STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TEAMSTERS LOCAL UNION NO. 2011,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1122RU
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on June 6, 2012, in Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Holly E. Van Horsten, Esquire
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For Respondent: Thomas Barnhart, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's temporary directive, which requires probation officers to request and obtain supervisor approval on a case-by-case basis before

incurring travel expenses for certain field visits, meets the definition of a "rule" in section 120.52(16), Florida Statutes (2011),[1/] which should have been promulgated as such.

PRELIMINARY STATEMENT

On March 27, 2012, the Teamsters Local Union No. 2011 (Petitioner) filed a Petition for Rule Challenge Pursuant to Section 120.56, Florida Statutes (Petition). Invoking section 120.56(4), the Petition alleged that certain statements by the Department of Corrections (Respondent), communicated in a telephone conference call and then memorialized in a memorandum and a letter dated March 2, 2012, meet the definition of a "rule" in section 120.52(16) and should have been promulgated pursuant to section 120.54. The statements at issue allegedly changed the process to be followed by probation officers with regard to making certain field visits to monitor offenders under their supervision.

A telephonic pre-hearing conference was conducted on April 2, 2012. Good cause was shown for scheduling the final hearing outside of the 30-day window following assignment, and the hearing was set for May 14, 2012. On May 1, 2012, Respondent filed a motion for continuance, which was opposed by Petitioner. Respondent requested a short delay to accommodate a surgery and post-surgical recovery for its counsel of record, who was representing Respondent in discovery and pre-hearing preparation

and who would represent Respondent at the final hearing; although Respondent also had a co-counsel of record, co-counsel was out of state and would not return until May 16, 2012. A continuance was granted for good cause shown, and the final hearing was rescheduled for June 6, 2012.

On May 25, 2012, Respondent filed a Motion for Summary Final Order, which was denied. On June 1, 2012, Respondent filed a Motion for Entry of Protective Order with respect to a document expected to be an exhibit. After argument on the motion at the outset of the final hearing, the motion was granted, and a Protective Order was entered on June 6, 2012.[2/]

The parties offered Joint Exhibits 1 through 10, which were admitted in evidence subject to rulings on any post-hearing objections to specific deposition testimony or deposition exhibits in Joint Exhibits 5 through 9.[3/]

Petitioner presented the testimony of Kimberly Schultz, a probation officer specialist; and Jeff Edmiston, administrative coordinator for Petitioner. Petitioner offered Exhibits 1 through 5, which were admitted in evidence without objection.

Respondent presented the testimony of Jenny Nimer, assistant secretary for Respondent's Office of Community Corrections (Community Corrections). Respondent offered Exhibits 1 through 3, which were admitted in evidence without objection.

The one-volume Transcript of the final hearing was filed on June 25, 2012. Both parties timely filed proposed final orders by the deadline of July 5, 2012, and both have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Respondent is the state agency with "supervisory and protective care, custody, and control of the inmates, buildings, grounds, and property, and all other matters pertaining to [specified correctional facilities and programs] for the imprisonment, correction, and rehabilitation of adult offenders[.]" § 945.025(1), Fla. Stat. (setting forth Respondent's jurisdiction). By far, Respondent's resources, including personnel, are primarily devoted to Respondent's responsibilities over correctional facilities and programs. There are approximately 17,000 certified officers on the correctional institution side.

2. Respondent also is the state agency responsible for supervising offenders who are granted conditional release from incarceration or who are granted parole by the Parole Commission (chapter 947, Florida Statutes), as well as the state agency responsible for supervising probationers placed on probation (or in community control, known commonly as house arrest) by a court (chapter 948, Florida Statutes). Collectively, persons who have been conditionally released, parolees, and probationers will be

referred to as "offenders." A relatively small percentage of Respondent's resources, including personnel, are devoted to the supervision of offenders. There are approximately 2,100 certified parole and probation officers providing community supervision.

3. Organizationally, Respondent's supervisory functions fall under the umbrella of Community Corrections. The supervision of offenders statewide is divided into a northern and southern region, each covering ten of the state's 20 judicial circuits. Each region is headed by a regional director, who oversees the supervision of offenders within the region's ten judicial circuits. Each of the 20 judicial circuits has a circuit administrator. Each circuit also used to have a deputy circuit administrator, but that position was eliminated in 2009. Reporting to the circuit administrators are probation supervisors, who supervise and coordinate the activities of individual probation officers and probation officer specialists.

4. Offenders are assigned to certified probation officers and probation officer specialists, who directly carry out the supervisory functions. See § 948.01(1)(a), Fla. Stat. (an offender on probation or community control is to be supervised by an officer meeting the qualifications in section 943.13, Fla. Stat.). A probation officer specialist is a probation officer with a certain level of experience to whom the offenders with the

most serious criminal records are assigned. Unless otherwise specified, the term probation officer will be used, in the broad sense, to include both probation officers and the more experienced probation officer specialists.

5. In carrying out its community supervisory functions, Respondent's goals are all of the following: to ensure compliance with the conditions of supervision imposed by the court or by the Parole Commission; to ensure public safety; to foster rehabilitation of the offender; and to reduce or eliminate future victimization.

6. Probationers may be placed on probation, in lieu of incarceration, or as part of a split sentence that includes incarceration followed by probation. §§ 948.011 and 948.012. The starting place for supervision of a probationer is the court's order of supervision, which specifies the terms and conditions of probation. Respondent is charged with preparing a form order of supervision for the courts to use. § 948.01(1)(b). The form order prepared by Respondent and used by the courts reflects the standard conditions of probation which may be imposed by the courts, enumerated in section 948.03. The form order also provides options for the court to exercise its authority and discretion to impose special terms and conditions. See, e.g., §§ 948.031 through 948.039.

7. The standard conditions of probation that may be imposed by a court in its order of supervision are broadly worded and general in nature and include the following:

> (a) Report to the probation and parole supervisors as directed.
>
> (b) Permit such supervisors to visit him in his or her home or elsewhere.
>
> (c) Work faithfully at suitable employment insofar as possible.
>
> (d) Remain within a specified place.
>
> (e) Live without violating the law.

8. The statutes and standard terms of probation do not dictate or specify how, precisely, Respondent is to carry out its supervisory function in monitoring offenders to serve the goal of ensuring compliance with these terms. The concept of "supervision" is not quantified, such as by specifying how often an offender must report to his or her probation officer or whether and how often probation officers may or will visit an offender in his or her home or elsewhere. A court's order of supervision could theoretically provide a condition specifying that a probationer must go to his or her probation officer's office twice a month or five times a month. However, the one sample order of supervision entered in evidence in this case did not impose any such terms quantifying the number of office visits

or other visits that the unidentified probationer had to make with his or her probation officer.

9. With respect to "supervision," section 948.12 provides a distinction for violent offenders who are on probation following incarceration by providing that these offenders "shall be provided intensive supervision by experienced probation officers." However, just as the statutes do not purport to specify or quantify what is meant by "supervision," there is no statutory specification for what is meant by "intensive supervision."

10. Respondent has had, apparently as far back as 2002, internal procedures in place to provide detailed processes for probation officers to follow in carrying out their duty to supervise offenders assigned to them. These procedures are published in a 41-page document called Procedure 302.303, which Respondent considers a "restricted access" document for internal use only.

11. One subject addressed in Procedure 302.303 is an offender classification system. The current classification system was designed in-house and then validated by the Florida State University School of Criminology. The system considers a number of variables and is used by Respondent as a way to group offenders in an effort to ensure that supervision is provided at a level commensurate with the danger or risk the offender

represents to the community. This offender classification system, which is not promulgated as a rule, is not the subject of Petitioner's challenge.

12. Procedure 302.303 also addresses the subject of contacts expected to be made by a probation officer with individual offenders assigned to the officer. In general terms, Procedure 302.303 specifies minimum contacts, by type and frequency, that probation officers are expected to make, or try to make, for each of their assigned offenders. The types of contacts include office visits, meaning the offender comes into the probation officer's office for a meeting; other kinds of visits, scheduled or unscheduled, when the probation officer travels outside the office to visit or attempt to visit the offender in his home, in his place of employment, or another place; and field visits with third parties, when the probation officer travels outside the office to visit or attempt to visit the offender's employer, treatment providers, family, neighbors, or other third persons who might have information about the offender.

13. Different minimum contact requirements, by type and frequency, are provided for each of the different offender risk classification categories in Procedure 302.303. The minimum contact standards are performance standards that apply to probation officers; without the minimum contact requirements,

some probation officers might do less than the minimum. These minimum contact standards, which have not been promulgated as a rule, are also not the subject of Petitioner's challenge.

14. Instead, Petitioner's challenge is directed to a recent temporary directive by Respondent that suspended some aspects of the (unpromulgated) minimum contact standards in Procedure 302.303. In lieu of these minimum contact standards, Respondent's directive provides that probation officers need to request and receive permission of their supervisors on a case-by-case basis to incur travel expenses for certain field visits. As a related part of the directive, supervisors are given discretion to approve travel expenses for any field visit if there is reason to believe there may be a violation of a condition of supervision or if there is reason to believe that there is a threat to public safety.

15. The challenged directives were first communicated verbally on February 29, 2012, in a telephone conference call between Jenny Nimer, assistant secretary of Community Corrections, and the Community Corrections regional directors, and then reduced to writing in the following memorandum dated March 2, 2012, on the subject of "Reduced Travel" (Reduced Travel Memo) from Assistant Secretary Nimer to Community Corrections regional directors and circuit administrators:

On 2/29/12 directives were provided for adjustments to be made on some non-critical supervision activities. As these directives are temporary and related to "restricted" policy areas they were given verbally; existing written policy will not be changed. Our goal is to reduce the travel budget by focusing on mission critical activities without compromising public safety. Travel related to core operational duties will continue; however **all** travel will be reviewed for efficiency.

NO adjustments have been made to travel that involves investigation of known or suspected violations, violation proceedings/subpoenas, investigations or instruction of offenders in correctional facilities. Adjustments are focused on reduction of department established minimum contact standards and administrative duties. There is an urgent need to reduce travel costs for the remainder of the fiscal year; however public safety is the utmost priority and supervisors maintain the discretion to approve any travel that is needed to accomplish officer safety and protection of the community.

For the months that adjustments are in place (March, April, May and June) officers will annotate electronic field notes for offenders requiring field contacts during the month, as follows: CN--"Contact Standards Adjusted". Alternative methods to verify (and re-verify) residence and employment during this period, including making telephone calls to the landlord and employer or instructing the offender to provide bills and paychecks to show proof of residence and employment will be utilized. Contact codes for purposes of electronic case notes for residence and employment verification will be HV, EN, or EV and text should indicate the alternative method utilized for verification. Planned Compliance Initiatives will continue;

> partnerships established with local law enforcement remain essential to enhance surveillance and contacts made in the community. These contacts should always be documented in case notes.
>
> Circuit Administrators are directed to reach out to judiciary, state attorney and law enforcement to ensure that they are aware of the limited scope of this reduction and that contacts required to ensure offender supervision and/or threats to public safety will not be compromised.
>
> Thank you for your cooperation during this difficult time.

16. The Reduced Travel Memo was distributed to probation officers as the means by which Respondent communicated to its probation officers that they would not be expected to comply with all of the minimum contact requirements set forth in Procedure 302.303 between March 1, 2012, through the end of the fiscal year, June 30, 2012. The expectation was, at the time of the challenged statement, that this cost-saving measure was temporary and that the (unpromulgated) minimum contact requirements in Procedure 302.303 would resume as of the new fiscal year beginning July 1, 2012.

17. As of the final hearing on June 6, 2012, Respondent's expectation was unchanged. The announced temporary replacement of minimum contact requirements based on risk category with a procedure for supervisor review and approval of field contacts remained just that--temporary--and the expectation was that the

minimum contact standards set forth in Procedure 302.303 would resume for the fiscal year beginning July 1, 2012. Petitioner hinted at, but offered no evidence to prove the notion that Respondent did not really intend to resume the minimum contact standards in the fiscal year beginning July 1, 2012.[4/]

18. The Reduced Travel Memo and a March 2, 2012, letter from Secretary Kenneth S. Tucker (Tucker Letter), represent the challenged agency statements in that these two documents memorialize the temporary directive.[5/] As explained in the Tucker Letter:

> Due to a 79 million dollar deficit, the Department has had to make temporary modifications to field contact requirements in order to reduce travel expenditures by probation officers. . . .
>
> Our probation officers will continue to make field contacts with sex offenders and community control offenders in order to closely monitor sex offender conditions and/or house arrest requirements. Probation officers will continue to monitor other supervised offenders' compliance with conditions of supervision and probationers will still be required to meet monthly with their probation officer at the office. In addition, probation officers will make field contacts in the community as necessary to investigate non-compliance or possible violations. Probation officers will also continue to participate with law enforcement in Planned Compliance Initiative (PCI's) in the community. Probation officers will use this opportunity to spend more time with offenders in the office or on the telephone, assisting with job referrals or other resources and services needed.

19. Community Corrections undertook an analysis of its budget in an effort to identify expenditures where cost savings might be realized to help reduce the budget deficit. The three significant budget categories of expenditures were salaries, leases, and expenses. There had been a hiring freeze in place for some time already, and so an effort was made to not cut personnel to save salary costs. There also had been a concerted effort to reduce lease costs by consolidating offices to eliminate some leases. The viable short-term option to cut costs for the remainder of the fiscal year was in the expense category, which was predominately travel reimbursement. It was determined that, over the year, Community Corrections was averaging between $250,000 and $300,000 per month in travel reimbursement.

20. Some travel reimbursement had already been reduced before the temporary directive challenged here. For example, Community Corrections personnel, including probation officers, might travel to participate in training programs. However, training had already been greatly limited. Some travel reimbursement could not be reduced, such as reimbursing probation officers for necessary travel for court appearances. In these instances, efforts were made to use state cars and to encourage carpooling, if possible.

21. Community Corrections assessed the number of field contacts and attempted contacts that were being made by probation officers to comply with Respondent's minimum contact standards and the travel reimbursement associated with them (i.e., the contacts). Respondent estimated that its temporary directive, challenged here, would reduce travel costs by $150,000 per month for each of the four months in which the directives would be in place. In total, Respondent expected to save $600,000.

22. Respondent's actual experience following issuance of the Reduced Travel Memo and Tucker Letter shows that Respondent's estimates were on target. In February 2012--the last month before the temporary suspension of some of the minimum contact standards--travel reimbursement totaled $277,000. After switching to a procedure of case-by-case probation officer request and supervisor review to approve field visits, travel reimbursement was down to $99,000 in March 2012, a savings of $187,000, compared to February. In April 2012, travel reimbursement dropped to $80,000.

23. The evidence established that the discretion afforded probation supervisors in the Reduced Travel Memo is true discretion vested in supervisors to review requests and act on a case-by-case basis to approve field visits. That discretion has been exercised on numerous occasions to authorize a field contact. There was no evidence of any probation officer having

submitted a request to make a field visit to investigate a possible violation of a probation condition or where there was a public safety issue that was not approved by his or her supervisor. To the contrary, the evidence established that requests are being made and leeway is being provided to probation officers to travel, if they can articulate a reason for doing so. However, for one or two probation officers who do not accept that they must request approval and justify their travel expense on a case-by-case basis and who simply ask for block reinstatement of the minimum contact standards, without articulating any reason why field visits are needed for particular offenders, those requests have been denied.

24. As the Reduced Travel Memo and Tucker Letter suggest, there are other tools available to probation officers besides incurring the expense of field visits, which are often equally effective to accomplish the goal. For example, a field visit to an offender's employer is certainly one way to verify employment and to verify the offender's attendance, but telephone calls may well suffice to obtain the same information at much lower costs. There are also other ways to attempt to verify residence besides a personal home visit. An offender can be required to present documentation, such as a utility bill, rental agreement, or pay stub showing the offender's address. An offender can be made to come in for office visits more frequently than once a month. A

probation officer can telephone the offender frequently, and the voice mail message or background noise may give some reason to believe there is a need for a field visit. A probation officer can call family members and neighbors to check on an offender and to verify information. A probation officer can enlist the help of a local law enforcement officer to check on an offender. In short, for the period of Respondent's urgent need to reduce costs, probation officers have been asked to work a little harder and more creatively from their desks, while reserving travel expenses for field visits to the cases where they have some reason to think a field visit is needed.

25. Petitioner presented the testimony of one probation officer specialist, Kimberly Schultz. As a specialist, this officer handles a case load disproportionately made up of sex offender probationers (for whom the temporary directives did not suspend minimum contact standards) and the next category down on the risk scale--maximum offenders.

26. Officer Schultz testified that she believes that public safety is best served by the old minimum contact standards in (unpromulgated) Policy 302.303. Officer Schultz suggested, but failed to prove, that public safety is compromised by the temporary directive. Under the temporary directive, Officer Schultz has only requested approval once from her supervisor to make a field contact based on a suspicion she developed that the

offender may be in violation of his probation requirements. That single request was approved.

27. Officer Schultz did not identify any instance in which public safety was jeopardized because a field contact was not allowed. Instead, Officer Schultz spoke to the increased possibility that allowing more travel to make surprise visits to offenders' homes or places of employment would reveal suspicious behavior or incorrect information. Certainly, Officer Schultz has the experience to draw on to offer the view that, in a general sense, increased field visits would serve to increase the possibility of discovering probation violations or other issues with offenders. In an ideal situation with unlimited resources, a probation officer following every move an offender makes could well come to find that the offender is not "liv[ing} without violating the law," as required in a standard probation condition. However, such an ideal situation obviously does not exist. Instead, Respondent has taken action to manage its limited resources. The evidence did not show that Respondent's temporary directive has threatened public safety.

28. Officer Schultz attempted to suggest that, in the single instance when she requested a field contact, she would have discovered sooner that the offender was not living where he said he was, if she had made the minimum field contacts under Procedure 302.303. Her testimony did not bear that out. Officer

Schultz testified that an offender assigned to her in March 2012, came in for the required office visits in March and in April, and he filled out the required monthly reports giving his address, telephone number, and other contact information. When the offender came in for his May office visit, the offender was supposed to stay for a drug test, but he left. Officer Schultz tried to call the offender at the number he had provided to check to see if he had misunderstood. That is when she learned that the phone number the offender had given her "wasn't a good number." Officer Schultz requested and was given approval to incur travel to investigate and learned, then, that the offender was not living where he said he was.

29. While Officer Schultz contends that, in the above example, a field visit to verify the offender's address would have identified the problem sooner, Officer Schultz admitted that she had not previously tried to call the offender. Indeed, she said that she never calls her offenders on their cell phones. Thus, instead of incurring travel expense for a field visit, Officer Schultz could have attempted to verify the offender's office report immediately in March through other ways, such as calling the phone number provided and learning much sooner that the offender had provided a phone number that was not good. Officer Schultz might have checked for a home phone number associated with the address the offender gave; she learned when

she went there that the offender's cousin lived there, and the cousin volunteered that the offender did not live there. Officer Schultz could have required this offender, and could require all of her offenders, to come into the office multiple times per month. She could have required this offender to bring in a utility bill for his residence, whether in his name or someone else's name. Had Officer Schultz tried alternative verification means, she may have been able to contact the cousin sooner.

30. It was evident from Officer Schultz' testimony that she has become accustomed to operating under the guidance provided in unpromulgated Procedure 302.303 and does not like being asked temporarily to work harder and more creatively from her office to find other ways to conduct surveillance and monitor offenders that do not cost Respondent as much in travel expenses as her travel in the field used to. It seemed that rather than trying to replace the field visit time with alternative investigation techniques, Officer Schultz has done little to fill the gap with constructive methods to monitor her offenders using alternative means. Indeed, when Officer Schultz was asked how she was making use of her new-found office time since she is spending less time in the field, her first response was, "I'm organizing my closed files."

31. Officer Schultz expressed concern that a probation officer could be subject to discipline if he or she were to not

follow the temporary directive. However, there was no evidence that any probation officer had refused to request supervisor review and approval for a field visit, much less that discipline resulted. Officer Shultz did not represent that she had refused to follow the temporary directive or that she intended to in the few weeks remaining in the fiscal year.

32. Petitioner's representative testified that the temporary directive harms its 2,100 certified probation officer members, although the directive does not apply to the other approximately 17,000 certified members who serve on the correctional institution side of Respondent. Thus, the temporary directive applies to only about 12 percent of Petitioner's members. Nonetheless, Petitioner's representative asserted that its members are affected by the temporary directive because they are all members of communities with a concern for public safety.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.56(4), Fla. Stat.

34. Petitioner initiated this action pursuant to section 120.56(4), which provides in pertinent part:

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

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

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

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

(d) If an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency must 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 subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from

bringing a proceeding pursuant to s. 120.57(1)(e).

35. Petitioner has the burden to prove its standing to bring this challenge, as well as the burden to prove that the challenged statement constitutes a rule, as defined in section 120.52(16), that was required to be promulgated in accordance with section 120.54. § 120.56(4)(a) and (b). If Petitioner satisfies these burdens, then the burden would shift to Respondent to prove that rulemaking is not feasible or practicable. § 120.56(4)(b). The standard of proof is by a preponderance of the evidence. § 120.57(1)(k).

36. As an organization seeking to represent the interests of some of its members, Petitioner must prove that a substantial number of its members, though not necessarily a majority, are "substantially affected by [the challenged] agency statement[.]"[6/] § 120.56(4)(a); see Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353 (Fla. 1982). The "substantially affected" test in section 120.56 is a two-part test requiring Petitioner to establish: (1) that the agency statement will result in a real and immediate injury-in-fact to its members; and (2) that the asserted interest is arguably within the "zone of interest" intended to be protected or regulated by the statutory scheme at issue. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

37. Petitioner alleged that the temporary directive substantially affects its members who are probation officers because the temporary directive applies to those officers in the performance of their job duties, and they are subject to discipline if they do not comply with the directive. Thus, Petitioner argued for standing to represent the interests of roughly 12 percent of its membership, to whom the temporary directive applies.[7/] That small percentage arguably falls short of a "substantial number of Petitioner's members" within the meaning of Florida Home Builders.

38. If the small percentage of Petitioner's membership were deemed sufficient to meet the "substantial number" test, then Petitioner has demonstrated a sufficient predicate for standing in this one sense: by reason of the temporary directives, probation officers are now required to submit a request (orally or in writing) to their supervisors for approval on a case-by-case basis to incur travel expenses for certain field visits, based on a reason to believe there may be a violation of a probation condition or some public safety issue. One could argue that requiring state employees to submit requests for approval to incur travel expenses, in advance, with justification for the specific travel, is a marginal injury, if it can be called an injury at all; nonetheless, it is a real and immediate impact that satisfies the first prong.

39. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995), supports the conclusion that individual probation officers are substantially affected by the temporary directives. In Ward, an engineer was found to have standing to challenge proposed amendments to rules related to constructing docks in aquatic preserves. The court agreed that Mr. Ward was substantially affected by the proposed amendments because they regulated the manner in which he had to perform his job designing docks. Similarly, in this case, Petitioner has established that the challenged directives apply directly to probation officers and impose a new request and approval process for probation officers to follow.

40. Assuming that Petitioner has sufficiently established standing, the next burden on Petitioner is to establish that the challenged directive meets the definition of a "rule" in section 120.52(16). Insofar as pertinent to this case, the statute provides:

> "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.

41. Petitioner contends that the Reduced Travel Memo is a statement of general applicability in that it applies uniformly, without exception or discretion in application. However, Petitioner's argument ignores the fact that the Reduced Travel Memo, while providing a general restriction on probation officers incurring travel to make certain field contacts, expressly gives each probation officer's supervisor the discretion to not adhere to the travel restriction upon request for approval of a field contact.

42. In Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997), the First District held that three policies challenged as unadopted rules could not be considered statements of general applicability because the evidence showed that they were only to apply under "certain circumstances." The court found that those three policies "should be considered effective merely as guidelines, in that their application was subject to the discretion of the employee's supervisor[,]" and, as such, could not be considered to have the "direct and consistent effect of law." Id; see also Ag. for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d

984, 986 (Fla. 1st DCA 2008) (finding that a formula used to calculate Medicaid overpayments was subject to discretionary application because the agency could choose whether or not to use the methodology). Most recently, these principles were applied in Coventry First, LLC, v. State, Office of Insurance Regulation, 38 So. 3d 200, 204 (Fla. 1st DCA 2010), to conclude that policies and procedures of the Office of Insurance Regulation and an examination manual provided to examiners, were not statements of general applicability that had to be promulgated as rules. In Coventry First, the challenged policies, procedures, and manual addressed the process by which examiners conduct their examinations of insurer books and records. As the court noted, the record testimony established that the documents at issue were applied on a case-by-case basis, and there was discretion to deviate from the documents. Id. at 205. So too, in this case, the evidence established that the challenged temporary directive, which suspended travel for certain field contacts, was subject to the discretion of supervisors to apply or waive on a case-by-case basis. Indeed, it could be said that Petitioner is actually objecting to Respondent's retreat from statements of general applicability (the minimum contact standards), which have been temporarily replaced by review and decision on a case-by-case basis, the antithesis of statements of general applicability.

43. The temporary directive also does not meet the definition of a "rule" because it is an "internal management memorandum." It is difficult to imagine a more compelling case for application of the "internal management memorandum" exclusion from the definition of a "rule" than this case where Respondent was trying to manage its limited resources in the face of a large budget deficit. Respondent's imposition of a process requiring its probation officers to request approval from their supervisors before incurring travel expenses for certain field visits and requiring probation officers to justify those travel expenses in advance, on a case-by-case basis, is a pure management function. By its terms, the temporary directive only applies to probation officers and their supervisors.

44. Petitioner does not contend that the temporary directive affects the private rights of any person. Instead, Petitioner asserts that the temporary directive is not an internal management memorandum "because minimum field contacts are designed for the protection of the community." Based solely on that contention, Petitioner argues that the temporary directive involves a "plan or procedure important to the public" and that the challenged statements have application outside the agency. Petitioner's argument does not square with appellate law interpreting these two parts of the "internal management

memorandum" provision; Petitioner has not offered any discussion or analysis of the case law suggesting otherwise.

45. In Department of Revenue v. Novoa, 745 So. 2d 378, 381 (Fla. 1st DCA 1999), the court considered whether the Department of Revenue's policy restricting its employees from preparing tax returns for private parties during their non-working hours was an "internal management memorandum." In concluding that the policy was an internal management memorandum, the court rejected the contention that the policy was a "plan or procedure important to the public" and that the policy had application outside the agency, holding instead as follows:

> The Department's policy does not "affect . . . a plan or procedure important to the public." Members of the general public have no arguable interest in the restrictions an administrative agency imposes on its own employees. Likewise, the policy does not apply "outside the agency." Because the policy applies only to employees of the Department, no person or firm outside the Department could possibly be affected by it.

Id. Similarly, in this case, as Petitioner acknowledges, the challenged temporary directive only applies to Respondent's probation officers and their supervisors. The directive specifies a procedure for probation officers to request and obtain approval from their supervisors on a case-by-case basis before incurring certain job-related travel expenses. Just as in Novoa, members of the general public have no arguable interest in

Respondent's management of its employees. Additionally, even more clearly than in Novoa, the temporary directive at issue here has no application outside the agency, because it only applies to Respondent's employees performing their public duties as agency employees.

46. At most, Petitioner's argument is that, in a general sense, the public at large would consider the supervision of offenders in the community to be important. However, that does not mean that the general public has an arguable interest in the details of the means and methods by which Respondent manages its resources to carry out its supervisory authority so as to make such matters subject to public rulemaking.

47. Petitioner points to a statute providing rulemaking authority to Respondent that requires rules on various subjects, including the following: "The functions and duties of employees working in the area of community corrections and the operations of probation field and administrative offices." § 944.09(1)(r), Fla. Stat. However, Respondent has adopted rules on that subject. In particular, Florida Administrative Code Rule 33-302.1031(1) specifies, as follows, with respect to probation officers:

> [Correctional Probation Officers] are appointed by the State of Florida under the authority of the Department of Corrections and are responsible for supervision and control of offenders, including the

> enforcement of conditions of supervision, conducting investigations and initiating arrest of offenders under their supervision as appropriate with or without warrant. Officers will notify the sentencing or releasing authority whenever the officer has reasonable grounds to believe that a willful violation of any condition of supervision has occurred.

48. Petitioner has not contended that the myriad of details in Procedure 302.303--from recordkeeping procedures to be followed by probation officers, to strategies for officers' initial meetings with offenders and subsequent surveillance and investigation techniques--should be promulgated as rules with public input. Indeed, the Legislature has made a policy judgment that these internal procedures should not be matters for public consumption.

49. Section 119.071(2), Florida Statutes, provides certain public records exemptions related to agency investigations. Paragraph (c) of that subsection states that the following is exempt from the public's statutory and constitutional right to access public records: "Any information revealing surveillance techniques or procedures or personnel[.]"

50. Petitioner has acknowledged that at least portions of Procedure 302.303 should be kept confidential and not disclosed to the public under this provision. However, Petitioner asserts that the details of the minimum contact requirements are not confidential, because Procedure 302.303 contains a definition of

"surveillance" for purposes of that document that excludes actual face-to-face contacts with offenders. Petitioner overlooks the fact that Procedure 302.303 expressly recognizes that minimum contact standards are intended to include "gathering information from surveillance and contacts with" family members, neighbors, treatment providers, and others. Thus, "credit" is given towards meeting the minimum contact standards for a variety of surveillance and investigation techniques that do not involve face-to-face contact with offenders, because valuable information can be learned other ways. Indeed, since the minimum contact standards are performance standards, even field visits in which a probation officer attempts to contact the offender, but is unsuccessful--such as a surprise visit to the offender's home when he or she is not there--count towards the probation officer's minimum contact requirements under Policy 302.303. Accepting Petitioner's argument would mean carving up the minimum contact standards so that parts are confidential surveillance and other parts are not, depending on whether face-to-face contact with the offender is achieved.

51. Petitioner has not demonstrated, in any event, that Respondent's definition of "surveillance" for purposes of Procedure 302.303 is the meaning to be ascribed to the Legislature's use of that term in section 119.071(2)(c). Instead, the Legislature has shown, by its usage of the term

"surveillance" in probation laws, that surveillance is considered the equivalent of, or at least indivisible from, supervision of offenders. The equivalence of "surveillance" and "supervision" is reflected in the following discussion of drug offender probation by the Florida Supreme Court in Lawson v. State, 969 So. 2d 222, 230 (Fla. 2007):

> Chapter 948, Florida Statutes (2005), offers a detailed statutory approach to "Probation and Community Control." Within this chapter, the Legislature created a specific scheme to address defendants who are "chronic substance abusers," by authorizing trial courts to "stay and withhold the imposition of sentence and place the defendant on drug offender probation." § 948.20, Fla. Stat. Indeed, in Jones v. State, 813 So. 2d 22 (Fla. 2002), we reiterated that "treatment and intensive surveillance, rather than incarceration, is available to defendants who qualify [for drug offender probation] . . . .
>
> As defined by statute, drug offender probation is "a form of intensive supervision which emphasizes treatment of drug offenders in accordance with individualized treatment plans." § 948.001(4), Fla. Stat. (2005). This is mirrored in section 948.20, which mandates that the Department of Corrections
>
> > develop and administer a drug offender probation program which emphasizes a combination of treatment and intensive community supervision approaches and which includes provision of supervision of offenders in accordance with a specific treatment plan. The program may include the use of graduated sanctions consistent with

> the conditions imposed by the court. Drug offender probation status shall include surveillance and random drug testing, and may include those measures normally associated with community control, except that specific treatment conditions and other treatment approaches necessary to monitor this population may be ordered.
>
> (emphasis added).

52. In the context presented, there is every reason to give credence to the Florida Supreme Court's usage of the word "surveillance" as interchangeable with "supervision." The specific details of when and how a probation officer will be monitoring his or her offenders should not be details for public consumption, because if those details are public information, they are known to the offenders. Informing offenders of the precise number of minimum contacts expected from their probation officers arms the offenders with too much information.

53. The public records exemption for surveillance procedures and techniques reinforces the conclusion suggested by Novoa, supra. The general public has no arguable interest in the procedures adopted by Respondent that apply to its probation officers and that detail how its probation officers carry out their supervision of offenders.

54. Petitioner failed to prove that the challenged agency statement meets the definition of a rule in section 120.52(16).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition for Rule Challenge Pursuant to Section 120.56, Florida Statutes, is dismissed.

DONE AND ORDERED this 25th day of July, 2012, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2012.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2011 codification.

[2/] The Protective Order provides that Joint Exhibit 1 is confidential and subject to specified protection. Joint Exhibit 1 was received in evidence under seal as a non-public part of the record of this proceeding. In addition, it was discovered after the hearing that Exhibit 1 to the Petition (which had been missing from the filed Petition and which Petitioner was allowed to supply post-hearing) actually is an excerpt from Joint Exhibit 1. That excerpt, attached to Petitioner's Notice of Filing dated June 12, 2012, also has been placed in the sealed envelope containing Joint Exhibit 1.

[3/] Respondent filed an objection, within the time allowed, to a 2006 report issued by the Office of Program Policy Analysis and Government Accountability (OPPAGA report), which is Deposition Exhibit 3 to the deposition of Jenny Nimer, Joint Exhibit 7. Petitioner filed no response to the objection, although time was allowed for responses. Respondent's relevancy objection to the OPPAGA report is sustained and, therefore, Deposition Exhibit 3 to Joint Exhibit 7 has been removed from the record. It is noted that Petitioner did not refer to the OPPAGA report in any proposed findings of fact or conclusions of law in its proposed final order.

[4/] Petitioner contends that Secretary Tucker's letter dated March 2, 2012 (Joint Exhibit 10), is evidence that Respondent intends to continue the temporary directives past the end of June 2012. However, Petitioner's argument is based on the inaccurate view that the letter's reference to resuming field contacts "the next fiscal year" meant that field contacts would resume in the fiscal year beginning July 1, 2013. Instead, the more reasonable interpretation is that the reference to the "next fiscal year" was to the fiscal year immediately following the then-current fiscal year, which would be the fiscal year beginning July 1, 2012. Petitioner's interpretation skips an entire fiscal year.

[5/] Before the February 29, 2012, telephone conference, a document dated February 27, 2012, was provided to the conference participants. The February 27, 2012, document summarizes a somewhat different temporary directive than the descriptions in the two March 2, 2012, documents (the Reduced Travel Memo and the Tucker letter). As indicated at the hearing, the February 27, 2012, document is not considered part of the challenged agency statement because it was not identified as such in the Petition. In addition, the evidence established that the Reduced Travel Memo was the document provided to probation officers, not the February 27, 2012 document, and it has been the Reduced Travel Memo that has been implemented by circuit administrators and probation supervisors who are reviewing requests for field visits and approving them on a case-by-case basis.

[6/] To establish standing to represent its members under the Florida Home Builders test, an organization such as Petitioner must also demonstrate that the interests it seeks to protect are germane to the organization's purpose and that the type of relief requested is appropriate for an organization to receive on behalf of its members. Petitioner has demonstrated that it meets these two criteria; Respondent does not contend otherwise.

[7/] Petitioner's representative testified at the final hearing that its members are substantially affected (as a layperson would understand that requirement) because they are members of communities concerned with public safety, just as all members of the public. That predicate for standing was not alleged in the Petition; if it had been properly alleged, it would be an insufficient predicate for standing. Although, in a general sense, the laws vesting Respondent with supervisory authority over offenders are designed as police power laws to protect the public safety, that does not mean that all members of the public would have standing in proceedings regarding the means by which Respondent manages its resources to carry out that supervisory authority. Moreover, there was no evidence of a real and immediate injury-in-fact to members of the public generally, as opposed to speculation and conjecture.

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.