STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PROJECT REFOCUS, INC., A FLORIDA CORPORATION, Petitioner, vs. UNITED SAFETY COUNCIL, INC., d/b/a FLORIDA SAFETY COUNCIL, INC., A FLORIDA NON-PROFIT CORPORATION AND DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondents.	)	Case No. 11-3297RX

SUMMARY FINAL ORDER

Pursuant to notice, a hearing was held in this case on August 22, 2011, by teleconference on Respondent, United Safety Council's Motion for Summary Final Order, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Samuel B. Weissman, Esquire
Kramer Law Firm, P.A.
IDC Building
999 Douglas Avenue
Suite 3333
Altamonte Springs, Florida 32714

Damon Chase, Esquire
Chase Freeman
1525 International Parkway, Suite 402
Lake Mary, Florida 32746

For Respondent: Brandon S. Peters, Esquire
Peters Trial Group, LLC
1844 West Fairbanks Avenue
Winter Park, Florida 32789

For Department: Douglas Sunshine, Esquire
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, Room A432
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether a final order dismissing the Petitioner's rule challenge should be entered because Respondent, United Safety Council, Inc., doing business as Florida Safety Council (United Safety Council), is not an "agency" within the Florida Administrative Procedures Act (APA), and there is no claim challenging a rule enacted by Respondent, Department of Highway Safety and Motor Vehicles (Department).

HOLDINGS

United Safety Council is not an "agency" within the definition of section 120.52(1), Florida Statutes (2010); thus Project Refocus' rule challenge against United Safety Council is not subject to the APA. Consequently, United Safety Council's Motion for Summary Final Order is Granted.

Project Refocus' petition in the instant case does not challenge a Department rule or action, and the Department was never added or served as a party. Therefore, the Department's motion to remove it as a party is Granted.

PRELIMINARY STATEMENT

On June 27, 2011, Petitioner, Project Refocus, Inc., (Project Refocus) filed a Petition Seeking Administrative Determination of the Invalidity of Rulemaking and Invalid Exercise of Delegated Powers Under Florida Administrative Code (Petition). Specifically, the Project Refocus brought an existing rule challenge, pursuant to section 120.56(3), that claimed Respondent, United Safety Council, a non-profit Florida Corporation, had "exceeded the powers delegated by the Department under Chapter 322,Florida Statutes, and Florida Administrative Code Rule 15A-10, and finding such actions by [United Safety Council] to be invalid[.]"[1/]

On June 30, 2011, the Clerk for the Florida Division of Administrative Hearings (DOAH) provided the Florida Department of State a copy of the Project Refocus' rule challenge. The Clerk added the Department into the case-style. On July 1, 2011, DOAH assigned the case to the undersigned, Administrative Law Judge Thomas P. Crapps.

On July 8, 2011, the undersigned conducted a telephonic hearing to set a final hearing date for the rule challenge. At the hearing, the Department made an ore tenus motion to remove the Department as a party, because the Department was not listed or served as a party. On July 20, 2011, the Department followed the ore tenus motion with a written motion, Respondent's Motion

to Remove Party, that argued that the Department had not been served with process and was not a proper party. The Department's motion did not comply with Florida Administrative Code Rule 28-106.204(1), which requires that a movant contact all parties and state the parties' position concerning the relief sought by movant. To date, neither Project Refocus nor United Safety Council has filed an objection to the relief sought by the Department.

The final hearing for the rule challenge was set for August 25 and 26, 2011.

On August 3, 2011, United Safety filed Respondent's Motion for Summary Final Order, arguing that because United Safety Council is not a state "agency" as defined by the APA, a final summary order should be entered against Project Refocus.

On August 11, 2011, Project Refocus filed Petitioner's Response to Respondent's Motion for Summary Final Order and Motion to Strike Respondent's Motion for Summary Final Order. Project Refocus advanced two reasons why United Safety Council's motion should be denied. First, Project Refocus argued that in a circuit court proceeding between the parties, United Safety Council had taken a contrary position that the Division of Administrative Hearings had jurisdiction, not the circuit court, to consider the claims. Project Refocus' second argument was that United Safety Council was a private entity undertaking a

public role which made it subject to the APA. In addition to its response, Project Refocus also advanced a motion to strike United Safety Council's Motion for Summary Final Order based on United Safety Council's failure to comply with Florida Administrative Code Rule 28-106.204(1), by not stating Project Refocus' position as to the motion.

On August 19, 2011, United Safety Council filed a response arguing that it had not taken an inconsistent position before a circuit court, and that its position "remains - that any remedy afforded Petitioner is an administrative remedy before [the Department]." As for the motion to strike, United Safety Council noted that Project Refocus was not prejudiced and had an opportunity to file an appropriate response.

On August 22, 2011, the undersigned conducted a telephonic hearing on United Safety Council's Motion for Summary Final Order. Because the issue raised by United Safety Council appeared dispositive, the undersigned cancelled the August 25 and 26, 2011, final hearing on the rule challenge.

I. Removal of the Department of Highway Safety and Motor Vehicles as a party.

The first issue that will be addressed is the inclusion of the Department into this rule challenge. A review of Project Refocus' rule challenge shows that it does not name the Department as a party. In fact, Project Refocus does not

identify a rule or action where it claims the Department engaged in improper rulemaking or enforcement of an improper rule. Rather, Project Refocus identifies United Safety Council's determination as to the maximum number of treatment providers approved under the DUI Program, pursuant to section 322.292, as invalid. Thus, it is clear from Project Refocus' rule challenge that it does not contain a claim against the Department or Department action.

Because a rule challenge by statutory definition necessarily involves a state "agency," the Clerk for the Division of Administrative Hearings, sua sponte, added the Department into the case style and provided a copy of the challenge. Certainly, in a rule challenge, the Department would need to be put on notice if there was a challenge to one of its rules or rule-making authority. In the instant case, the Department has made two timely objections to its inclusion into the case based on the fact that it was never noticed as a proper party or ever served by Project Refocus. To date, neither Project Refocus, nor United Safety Council has filed an objection to the relief sought by the Department. Because the rule challenge in the instant case fails to identify a Department rule or action and the Department has not been served as a party, the undersigned finds that it is proper to remove the Department as a party in the instant case.

II. United Safety Council's Motion for Summary Final Order.

United Safety Council's Motion for Summary Final Order raises the dispositive issue of whether United Safety Council, a private entity, is an "agency" for the purposes of Project Refocus' rule challenge. Before turning to the statutory and case law analysis, it is helpful to set out Project Refocus' rule challenge Petition in detail.

In the Petition, Project Refocus alleges that section 322.292(2) directs the Department to adopt rules to implement its supervisory authority over the DUI programs, and requires the Department to adopt rules for statutorily required education, evaluation, and supervision of DUI offenders. Further, Project Refocus alleges that Department adopted Florida Administrative Code Rule 15A-10, as required under section 322.292. According to the Petition, United Safety Council operates a DUI Program under section 322.292, and rule 15A-10.

Project Refocus brings a rule challenge under section 120.56(3), claiming that United Safety Council had "exceeded the powers delegated to the Department of Highway Safety and Motor Vehicles" under the applicable Florida Statutes and Florida Administrative Code. Project Refocus seeks an administrative determination that United Safety Council failed to follow statutory rulemaking procedure; exceeded the grant of its rule-

making procedure; enacted a rule or policy that is vague, because it fails to establish adequate standards for agency decision or give the United Safety Council unbridled discretion; and has adopted a rule or policy that is arbitrary or capricious. As for relief, Project Refocus seeks an administrative order awarding it damages for lost business and income during the period that United Safety Council's rule or policy affected Project Refocus's interests; an order reinstating Project Refocus onto the United Safety Council's treatment provider list; and awarding attorneys fees and costs under section 120.595(2).

The beginning point for determining whether or not Project Refocus' rule challenge is proper is an examination of the APA statutory definitions. Section 120.56(3)(a), provides that "a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule." Further, "[t]he petitioner has a 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." Id. The term "invalid exercise of delegated authority" is further defined in section 120.52(8).[2/] A reading of this definition of "invalid exercise of delegated legislative authority," shows that a challenge goes to an "agency" action involving a "rule"

or "rulemaking." Each of these terms, "agency," "rule," and "rulemaking," are in turn defined by statute.

Section 120.52(16), defines a "rule," in part, as "each agency statement of general applicability that implements, interprets, or prescribes law or policy . . . ."[3] Similarly, "rulemaking" is defined as "statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or create any statement coming within the definition of the term 'rule'." § 120.52(17), Fla. Stat.[4] By definition, both "rules" and "rulemaking" are directed by an "agency." The final statutory definition for this analysis is for the term "agency" found in section 120.52(1)(a), (b), and (c).[5] A reading of the statutory definition of an "agency" shows that the language is limited to government officers and listed government entities.

Applying these statutory definitions to the undisputed facts in the instant case, it is clear that United Safety Council is not an "agency" within the APA definition. It is not disputed that United Safety Council is a private Florida non-profit corporation, not a governmental entity. As such, the United Safety Council does not fit any of the definitions of an "agency" provided in sections 120.52(1)(a), (b), or (c). Because United Safety Council is not an "agency," it logically follows that United Safety Council does not engage in "rule making" or enact "rules" within the APA. Therefore, following the plain

language of chapter 120, United Safety Council is not subject to a rule challenge under the APA.

The conclusion that United Safety Council is not an "agency" is supported by case law holding, that private entities are not subject to the APA. See First Quality Home Care, Inc. v. Alliance for Aging, Inc., 14 So. 3d 1149 (Fla. 3d DCA 2009)(holding that an area agency on aging, which is private non-profit corporation, is not an "agency" within the definition of section 120.52(1); thus denying a writ of mandamus seeking the private entity to refer a bid protest to the Division of Administrative Hearings); Fla. Dep't of Ins. v. Fla. Ass'n of Ins. Agents, 813 So. 2d 981 (Fla. 1st DCA 2002)(holding that an association, which was created by statute to make windstorm insurance coverage available to Floridians who could not obtain the coverage through private insurers, was not an "agency" for purposes of chapter 120, because the association did not fall within any of the categories of entities identified as agencies in section 120.52(1)); and Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137 (Fla. 1st DCA 1981).

Project Refocus relies upon the holding in Mae Volen Senior Center Inc., v. Area Ag. on Aging Palm Beach/Treasure Coast, Inc., 978 So. 2d 191 (Fla. 4th DCA 2008), review denied, 1 So. 3d 172 (Fla. 2009), for the proposition that United Safety Council is an "agency," because it is acting as a "quasi-

governmental agency," by providing the DUI Program mandated by section 322.292. Further, Project Refocus argues that if one reads the definition of "agency" literally to hold that United Safety Council is not subject to the APA, then the holding reaches an absurd result. According to Project Refocus, the absurd result is that there is no review of private entities performing public work; for example, no independent review of United Safety Council's decision not to select Project Refocus as a treatment facility for the DUI Program.

Reading the decisions in Mae Volen and First Quality, it is clear that the two district courts of appeal are in conflict concerning the interpretation of whether or not area agencies on aging, which are private non-profit corporations serving a governmental function, are "agencies" within the definition of section 120.52(1).

The undersigned finds the statutory construction discussed by the First Quality court that a private entity does not meet the statutory definition of an agency more persuasive than the analysis set out in Mae Volen. First Quality is more persuasive because it applies the plain language of section 120.52(1), that the APA does not extend to private entities. If the legislature intended to subject private entities who contract to provide public services to the APA, then the legislature may expand the

statutory definition. The undersigned, however, cannot expand the definition.

Moreover, even if one considered the Mae Volen court's holding that a private entity providing a government function is an "agency" within chapter 120, is correct, the instant case would be legally distinguishable from Mae Volen. The discussion in Mae Volen shows that under the relevant statutes and rules of administrative procedure, decisions made by area agencies on aging were subject to competitive bidding in accordance with state and federal regulations. Mae Volen, 978 So. 2d at 193. Mae Volen further discussed that the statutory scheme allowing the Department of Elder Affairs to coordinate and administer programs through private contracting agencies, the area agencies on aging, was part of a federal program. Id. at 192-193. Mae Volen specifically recognized that the state's ability to participate in the federal program and receive federal funding required the state "to submit a plan consistent with federal law regarding the provision of services for the elderly." Id. at 192. In fact, as Mae Volen outlines, pursuant to this legislative direction, the Department of Elder Affairs and the area agency on aging adopted a rule for bid protests for contracts awarded by the area agency on aging. 978 So. 2d at 193. Consequently, if one accepts the Mae Volen, it is clear

that the legislature intended that contracts awarded by area agencies on aging be subject to bid protests under chapter 120.

Unlike Mae Volen, in enacting section 322.292, the legislature did not provide language-making decisions by the private DUI Program subject to review under the APA. This conclusion is further reflected by a review of Florida Administrative Code Rule 15A-10.028, which permits a DUI Program to establish a treatment referral and list of "approved providers," but does not provide for an appeal or review of the DUI Program's decision. Thus, unlike Mae Volen, the legislature did not create APA review for bringing the challenge against United Safety Council's decision to exclude Project Refocus as a treatment provider.

Finally, Project Refocus argues that a literal reading of the section 120.52(1), concerning the definition of an "agency," here will reach an absurd result. Project Refocus argues that the absurd result is that there is no review or appeal of United Safety Council's decision to exclude Project Refocus as an approved treatment provider.

The First District Court of Appeal has cautioned courts against deviating from the plain text of a statute purportedly to avoid reaching what a court considers an "absurd result." Nassau Cnty. v. Titcomb, 41 So. 3d 270, 279 (Fla. 1st DCA 2010). As the district court of appeal noted, when improperly used, the

absurdity doctrine allows courts to substitute their judgment of how legislation should read, rather than how it does read, in violation of the separation of powers enshrined in article II, section 3 of the Florida Constitution. Id. "When the language of a statute is unambiguous, courts are bound to follow the text." Id. (case citation omitted); see also Webster, et al., Statutory Construction In Florida: In Search of a Principled Approach, 9 Fla. Coastal L. Rev. 435, 505 n. 482 (2008). It is only when the literal interpretation of statutory terms frustrates legislative intent, that the literal meaning must yield to legislative intent for the statute as a whole. Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986); Dept of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, Inc., 612 So. 2d 646, 654 (Fla. 1st DCA 1993); cf. State v. Perez, 531 So. 2d 961, 963 (Fla. 1988)(rejecting literal meaning leading to illogical result); see also Haddock v. Carmody, 1 So. 3d 1133 (Fla. 1st DCA 2009)(declining to read statute literally in order to avoid an absurd result).

Turning to the instant case, section 120.52(1) does not define an "agency" for purposes of the APA to include a private entity, even if that entity is providing some government function. There is no legislative intent to subject private entities, who provide government services, to the APA. The legislature could expand the definition of "agency" to include

private entities, if it wanted to. However, the legislature has neither expanded the definition of "agency," nor provided for review of the DUI Program's decision in choosing approved treatment providers under section 322.292. It does not follow that the legislature's decision not to subject a private entity to the APA is an absurd result.[6/]

Based on the foregoing, the undersigned rules the following:

A) Granting United Safety Council's Motion for Summary Final Order is granted and the Petition seeking a rule challenge is dismissed. Jurisdiction is retained to award United Safety Council attorneys fees and costs against Project Refocus, pursuant to sections 57.105(5) and 120.595(6);

B) Counsel for United Safety Council and Project Refocus are to confer within 30 days of this Summary Final Order to determine whether or not the parties can stipulate reasonable attorneys fees and costs; and if not able to stipulate, to inform the Division of Administrative Hearings, so that a hearing may be conducted; and

C) The Department of Highway Safety and Motor Vehicle’s motion to remove it as a party is granted.

DONE AND ORDERED this 3rd day of October, 2011, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of October, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

[2/] Section 120.52(8), provides that:

> (8) "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.

[3/] Section 120.52(16), provides:

(16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

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

application outside the agency issuing the memorandum.

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

(c) The preparation or modification of:

1. Agency budgets.

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

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

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

Similarly, the definition of the term "Rulemaking authority"

[4/] Section 120.52(17), provides:

(17) "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."

[5/] Section 120.52(1), provides:

(1) "Agency" means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:

(a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but

only when a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

(c) Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any municipality or legal entity created solely by a municipality; any legal entity or agency created in whole or in part pursuant to part II of chapter 361; any metropolitan planning organization created pursuant to s. 339.175; any separate legal or administrative entity created pursuant to s. 339.175 of which a metropolitan planning organization is a member; an expressway authority pursuant to chapter 348 or any transportation authority under chapter 343 or chapter 349; or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

[6/] A review of Florida Administrative Code Rule 15A-10.042, provides for complaints against DUI Programs to be filed with the Department. Consequently, it appears that Project Refocus' remedy is to file a complaint with the Department of Highway Safety and Motor Vehicles under rule 15A-10.042, against United Safety Council and to raise its concerns, rather than a rule challenge against another private entity.

COPIES FURNISHED:

Jennifer Clark, Agency Clerk
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-430
2900 Apalachee Parkway, Mail Stop 61
Tallahassee, Florida 32399

Samuel B. Weissman, Esquire
Kramer Law Firm, P.A.
999 Douglas Avenue, Suite 3333
Altamonte Springs, Florida 32714

Douglas Sunshine, Esquire
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, A432
Neil Kirkman Building, Room A-432
Tallahassee, Florida 32399

Damon A. Chase, Esquire
Chase and Freeman
1525 International Parkway, Suite 4021
Lake Mary, Florida 32746

Brandon S. Peters, Esquire
Peters Trial Group, LLC
1844 West Fairbanks Avenue
Winter Park, Florida 32789

Jesslyn Krouskroup, Acting Coordinator
Joint Administrative Procedure Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400

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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed