rule between the full text version published November 24, 2010, and the changes published March 4, 2011, are non-substantive as to Metro is also without merit. The first line of the November 24, 2010, version prohibited only co-owned

DUI programs from distributing a list of DUI programs in their service area, whereas the March 4, 2011, changes prohibit all private probation providers from distributing lists of DUI programs in their service area, whether or not the DUI programs are owned by a private probation provider.

19. Similarly, the change which granted an exception for directional and business signage for only co-owned DUI programs is a substantive change over the original version, which would have prohibited such signs. As a non-affiliated DUI program, unlike its co-owned competitors, Metro does not have the benefit of the exception.

20. In sum, the changes to the proposed rule published on March 4, 2011, were substantive changes that substantially affected Metro, and Metro has standing to challenge those changes.

WHETHER THE PROPOSED RULE IS AN INVALID EXERCISE OF THE DEPARTMENT'S DELEGATED LEGISLATIVE AUTHORITY

21. Section 120.56(2)(a), Florida Statutes, requires that a petition challenging a proposed rule "must state with particularity . . . the reasons that the proposed rule is an invalid exercise of delegated legislative authority."

22. "Invalid exercise of delegated legislative authority" is defined in section 120.52(8) as follows:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the

powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

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

> extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

23. The arguments raised by Metro against the proposed rule implicate subsections (a)[failed to follow rulemaking procedures], (b)[exceeded rulemaking authority], (c)[enlarges, modifies, or contravenes law implemented], and (e)[is arbitrary or capricious], of section 120.52(8), quoted above.

Rulemaking Procedures

24. Metro contends that the Department made the challenged changes without complying with section 120.54(3)(d)1, Florida Statutes. That section requires that any substantive changes to a proposed rule must be supported by one of the following: the record of public hearings on the rule; in response to written material submitted within certain time frames; or in response to a proposed objection by the Joint Administrative Procedures Committee.

25. Specifically, Metro alleges that the change which altered the proposed rule to apply to private probation service providers instead of DUI programs, and the new language providing for directional and informational signage exceptions for co-owned DUI programs are substantive changes that are not supported by the record of public hearings on the rule.

26. In response, the Department argues that the challenged changes are not substantive, and that they are otherwise

supported by the record. As noted under the heading "Standing," above, it has been determined that the challenged changes are substantive. The change providing for exceptions for directional and informational signage, however, is supported by the record of the public hearing. See pages 7-12 of the public hearing held December 20, 2010, on the proposed rule, attached to the Department's Motion for Summary Final Order as Exhibit A-5 (Public Hearing Transcript).

27. Record support for the change in the first line of the proposed rule is less clear. That change substituted the term "private probation providers" in place of "DUI programs that are also authorized as private probation services providers" as the entities that would be prohibited by the proposed rule from distributing a list of DUI programs in their service area. Despite lack of clarity, there was at least some discussion at the Rule Hearing questioning the appropriateness of directing the responsibilities and prohibitions under the proposed rule to the DUI programs as opposed to the probation providers, as follows:

> MR. CHENES: I am sorry. I -- he was referring, he was making reference to the fact that the probation officers were sending the clients and were asking them to sign paperwork that it was, you know, being done freely and voluntarily type, and I was just clarifying that the rule that is being proposed states that the DUI program would be doing that, not the probation officer.

* * *

> MR. FORREST: No, I guess I have stated everything in writing. It is all there. I do think it should be noted one of the -- one of the new lines in this rule, I think it is a really good example of just how flawed the direction is that we are trying to approach this from, in that the first line in the new rule, I don't know if it is the first line, that says, DUI programs cannot provide a list, when in actuality, the list started as the first draft of this rule.[3/]
>
> So the current version of this rule literally, it is a contradiction to the original draft.
>
> I think we are going to have that same exact problem if we get it going down the direction of trying to keep writing what a referral is.

Public Hearing Transcript, pp. 13-14.

28. Therefore, based upon the Public Hearing Transcript, it is concluded that there is enough in the record to support the changes in the proposed rule that are challenged in this proceeding.

Rulemaking Authority

29. Metro also argues that the Department exceeded its statutory rulemaking authority by proposing a rule that regulates private probation service providers. Metro's argument fails in view of a plain reading of section 322.292. That section clearly prohibits private probation services providers from referring probationers to co-owned DUI programs, and

provides that the Department "shall establish rules to administer this subsection." See Finding of Fact 6, supra (quoting § 322.292); see also § 120.52(17), Fla. Stat. ("'Rulemaking authority' means 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.'").

Law Implemented

30. Section 120.52(8)(c), quoted above, includes within its definition of "invalid exercise of delegated legislative authority" a rule that "enlarges, modifies, or contravenes the specific provisions of law implemented."

31. Metro, in its petition and cross motion, argues that the proposed rule enlarges and modifies section 322.292 because it prohibits otherwise permissible activities that are not within the scope of the proscriptions contemplated by that statute.

32. Specifically, Metro complains that "[t]he proposed rule would require private probation services providers to refrain from distributing a list of DUI programs in their service area" even if they are not affiliated with a DUI program. Metro's Motion for Summary Final Order, pp. 8-9.

33. In response, the Department argues that when the entire proposed rule is read in pari materia it is clear that it

is only intended to apply to providers that have an ownership interest in a DUI program. The Department further "acknowledges that it only has authority over those [private probation service providers] which also own in whole or in part a DUI program." Department's Motion for Summary Judgment, p. 14, ¶ 34.

34. The first sentence of the proposed rule as changed (also quoted in Finding of Fact 10, above) states:

> A ~~DUI programs that are also authorized as~~ private probation services provider, authorized ~~providers~~ under Section 948.15, F.S., shall not distribute a list of DUI programs in their service area or ~~self-~~refer ~~persons who are~~ probationers to any DUI program owned in whole or in part by that private probation services provider or its affiliates.

35. The Department's contention that it has no authority over non-affiliated probation services providers does not change the plain meaning of the first clause of the first sentence, quoted above. This clause unambiguously applies the prohibition against distributing a list of DUI programs to all private probation services providers, whether or not they have an ownership interest in a DUI program. The second clause does not change the meaning of the first.

36. Given the plain and unambiguous language in the change that restricts even non-affiliated probation providers from distributing lists of DUI programs, it is concluded that the

challenged language of the proposed rule impermissibly enlarges and modifies the provisions of section 322.292(5).

37. In addition, Metro alleges that the proposed rule's restriction on placing advertising materials for a DUI program in the probation provider's common areas also impermissibly enlarges or modifies section 322.292(5). While the same restriction was in the proposed rule prior to the notice of change, the original prohibition was in the context of DUI programs that are also authorized as private probation services providers, so that the restriction prior to the notice of change appeared to only restrict advertising for affiliated DUI programs. Considering the context after the notice of change, the restriction now prohibits DUI programs, whether or not they are affiliated with a probation services provider, from posting any form of advertising or information regarding their services in the office of a probation services provider.

38. It is concluded that the change in the first clause of the first sentence and the change in the context which effectively expands the restriction against DUI program advertising both constitute impermissible enlargements of the proscriptions of section 322.292(5), in violation of section 120.56(8)(c), Florida Statutes. See also last paragraph of § 120.56(8), Fla. Stat. (often referred to as the "flush left" paragraph); see, e.g., Fla. Elections Comm'n v. Blair, 52 So. 3d

9, 12, n.2 (Fla. 1st DCA 2010), citing Bd. of Trs. Of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700-01 (Fla. 1st DCA 2001), for the proposition that "agencies are creatures of statute with only those powers conferred by statute and that statutory provisions delegating rulemaking authority must be interpreted in light of the significant restrictions on such authority contained in the 'flush left' paragraph in section 120.52(8)."

Arbitrary or Capricious

39. Metro further alleges that the rule is an invalid exercise of delegated legislative authority because it is arbitrary and capricious under section 120.52(8)(e), Florida Statutes. That section, also quoted in paragraph 23 above, provides: "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational."

40. In addition to broadening the proposed rule to restrict activities of non-affiliated DUI programs and private probation services providers as discussed above, the notice of change also added an exception which would allow private probation services providers with an ownership interest in DUI programs to place interior directional and exterior business signs in their facilities for their affiliated DUI programs.

This exception, Metro contends, makes the proposed rule arbitrary and capricious.

41. As conceded by the Department's Assistant Deputy Director for Motorist Services, under the exception, private probation services providers without an affiliation with a DUI program could not post directional or exterior business signs for DUI programs. Rather, only affiliated probation services providers could post such signs for those DUI programs in which they have an ownership interest. Deposition of Dana Reiding, p. 33, attached to Metro's cross motion as Exhibit E (Depo).

42. Therefore, instead of prohibiting referral by affiliated probation providers, the challenged change provides an exception that, in essence, allows referral via directional and business signs only in facilities of probation providers for their affiliated DUI programs. Such an effect is inconsistent with the Department's published Purpose and Effect,[4/] is contrary to the prohibition against self-referral in section 322.292(5), and is "not supported by logic." See § 120.52(8)(e), Fla. Stat. (quoted above).

43. Moreover, the exception does not limit the number of directional or business signs that a private provider can post for its affiliated DUI programs. In addition to being contrary to logic, such an effect is also irrational because it would

contravene provisions in the same proposed rule which restrict any form of advertising materials for DUI programs.

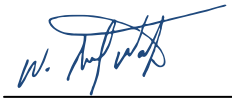
44. In sum, as a matter of fact and law, the challenged exception is arbitrary and capricious within the meaning of section 120.52(8)(e). Agrico Chem. Co. v. Dep't Envir. Reg., 365 So. 2d 759(Fla. 1st DCA 1998); St. Joseph Land & Dev. Co. v. Fla. Dep't of Nat. Resources, 596 So. 2d 137 (Fla. 1st DCA 1992).

CONCLUSION

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

ORDERED that the Motion for Summary Final Order filed by Metro is Granted; the proposed rule 15A-10.009(4), as set forth in the notice of change, is determined to be an invalid exercise of delegated legislative authority; and the Department's Motion for Summary Final Order is Denied.

DONE AND ENTERED this 7th day of September, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2011.

ENDNOTES

[1/] The issues set forth under heading "Statement of the Issues" are derived from the parties' cross motions for summary final order.

[2/] All references to the Florida Statutes are to the 2010 versions.

[3/] Indeed, the first line of the preliminary draft of the proposed rule published August 13, 2010, provided:

> DUI programs who are also authorized as a private probation services provider under Section 948.15, F.S., shall not distribute a list of DUI programs in their service area. . . .

[4/] See Finding of Fact 9, supra.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Summary 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 proceeding 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.