STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PETER R. BROWN CONSTRUCTION, Petitioner, vs. DEPARTMENT OF FINANCIAL SERVICES, Respondent.	)	Case No. 12-1357RX

FINAL ORDER

On May 15, 2012, a hearing was held in Tallahassee, Florida, pursuant to the authority granted in sections 120.56, 120.569 and 120.57(1), Florida Statutes.[1/] The case was considered by June C. McKinney, Administrative Law Judge.

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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 69I-40.103 is an invalid exercise of legislatively delegated authority in violation of section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On April 16, 2012, a Petition to Determine the Invalidity of Existing Administrative Rule 69I-40.103 was filed on behalf of Petitioner, Peter R. Brown Construction, Inc., ("Peter Brown" or "Petitioner"). The case was assigned to the undersigned on April 17, 2012, and a Notice of Hearing was issued setting the final hearing for May 15, 2012, in Tallahassee, Florida. The case proceeded to hearing as scheduled.

On April 27, 2012, the Department of Financial Services ("Department" or "Respondent") filed a Motion to Dismiss ("Motion"). On May 7, 2012, Petitioner filed Petitioner's Memorandum of Law in Opposition to Respondent's Motion to Dismiss. On May 8, 2012, the undersigned denied the Motion.

No witnesses were presented by either party at hearing. Exhibits numbered 1 through 13 and 15 and 16 were admitted for Petitioner, and Department's Exhibits numbered 1 through 3 were admitted. The parties were given until June 8, 2012, to file their proposed final orders. All submissions were timely filed and have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Department is an agency of the State of Florida.

2. The Department adopted Florida Administrative Code Rule 69I-40.103, which became effective October 21, 1975. The rule was amended on January 8, 1995.

3. On or about January 7, 2008, the Department of Management Services ("DMS"), on behalf of the State of Florida, and Peter Brown entered into a contract ("General Contract").

4. The General Contract is a valid and enforceable contract pursuant to which Petitioner agreed to manage the construction of the First District Court of Appeal project.

5. The General Contract was amended on March 13, 2009.

6. On or about December 28, 2009, DMS issued Petitioner a Change Order for the new courthouse project.

7. The Change Order incorporated the services of Signature Art Gallery, Inc. ("Signature") to reproduce photographs from the Florida Archives, enlarge, matte, frame, caption, deliver, and permanently install the framed historical reproduced photographic images in the new courthouse.

8. On or about January 19, 2010, Signature entered into a subcontract with Petitioner for the services delineated in the Change Order.

9. All of Petitioner's payment requests submitted to Respondent were approved by DMS. Payments to Petitioner for

construction services performed under the General Contract were made directly to Peter Brown by DFS.

10. Respondent denied payment of funds to Petitioner associated with the Change Order and the subcontract work of Signature.

11. Respondent has relied in part upon rule 69I-40.103 to deny payment of funds to Petitioner associated with the Change Order and subcontract related to Signature for the reproduction and installation of the historical photographic images.

12. As a direct result of DFS' denial of payment, Peter Brown is a defendant in a lawsuit pending in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. By court order in that action, Petitioner was deemed indispensable, and made a party to the lawsuit.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.56, 120.569 and 120.57(1), Florida Statutes.

14. Petitioner has standing pursuant to section 120.56 to bring this rule challenge.

15. As Petitioner, Peter Brown "has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the

objections raised." § 120.56(3)(a), Fla. Stat. The standard of review is de novo. § 120.56(1)(e), Fla. Stat.

16. The challenged rule states in pertinent part:

> Expenditures from state funds for items as listed below are prohibited unless "expressly provided by law." (See Attorney General opinion [0]71-28):
> (1) Congratulatory telegrams;
> (2) Flowers and/or telegraphic condolences;
> (3) Presentment of plaques for outstanding service;
> (4) Entertainment for visiting dignitaries;
> (5) Refreshments such as coffee and doughnuts; and
> (6) Decorative items (globes, statues, potted plants, picture frames, etc.).

17. Rule 69I-40.103 identifies as specific authority section 17.29. Section 17.29 states:

> 17.29 Authority to prescribe rules.—The Chief Financial Officer may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this chapter and the duties assigned by statute or the State Constitution. Such rules may include, but are not limited to, the following:
> (1) Procedures or policies relating to the processing of payments from salaries, other personal services, or any other applicable appropriation.
> (2) Procedures for processing interagency and intraagency payments that do not require the issuance of a state warrant.
> (3) Procedures or policies requiring that payments made by the state for goods, services, or anything of value be made by electronic means, including, but not limited to, debit cards, credit cards, or electronic funds transfers.

(4) A method that reasonably accommodates persons who, because of technological, financial, or other hardship, may not be able to receive payments by electronic means. The Chief Financial Officer may make payments by state warrant if deemed administratively necessary.

18. The challenged rule lists as "Law Implemented" sections 17.001, 17.03, and 215.42.

19. Section 17.001 provides:

> 17.001 Chief Financial Officer.—As provided in s. 4(c), Art. IV of the State Constitution, the Chief Financial Officer is the chief fiscal officer of the state and is responsible for settling and approving accounts against the state and keeping all state funds and securities.

20. Section 17.03 provides:

> 17.03 To audit claims against the state.—
> (1) The Chief Financial Officer of this state, using generally accepted auditing procedures for testing or sampling, shall examine, audit, and settle all accounts, claims, and demands, whatsoever, against the state, arising under any law or resolution of the Legislature, and issue a warrant directing the payment out of the State Treasury of such amount as he or she allows thereon.
> (2) The Chief Financial Officer may establish dollar thresholds applicable to each invoice amount and other criteria for testing or sampling invoices on a preaudit and postaudit basis. The Chief Financial Officer may revise such thresholds and other criteria for an agency or the unit of any agency as he or she deems appropriate.
> (3) The Chief Financial Officer may adopt and disseminate to the agencies procedural and documentation standards for payment requests and may provide training and technical

assistance to the agencies for these standards.
(4) The Chief Financial Officer shall have the legal duty of delivering all state warrants and shall be charged with the official responsibility of the protection and security of the state warrants while in his or her custody. The Chief Financial Officer may delegate this authority to other state agencies or officers.

21. Section 215.42 provides:

215.42 Purchases from appropriations, proof of delivery.—The Chief Financial Officer may require proof, as he or she deems necessary, of delivery and receipt of purchases before honoring any voucher for payment from appropriations made in the General Appropriations Act or otherwise provided by law.

22. Petitioner challenges the proposed rule in accordance with the definition of "invalid exercise of delegated legislative authority" in section 120.52(8), which states:

(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.

23. Specifically, Petitioner contends that rule 69I-40.103 violates the requirements of sections 120.52(8)(b), (d), and (e).

Whether the Department Has Exceeded Its Authority

24. The First District set the standard for determining if a rule is authorized or not in Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc. 773 So. 2d 594 (Fla. 1st DCA

2000). In Save the Manatee, the court affirmed a decision invalidating portions of rule 40D-4.051, because the exemptions from permitting requirements created within the rule had no specific statutory authority. Ultimately, the First District determined that the question to be answered is "whether the statute contains a specific grant of authority for the rule, not whether the grant is specific enough. Either the enabling statute authorizes the rule at issue or it does not." Id. at 599.

25. The First District also set the parameters for a specific grant of authority in Fla. Dep't of Highway Safety & Motor Vehicles v. JM Auto, Inc. 977 So. 2d 733, 734 (Fla. 1st DCA 2008). The court reiterated its view that "the legislature's intent to restrict the scope of agency rulemaking [requires that the court] approve a rule only when there is statutory language authorizing the agency to adopt rules to implement the subject matter of the statute." Id. at 734.

26. Petitioner's reliance on JM Auto, Inc. and the contention that rule 69I-40.103 exceeds the Department's authority in that the enabling statute, section 17.29, only provides a general grant of authority and such authority is insufficient because there needs to be specific statutory authority is proper.

27. The Department's arguments asserted in its Proposed Final Order do not change the lack of specificity in the enabling statute for rule 69I-40.103. Section 17.29 confers broad powers and duties on the Chief Financial Officer's ("CFO") role to process day to day payments but makes no mention of restricting expenditures. The four subparts of section 17.29 are set forth at paragraph 17 above. When addressing each of the four subparts of the enabling statute, none of the subparts explicitly authorizes the CFO to prepare and enforce the specific list of restricted expenditures provided in the challenged rule.

28. Respondent's argument that subpart (1) authorizes the adoption of the rule because the challenged rule fits within the category of subpart (1) is not persuasive. Reimbursements might be reasonably related to the purpose of the enabling statute, but section 17.29(1) specifically authorizes the CFO only to process expenditures, not to prohibit them. Section 17.29(2) only relates to procedures for processing interagency and interagency payments, which is not related to the challenged rule. Additionally, subsections 17.29(3) and (4), deal with electronic means for payments, which are not issues relating to what is reimbursable as an expenditure.

29. Further, the Department's contention that the challenged rule was promulgated pursuant to explicit duties and powers assigned to the CFO by two statutes, sections 17.29(1) and

17.03, is rejected. Like section 17.29, section 17.03 also fails to make any mention of restricting expenditures. The bottom line is that when the Department promulgated rule 69I-40.103, section 17.03 was utilized as one of the laws implemented[2/] not as specific authority for the challenged rule. The First District specifically stated in Dep't of Children & Family Servs. v. I.B. 891 So. 2d 1168, 1172 (Fla. 1st DCA 2005), that the Department may not rely on statutory provisions not cited in the proposed rule as statutory authority. Accordingly, section 17.03 cannot be used in this matter to confer specific authority for rule 69I-40.103 when it was cited as law implemented. Moreover, with the test of Save the Manatee in mind, section 17.03 cannot be considered authority in that it is not the enabling statute for the challenged rule and therefore cannot provide specific authority.

30. It is concluded that there is simply no language within the text of section 17.29 which suggests that the CFO is authorized to adopt rules restricting expenditures. Therefore, rule 69I-40.103 does not implement or interpret any specific power or duty granted by section 17.29. Under these circumstances, rule 69I-40.103 is invalid because the Department has exceeded its rulemaking authority in violation of section 120.52(8)(b).

Whether the Rule is Vague

31. Petitioner also asserts that rule 69I-40.103(6) is an invalid exercise of delegated legislative authority because it is vague under section 120.52(8)(d). In support of this contention, Petitioner asserts that the term "decorative items" is never defined by statute or administrative rule and no standards are given as to how or when the Department will apply the phrase.

32. An administrative rule is invalid under section 120.52(8)(d) if it requires the performance of an act in terms that are so vague that men of common intelligence must guess at its meaning. See Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., Bd. of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997); Witmer v. Dep't of Bus. & Prof'l Reg. 662 So. 2d 1299 (Fla. 4th DCA 1995). The general rule is that where the legislature has not defined words or phrases used in a statute, they must be "construed in accordance with [their] common and ordinary meaning." Donato v. AT&T, 767 So. 2d 1146, 1154 (Fla. 2000). "[T]he plain and ordinary meaning of [a] word can be ascertained by reference to a dictionary." Green v State, 604 So. 2d 471, 473 (Fla. 1992).

33. Even though rule 69I-40.103(6) provides examples of "globes, statues, potted plants, picture frames, etc." as set forth in paragraph 16 above, subpart (6) is still vague because no qualifying language is available as a standard to determine

what items are covered and what items are not based on the examples. A wide range of things can be considered and different people can guess at its meaning or come up with various interpretations for "decorative items."

34. The Department's contention that Signature's contract for "framed pictures" falls within the interpretation of rule 69I-40.103(6) is not persuasive. First, it is important to note that the Department does not use the terminology in the rule, "picture frames," in its argument but transposes the phraseology to "framed pictures," [3/] which has a different common interpretation. Additionally, one definition of "picture frame" is "a framework in which a picture is mounted." Dictionary.com, available at http://www.dictionary.reference.com (last visited June 18, 2012). Therefore, contrary to the Department's argument, even "picture frames" in the example portion of the rule plainly means something different from "framed pictures."

35. Additionally, the subcontract between Petitioner and Signature was also for the reproduction and permanent installation of historical photographic images. DMS' approval of the subcontract payment and the Department's contrary denial of the payment, both of which decisions were taken in reliance of rule 69I-40.103, shows that the restricted items are not clearly defined. If the definition were clear, both agencies would have reached the same conclusion. Additionally, had the rule provided

a specific standard then no differing interpretations could be made when deciding the meaning of "decorative item."

36. The undersigned also finds that by the challenged rule listing "etcetera" in the example portion, no adequate standards are established for the Department to make a decision about "decorative items."

37. Therefore, since there are no sufficient explicit standards for applying rule 69I-40.103(6), the challenged rule is subject to inconsistent application and leaves the Department with unbridled discretion. Consequently, rule 69I-40.103(6) is vague and an invalid exercise of delegated legislative authority in violation of section 120.52(8)(d).

Whether the Rule is Arbitrary and Capricious

38. Finally, Petitioner asserts that the rule 69I-40.103 is an invalid exercise of delegated legislative authority because it is arbitrary and capricious.

39. The analysis for whether a rule is arbitrary and capricious is (1) whether the rule is supported by logic or the necessary facts; and (2) whether the rule was adopted without thought or is irrational. Las Mercedes Home Care Corp v. Ag. for Health Care Admin., Case No. 10-0860RX (Fla. DOAH F.O. July 23, 2010); See § 120.52(8)(e), Fla. Stat.

40. The First District defined the arbitrary and capricious standard in Agrico Chem. Co. v. Dep't of Envtl. Prot., 365 So. 2d 759 (Fla. 1st DCA 1979). As explained in Agrico Chem.:

> A capricious action is one which is taken without thought or reason and irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Id. at 763.

41. As set forth at paragraph 16 above, the challenged rule references AGO 071-28.[4/] The Department maintains that at the time of the challenged rule's promulgation, the Department relied upon AGO 071-28, which placed restrictions on discretionary spending as referenced in the opinion, as the rationale for the challenged rule. In its Proposed Final Order, the Department further explained that:

> Petitioner overlooks, however, that apparently in direct response to AGO 071-28, the legislature enacted in Chapter 71-84, Laws of Florida, later codified as Section 216.231, Florida Statutes, which specifically appropriated monies for the governor's discretionary expenditures as long those expenditures fell under the general functions of his office. The fundamental requirement for effecting public expenditures by the State of Florida, namely that funds must be appropriated for such expenditures by the legislature and not at the sole discretion of the executive branch, was simply highlighted by AGO 071-28. The legislature, mindful of this requirement, enacted Chapter 71-84 Laws of Florida, which specifically appropriated monies for the governor's "discretionary contingencies.

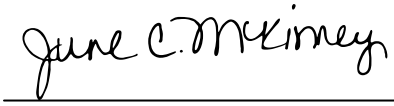
42. Petitioner's position that the subsequent Attorney General Opinion, AGO 071-160, significantly receded from the rational of AGO 071-28 is not persuasive. It is important to note, AGO 071-160 went into effect on June 17, 1971, prior to the challenged rule's adoption on October 21, 1975, and was available for use by the Department had it wanted to use the restricted rationale of AGO 071-160.

43. Moreover, the Department's use of AGO 071-28 as the rationale for rule 69I-40.103 is logical in that it limited the grant of discretionary expenditure authority to a matching appropriation by the legislature. The same rationale used when the challenged rule was adopted in 1975 is supported by logic and reason today in that all expenditures by state executive agencies must be authorized by a legislative appropriation. Therefore, the continued use AGO 071-28 by the Department is a rational explanation of how the Department determines current needs for restrictions on expenditures. Hence the rule is not arbitrary or capricious in violation of section 120.52(8)(e).

ORDER

Based on the foregoing, Findings of Fact and Conclusions of Law, it is ORDERED that rule 69I-40.103 constitutes an invalid exercise of delegated legislative authority in violation of subsections 120.52(8)(b) and (d).

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



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Filed with the Clerk of the
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this 25th day of June, 2012.

ENDNOTES

[1] All references to the Florida Statutes are to the 2012 edition, unless otherwise noted.

[2] Law implemented is defined in section 120.52(9) and provides in pertinent part:

> (9) "Law implemented" means the language of the enabling statute being carried out or interpreted by an agency through rulemaking.

[3] Department's Proposed Final Order paragraph 30.

[4] Of note, the undersigned rejects any proposition that AGO 071-28 provides authority for the challenged rule. However, to the extent that AGO 071-28 is incorporated by reference to interpret the law, such would be appropriate.

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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.