STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAYMOND COLANTONIO, ET AL.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 12-3282RX
	)	
DEPARTMENT OF LAW ENFORCEMENT,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.56, 120.569, and 120.57, Florida Statutes,[1/] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on November 29, 2012, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert R. Berry, Esquire
Eisenmenger, Berry and Peters, P.A.
5450 Village Drive
Rockledge, Florida 32955

For Respondent: Ann Marie Johnson, Esquire
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 11D-8.003(2) is an "invalid exercise of delegated legislative authority" for the reasons alleged in the petition filed by Petitioners.

PRELIMINARY STATEMENT

On October 8, 2012, Petitioners filed with DOAH a petition seeking the entry of a final order determining that Florida Administrative Code Rule 11D-8.003(2), a rule provision of the Florida Department of Law Enforcement (FDLE), is an "invalid exercise of delegated legislative authority," within the meaning of section 120.52(8)(a), Florida Statutes, "to the extent it includes a provision approving the Intoxilyzer 8000 for use as an evidentiary breath test instrument in the State of Florida" (Petition). With the agreement of the parties, the undersigned, on October 19, 2012, scheduled an evidentiary hearing on the Petition for November 29, 2012. He also, on that same date, issued an Order of Pre-Hearing Instructions, which directed the parties to, among other things, file a pre-hearing stipulation.

The parties filed their Pre-Hearing Stipulation on November 28, 2012. In it, they provided the following "general statement of each['s] position":

> Petitioner[s]: Based on a) Section 120.54(3)(a), Florida Statutes (2002),

> b) Section 120.54(3)(e), Florida Statutes (2002), c) the First District's decision in Manasota-88 Inc. v. DOER, 567 So.2d 895 (Fla. 1st DCA 1990) and d) the fact that the Florida Department of Law Enforcement's Alcohol Testing program had done approval testing studies on the Intoxilyzer 8000 during the 2002 rules making process, [Florida Administrative Code Rule] 11D-8.003(2) (approving the Intoxilyzer 8000 as a breath test instrument for use in Florida) was an invalid exercise of delegated legislative authority, because the State never shared with the public in general and the Administrative Procedures Committee and the Secretary of State in particular, approval studies done in April and May 2002. In particular, the statement by the Department purporting to constitute a "detailed written statement of the facts and circumstances justifying the rule" filed with the Administrative Procedures Committee and the Secretary of State prior to approval omitted to include the results of those studies or even suggest any such studies were done.
>
> Respondent [FDLE]: The Respondent fully complied with all rule promulgation requirements as they relate to the challenged rules and forms, and such rules and forms remain valid and in effect. The Respondent exercised its delegated legislative authority, pursuant to [s]ection 316.1932(1)(a)(2), Florida Statutes (2002), in proper promulgation of Florida Administrative Code Rule 11D-8.003(2).

The evidentiary hearing was held on November 29, 2012, as scheduled. Two witnesses testified at the hearing: Laura Barfield and Rafael Madrigal. In addition to the testimony of these two witnesses, 25 exhibits (Joint Exhibits 1 through 25) were offered and received into evidence.

At the conclusion of the taking of evidence at the hearing, the undersigned announced, on the record, the following extended deadlines, to which the parties had agreed: proposed final orders to be filed no later than January 11, 2013; and the final order to be issued no later than 30 days following the filing of the last-filed proposed final order.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on January 2, 2013.

On January 9, 2013, FDLE filed an unopposed motion requesting an extension of the proposed final order fling deadline. By Order issued January 10, 2013, the motion was granted and the proposed final order filing deadline was extended to January 25, 2013.

Petitioners and FDLE timely filed their Proposed Final Orders on January 25, 2013.

FINDINGS OF FACT

1. Petitioners are defendants in various pending prosecutions in Brevard County, Florida. They all were charged with driving with an unlawful breath alcohol level, after having taken breath tests pursuant to the implied consent requirement of section 316.1932(1)(a)1.a., Florida Statutes, which presently provides, in pertinent part, that "[a]ny person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such

vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages."[2/] They have also been charged under the alternative theory of driving under the influence of alcohol to the extent their normal faculties were impaired. Under this theory of prosecution, the State can argue that with a breath alcohol level in excess of .08, a defendant is presumed to have been under the influence of alcohol to the extent his or her normal faculties were impaired.[3/]

2. The state of Florida intends to offer evidence in each of these cases that the defendant had an unlawful breath alcohol level at the time of the charged offense.

3. In offering such evidence, the state will argue that it has complied with all statutory and rule prerequisites to the evidence's admissibility. Among other things, it will allege that each defendant took an "approved" infrared breath test on an Intoxilyzer 8000.

4. Section 316.1932(1)(a)2. presently provides, in pertinent part, as follows:

> The Alcohol Testing Program within the Department of Law Enforcement is responsible for the regulation of the operation, inspection, and registration of breath test instruments utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. . . . The program shall:
>
> * * *
>
> g. Have the authority to approve or disapprove breath test instruments and accompanying paraphernalia for use pursuant to the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.
>
> * * *
>
> l. Promulgate rules for the administration and implementation of this section, including definitions of terms.

5. Florida Administrative Code Rule 11D-8.003 is an existing rule of FDLE that was adopted pursuant to the rulemaking authority granted by section 316.1932(1)(a)2. It is entitled, "Approval of Breath Test Methods and Instruments," and provides as follows:

> (1) The Department has approved the following method(s) for evidentiary breath testing: Infrared Light Test, also known as Infrared Light Absorption Test.
>
> (2) The Department approves breath test methods and new instrumentation to ensure the accuracy and reliability of breath test results. The Department has approved the following breath test instrumentation for evidentiary use: CMI, Inc. Intoxilyzer 5000

> Series - including any or all instruments using one of the following programs: 5000 Basic Software Program; Florida Software Program; R-Software Program; and CMI, Inc. Intoxilyzer 8000 using software evaluated by the Department in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 - Rev. March 2004.
>
> (3) The Department has approved the following options for use with Intoxilyzer 5000 Series instruments: keyboard; simulator recirculation; sample capture; pressure switch setting at no less than two inches and no more than six inches of water.
>
> (4) A Department inspection performed in accordance with Rule 11D-8.004, F.A.C., validates the approval, accuracy and reliability of an evidentiary breath test instrument.
>
> (5) The Department shall conduct evaluations for approval of new instrumentation under subsection (2) in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 - Rev. March 2004.
>
> (6) The availability or approval of new instruments, software, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications.

6. Since 2001, rule 11D-8.003 has been amended twice--in 2002 and, most recently, in 2004.

7. Before its amendment in 2002, the rule provided as follows:

> (1) The Department has approved the following method(s) for evidentiary breath testing: Infrared Light Test, also known as Infrared Light Absorption Test.

(2) The Department has approved the following breath test instrument(s) for evidentiary use: CMI, Inc. Intoxilyzer 5000 Series – including any or all instruments using one of the following programs: 5000 Basic Software Program; Florida Software Program; R-Software Program.

(3) The Department has approved the following options for use with Intoxilyzer 5000 Series instruments: keyboard; simulator recirculation; sample capture; pressure switch setting at no less than two inches and no more than six inches of water.

(4) The determination to evaluate an evidentiary breath test instrument for use in the State of Florida will be made by the Department. Upon notification by the Department that an evidentiary breath test instrument will be evaluated, the instrument's manufacturer shall submit the following to the Department:

(a) The method of analysis upon which the instrument is based;

(b) The instrument's model designation;

(c) At least two (2) instruments for evaluation and a certificate of calibration for each instrument;

(d) A description of the instrument;

(e) The operator's/technician's manual;

(f) A schematic design of the instrument;

(g) The instrument's maintenance manual, if published;

(h) Any accessories and materials necessary to use the instrument for breath testing;

(i) The maximum and minimum temperatures at which the instrument provides accurate results;

(j) The name and description of the software used.

(5) A manufacturer whose instrument has been previously approved by the Department shall notify the Department in writing prior to making any modification or adding a new option to such instrument. The Department shall evaluate such modifications or options to an approved breath test instrument and determine whether they affect the instrument's method of analysis or analytical reliability.

(6) The Department shall conduct evaluations for approval under sections (4) and (5) in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 – Rev. March 2001.

8. The Instrument Evaluation Procedures FDLE/ATP Form 34 – Rev. March 2001 (Form 34) referred to in subsection (6) of the pre-2002 version of rule 11D-8.003 read as follows:

The following procedures will be used to evaluate breath test instruments for approval for use in Florida, and to evaluate any changes, modifications or new options to a previously approved breath test instrument.

1. Only breath test instruments listed on the US Department of Transportation Conforming Products List of Evidential Breath Measurement Devices will be evaluated.

2. All materials, equipment and supplies necessary to evaluate an instrument must be received and recorded prior to beginning the evaluation process. New instrument

evaluation requirements are outlined in Rule 11D-8.003(4), FAC, and requirements for evaluations of changes, modifications, or new options will be determined by the Department based on the nature of the change, modification or new option.

3. Results of all evaluations shall record:

a. The purpose for and subject of the evaluation.

b. The personnel involved and their specific role.

c. The make, model and serial number of the instrument.

d. The software which controls the instrument and the options and settings available.

e. The make, model and serial numbers, and the operating conditions of any external equipment and instrumentation (such as simulators) used in the evaluation process.

f. The testing location and operating conditions (such as room temperature).

g. All options, changes and modifications involved in the evaluation.

h. A conclusion to approve, disapprove, or withhold approval as inconclusive pending additional information, and the reasons for such conclusion.

4. Each instrument evaluated must be properly calibrated by the manufacturer prior to evaluation, and a certificate of calibration must be submitted by the manufacturer.

5. Each instrument evaluated must be operated in accordance with the manufacturer's operator/technician manual.

6. Each instrument will be evaluated at each of the following alcohol concentrations: 0.020g/210L, 0.050g/210L, 0.080g/210L, 0.150g/210L, 0.300g/210L, and 0.400g/210L. Each instrument will also be evaluated for its capability to detect acetone interference and mouth alcohol as prescribed by the manufacturer, and for its capability to properly analyze an alcohol free sample (0.00g/210L).

7. Each instrument evaluated will be subjected to at least fifty (50) repetitions of an alcohol free test, an acetone interference test, and a mouth alcohol test.

a. The alcohol free test will be conducted by analyzing a 500 mL of deionized or distilled water. The water will be analyzed by gas chromatography prior to the test to verify that it contains no alcohol. All results must be 0.000g/210L;

b. The acetone interference test will be conducted by analyzing an alcohol free simulator (deionized or distilled water) containing 3 mL of acetone stock solution. The acetone stock solution will be prepared using distilled or deionized water and adding 77 mL of reagent grade acetone per liter of water, and will be analyzed by gas chromatography prior to the evaluation to verify that it contains only acetone. The results must be 0.000g/210L and the acetone detected by the correct instrument response(s) prescribed by the manufacturer to denote the interferent.

c. The mouth alcohol test will be conducted by first analyzing an alcohol free subject's breath sample, and another breath sample after the subject has rinsed their mouth with an alcohol solution. The first breath sample result must be 0.000g/210L, and the mouth alcohol breath sample must be detected by the correct instrument response(s)

prescribed by the manufacturer to denote mouth alcohol.

8. Each instrument evaluated will be subjected to at least fifty (50) repetitions analyzing the following concentrations of either an alcohol reference solution or an alcohol stock solution: 0.020g/210L, 0.050g/210L, 0.080g/210L,, 0.150g/210L, 0.200g/210L, 0.300g/210L, and 0.400g/210L. In order to establish the accuracy of an evaluated instrument, the results of each analysis must fall within the following ranges: 0.020g/210L range is 0.015 to 0.025g/210L; 0.050g/210L range is 0.045 to 0.055g/210L; 0.080g/210L range is 0.075 to 0.085g/210L; 0.150g/210L range is 0.145 to 0.155g/210L; 0.200 range is 0.190 to 0.210g/210L; 0.300g/210L range is 0.285 to 0.315g/210L; and the 0.400g/210L range is 0.380 to 0.420g/210L. In order to establish the precision of an evaluated instrument, the average standard deviation for the above results will be calculated and must not exceed the manufacturer's specifications for precision.

9. Each lot of alcohol reference solution or alcohol stock solution will be analyzed by gas chromatography in accordance with the procedures in Rule 11D-8.0035(2)(a), FAC, before being used in the evaluation process.

10. Any option that is available with the instrument will be evaluated according to the manufacturer's recommendation for utilizing that option. If an option can be evaluated according to the methods stated above, then those procedures will be followed. If an option cannot be evaluated according to the methods stated above, the manufacturer must provide the information necessary to evaluate that option, and that option will be evaluated according to the manufacturer's recommendation. The procedure for evaluating the option and the results of the evaluation will be recorded.

> 11. The Department will determine whether to conduct additional tests or studies necessary to properly evaluate an instrument or any of its options, or additional evaluations for quality assurance or research purposes. The Department will record the procedures used and the results obtained.

9. In 2001, U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) determined that CMI, Inc.'s Intoxilyzer 8000 met all of the requirements for placement on its Conforming Products List of Evidential Breath Measurement Devices (CPL) referenced in the Instrument Evaluation Procedures FDLE/ATP Form 34 – Rev. March 2001.

10. On October 3, 2002, an amendment to the CPL was published in the Federal Register (at 67 Fed. Reg. 620191).[4/] Among the "[e]vidential [b]reath [m]easurement [d]evices" added to the CPL by this amendment was the Intoxilyzer 8000.

11. A Form 34 evaluation of the Intoxilyzer 8000 was conducted by FDLE's Alcohol Testing Program on April 30, 2002 (April 2002 Evaluation).[5/] Two Intoxilyzer 8000s--one bearing Serial Number 80-000208 and the other bearing Serial Number 80-000209--were assessed. The testing was not successfully completed. A written report of the evaluation was generated on or about July 29, 2002. It described the following "exceptions" that had occurred during the evaluation:

INSTRUMENT 80-000208:

1. The breath test affidavit failed to print completely on the first evidential breath test with external printer attached. On the second test, the affidavit printed correctly. Probable cause: software.

3. Three exceptions occurred during the mouth alcohol tests. On sample #5, the sample was introduced at the wrong time, on sample #12, the sample was introduced improperly, and on sample #35, a cell phone was used next to the instrument, causing a radio interference flag.

3. During the 0.20 simulator tests, the results were noted to be consistently dropping in value. After the 20th sample, a 0.40 simulator was attached. The results for this simulator were low and erratic. All connections were checked. It was then noted that air was being taken from the simulator. Blocking the breath tube resulted in closer to target values. This is symptomatic of a failed one-way valve. Testing was terminated at this point.

INSTRUMENT 80-000209

1. One exception occurred during the mouth alcohol tests. On sample #48, the sample was introduced improperly.

2. During the 0.02 simulator tests, the instrument reported interferent at simulator sample #42. During simulator sample #44, the instrument reported interferent and an alcohol reading during the subsequent airblank. Testing was suspended and the room checked for sources of interferents. The instrument was purged for 15 minutes. The instrument reported interferent when none was known to be present for two more 0.02 samples and for three 0.05 simulator

samples. Mr. Toby Hall, CMI Inc., was contacted for guidance. He attributed the exceptions to software failure. Testing was terminated.

12. Shortly after the April 2002 Evaluation, FDLE published in the May 17, 2002, edition of Florida Administrative Weekly a Notice of Development of Proposed Rules, advising that it was proposing to make the following changes to rule 11D-8.003 (with the underlined language representing proposed additions to the rule), as well as changes to other rules in rule chapter 11D-8:

> 11D-8.003 Approval of Breath Test Methods and Instruments.
>
> (1) No change.
>
> (2) The Department has approved the following breath test instrument(s) for evidentiary use: CMI, Inc. Intoxilyzer 5000 Series – including any or all instruments using one of the following programs: 5000 Basic Software Program; Florida Software Program; R-Software Program; and CMI, Inc. Intoxilyzer 8000 using software approved by the Department in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 – Rev. March 2002.
>
> (3) through (4)(e) No change.
>
> (f) A schematic design and a mechanical drawing of the instrument;
>
> (g) through (j) No change.
>
> (5) through (6) No change.
>
> (7) The availability or approval of new instruments, software, options or

> modifications does not affect the approval status or reliability of previously approved instruments, software, options or modifications.

The notice indicated that, "if requested in writing and not deemed unnecessary by the agency head, a rule development workshop [would] be held [at] 10.00 a.m. [on] June 4, 2002."

13. On May 29, 2002, while the rulemaking process was still ongoing, FDLE's Alcohol Testing Program conducted another Form 34 evaluation of the Intoxilyzer 8000 (May 2002 Evaluation), using the same two instruments (bearing Serial Numbers 80-000208 and 80-000209) that had been the subject of the April 2002 Evaluation, but they were newly calibrated by the manufacturer (CMI, Inc.) and had different software. The testing of the Intoxilyzer 8000 bearing Serial Number 80-000209 was aborted due to an "electrical short circuit" which caused it to emit smoke. The assessment of the Intoxilyzer 8000 bearing Serial Number 80-000208, however, "proceeded to completion as outlined in the Report based on work done on that date,"[6/] as the parties stipulated in Admitted Fact 13 set forth in their Pre-Hearing Stipulation. That "Report" indicated, among other things, that the testing yielded the following "Analytical Results" and "Conclusion":

> Analytical Results
>
> All results met the requirements of FDLE/ATP Form 34 Instrument Evaluation Procedures for

> accuracy, and all instrumentation performed within the manufacturer's specification for precision of 0.003. All results for the acetone interferent test were 0.000g/210L and acetone was detected by the correct instrument response prescribed by the manufacturer to denote the interferent. Mouth alcohol was correctly determined by the instrumentation.
>
> Conclusion
>
> The results of this evaluation establish that the CMI, Inc. Intoxilyzer 8000 instrumentation produces accurate and reliable breath alcohol test results. Based on the results of this evaluation, the Florida Department of Law Enforcement Alcohol Testing Program approves the infrared light absorption method as it exists in the CMI, Inc. Intoxilyzer 8000 instrumentation using software version 8100.10. The CMI, Inc. Intoxilyzer 8000 instrumentation is approved for use as evidentiary breath instrumentation in the State of Florida.

Pursuant to FDLE's interpretation of the version of rule 11D-8.003 then in effect (an interpretation with which Petitioners have, in this proceeding, expressed their disagreement), the successful completion of Form 34 testing on one of the two Intoxilyzer 8000s that CMI (as required by subsection (4)(c) of the rule) had submitted was sufficient to warrant FDLE's approval of the Intoxilyzer 8000 under the then-existing version of the rule.

14. By letter dated July 8, 2002, William Harrold, the Joint Administrative Procedures Committee's (JAPC's)[7/] Chief

Attorney, advised Fern Rosenwasser of FDLE's Office of General Counsel that he had "completed a preliminary review of [the proposed amendments to rule chapter 11D-8][8/] and ha[d] . . . comments for [her] consideration" regarding proposed rules 11D-8.003(7) and 11D-8.017 (and no other matters), which comments were set forth in the letter. Significantly, Mr. Harrold did not request any further information concerning FDLE's justification for amending rule 11D-8.003(2) to list the Intoxilyzer 8000 as an FDLE-approved breath test instrument.

15. On July 18, 2002, Ms. Rosenwasser sent Mr. Harrold the following letter in response to his July 8, 2002, letter:

> I write in reference to the preliminary review of [FDLE's proposed amendments to rule chapter 11D-8]. I have included FDLE's comments in each individual rule section to facilitate your review.
>
> 11D-8.003(7) This rule provision states:
>
> > The availability or approval of new instruments, software options or modifications does not affect the approval status or reliability of previously approved instruments, software, options or modifications.
>
> [Comment by Mr. Harrold:] Under the "map tack" provisions of § 120.536, F.S., a specific law implemented is required for each rule provision. Provide citation to the statutory authority that authorizes this rule provision. The statement in the rule appears overly broad. If all of the new instruments, software, options or modifications were examined since the breathalyzers were first used there is a

high probability that the approval status of previously approved instruments, software, options and modifications have been affected.

Response: The approval of another instrument does not affect the "approval status" of a previously approved instrument. If the previously approved instrument['s] reliability is in question, then there are tests and procedures to determine such and to terminate approval status. This section merely reaffirms that approval of a new instrument does not invalidate the approval of a previous instrument. Language revised to read: (7) The availability or approval of new instruments, software, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications.

11D-8.017 [Comment by Mr. Harrold:] This rule provision incorporates various forms. FDLE/ATP Form 14, Breath Test Result Affidavit was not submitted with the rule package and must be supplied.

Response: Form submitted in Notice of Proposed Rulemaking package.

16. Eight days later, FDLE published in the "Proposed Rules" section of the July 26, 2002, edition of the Florida Administrative Weekly its proposed amendments to rule chapter 11D-8, as revised in the manner described in Ms. Rosenwasser's July 18, 2002, letter to Mr. Harrold (2002 Proposed Rules). The "full text of the [2002] [P]roposed [R]ules" was published, accompanied by, among other things, a statement that, if requested within 21 days, a hearing on the 2002 Proposed Rules would be held on August 21, 2002.

17. On October 16, 2002, JAPC issued a Certification concerning the 2002 Proposed Rules, certifying that:

> The adopting agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the Committee regarding the [2002 Proposed Rules];
>
> That all statutory rulemaking requirements of Chapter 120, F.S. have been complied with;
>
> There is no administrative determination under subsection 120.56(2), F.S. pending on any rule covered by this certification;
>
> All rules covered by this certification are filed within the prescribed time limitations of paragraph 120.54(3)(e), F.S. They are filed not less than 28 days after the notice required by subsection 120.54(3)(a), F.S.; and [a]re filed not more than 90 days after the notice.[9/]

The Certification noted that the 2002 Proposed Rules "remain[ed] subject to committee review pursuant to the provisions of section 120.545."

18. That same day (October 16, 2002), FDLE filed with the Secretary of State the 2002 Proposed Rules, along with the following Summary of Proposed Rule[s], Justification of Proposed Rule[s], Federal Comparison Statement, and Summary of Hearing:

SUMMARY OF PROPOSED RULE[S]

> Proposed revisions to Chapter 11D-8, F.A.C. pertain to the regulation and implementation of Florida's implied consent and alcohol testing program. The proposed revisions govern definitions based on scientific and

common usage; standards for issuance and regulation of permits; evaluation and approval of breath and blood alcohol analysis methods; approval, use, and inspection of breath test instruments and records; and training requirements and qualifications.

JUSTIFICATION OF PROPOSED RULE[S]

The proposed revisions are necessary to accommodate approval of a new breath test instrument for use in the State of Florida that employs new technology with expanded capabilities, to implement certification of breath test instructors and approval of breath test courses by the Criminal Justice Standards and Training Commission, and to ensure the qualifications and proficiency of blood alcohol analysts.

FEDERAL COMPARISON STATEMENT

There are no federal requirements dealing with this topic.

SUMMARY OF HEARING

The proposed rules were noticed in the Florida Administrative Weekly on July 26, 2002, for a hearing to be held on August 21, 2002, if requested. FDLE received no requests for a public hearing and none was conducted. One written comment was submitted and is summarized below.

Stuart I. Hyman, P.A., objects to the proposed revision because information relating to breath test instrumentation software and technical components are confidential and exempt from public records disclosure. FDLE's response restated the exemption and provided the applicable statutory authority.

19. The Justification of Proposed Rule[s] that FDLE filed with the Secretary of State had previously been submitted to JAPC for its review and consideration.

20. The 2002 Proposed Rules became effective November 5, 2002.[10/]

21. On November 12, 2002, the Department of State received the following letter from Ms. Rosenwasser:

> Please accept this request from [FDLE} for a technical change to Rule 11D-8.003(6). The change is necessary since FDLE/ATP Form 34 does in fact reflect a March 2002 revision date, and is referenced as such throughout the rules. Effective November 5, 2002, the 2001 version was replaced by the 2002 version.

22. Information concerning the April and May 2002 Evaluations was not requested by, nor shared with, JAPC during the rulemaking process in 2002.

23. FDLE engaged in rulemaking in 2004 to again make changes to rule 11D-8.003, including subsection (2) of the rule. These changes became effective December 9, 2004. The rule has not been amended since. Accordingly, the existing version of rule 11D-8.003 is the version that emerged from the rulemaking process in 2004.

CONCLUSIONS OF LAW

24. The instant challenge is being made pursuant to section 120.56(1) and (3), Florida Statutes, which allows

substantially affected persons to administratively challenge the facial validity of an existing rule (but not a rule no longer in existence) and, if successful, to obtain from a DOAH administrative law judge a declaration of the rule's invalidity (which declaration has prospective effect only[11/]). See Off. of Ins. Reg. v. Serv. Ins. Co., 50 So. 3d 637, 638 (Fla. 1st DCA 2010)("Section 120.56(3)(a), Florida Statutes (2008), sets forth the parameters of an ALJ's jurisdiction to entertain a rule challenge. It 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.' . . . This statute does not authorize a rule challenge to a rule that is no longer in existence."); Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 653 (Fla. 1st DCA 2009)("[S]ection 120.56(3) delays the date on which a rule shall become void until after appellate proceedings have ended."); Dep't of Rev. v. Sheraton Bal Harbour Ass'n, 864 So. 2d 454 (Fla. 1st DCA 2003)("The Department contends that section 120.56, Florida Statutes, does not authorize a rule challenge to a rule that is no longer in existence, and therefore, DOAH is acting in excess of its jurisdiction. We agree and grant the petition."); Fairfield Cmtys. v. Fla. Land & Water Adj. Comm'n, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988)("At the outset, we note that we are being asked [in this appeal of a final order

issued in a DOAH rule challenge proceeding] to determine the facial validity of these two rules [being challenged], not to determine their validity as applied to specific facts, or whether the agency has placed an erroneous construction on them."); State Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So.2d 878, 889 (Fla. 1st DCA 1989)(on motions for rehearing and motion for clarification)("It is apparent that the statutory scheme in chapter 120 for invalidating agency rules contemplates that once a rule . . . has been issued and acted or relied upon by the agency or members of the public in conducting the business of the agency, the rule will be treated as presumptively valid, or merely voidable, and must be given legal effect until invalidated in a section 120.56 rule challenge proceeding. . . . The statutory scheme is obviously intended to avoid the chaotic uncertainty that would necessarily flow from retroactively invalidating agency action taken in reliance on the presumed validity of its rule prior to a proper rule challenge proceeding holding the rule invalid."[12/]); MDG Capital Corp. v. Fla. Hous. Fin. Corp., Case No. 09-5115RX, slip op. at 2 (Fla. DOAH Oct. 6, 2009)("[R]ules can be invalidated only on a prospective basis."); The Fla. Retail Fed'n, Inc. v. Ag. for Health Care Admin., Case No. 04-1828RX, 2004 Fla. Div. Adm. Hear. LEXIS 2018 *26 (Fla. DOAH July 19, 2004), aff'd, 903 So. 2d 939 (Fla. 1st DCA 2005)(table)("[A]n administrative decision

invalidating a rule cannot be applied retroactively."); Advantage Therapy and Nursing Ctr. v. Ag. for Health Care Admin., Case No. 97-1625RX, 1997 Fla. Div. Adm. Hear. LEXIS 5550 *17 (Fla. DOAH July 29, 1997)("[I]n a rule challenge, the issue to be determined is whether the rule, either proposed or adopted, is valid on its face."); and 120.56(3)(b)("The rule or part thereof declared invalid shall become void when the time for filing an appeal expires.").

25. Section 120.56(1) and (3) provides as follows:

> (1) General procedures for challenging the validity of a rule or a proposed rule.
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.
>
> (c) The petition shall be filed by electronic means with the division which shall, immediately upon filing, forward by electronic means copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies

with the requirements of paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown. Evidence of good cause includes, but is not limited to, written notice of an agency's decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

(d) Within 30 days after the hearing, the administrative law judge shall render a decision and state the reasons therefor in writing. The division shall forthwith transmit by electronic means copies of the administrative law judge's decision to the agency, the Department of State, and the committee.

(e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

> (3) Challenging existing rules; special provisions.
>
> (a) 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. The 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.
>
> (b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

26. An existing rule may be challenged pursuant to the foregoing statutory provisions only on the ground that it is an "invalid exercise of delegated legislative authority." An administrative law judge is without authority to declare an existing rule invalid on any other basis;[13/] nor may the administrative law judge declare an existing rule retroactively invalid. To do so would be an impermissible extension of the administrative law judge's authority beyond the boundaries established by the Legislature. See Cape Coral v. GAC Utils., Inc., 281 So. 2d 493, 495-496 (Fla. 1973)("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course,

includes the Public Service Commission. As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.")(citations omitted); Ocampo v. Dep't of Health, 806 So. 2d 633 (Fla. 1st DCA 2002)("An agency can only do what it is authorized to do by the Legislature."); Fla. Dep't of Ins. v. Bankers Ins. Co., 694 So. 2d 70 (Fla. 1st DCA 1997)("In determining the extent of an agency's authority or jurisdiction, we start with the proposition that agencies are creatures of statute. Their legitimate regulatory realm is no more and no less than what the Legislature prescribes by law."); and Fiat Motors of North America, Inc. v. Calvin, 356 So. 2d 908, 909 (Fla. 1st DCA 1978)("Administrative agencies are creatures of statute and have only such powers as statutes confer.").

27. In the instant case, Petitioners contend that Florida Administrative Code Rule 11D-8.003(2) is an "invalid exercise of delegated legislative authority," within the meaning of section 120.52(8)(a), Florida Statutes,[14/] which provides as follows:

> Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter.[15/]

The alleged lack of compliance upon which Petitioners' challenge to rule 11D-8.003(2) is based occurred in 2002, during the development and adoption of the immediate predecessor to the current version of the rule. Petitioners contend that, in the 2002 rule development and adoption process, FDLE violated the "detailed written statement of the facts and circumstances" requirement of section 120.54(3)(a)4 and (e)1, which statutory provisions then provided as follows:

> ADOPTION PROCEDURES.--
>
> (a) Notices.--
>
> * * *
>
> 4. The adopting agency shall file with the [Joint Administrative Procedures] [C]ommittee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice required by subparagraph 1.
>
> (e) Filing for final adoption; effective date.--
>
> 1. If the adopting agency is required to publish its rules in the Florida Administrative Code, it shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances

> justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required by this subparagraph, in the office of the agency head, and such rules shall be open to the public.

(emphasis added). According to Petitioners, the statement that FDLE provided to JAPC and then to the Secretary of State lacked necessary detail because it failed to include any mention of the April 2002 and May 2002 Evaluations.

28. The undersigned has grave doubt as to whether Petitioners may challenge rule 11D-8.003(2) based upon an alleged procedural defect in the rulemaking process that culminated in the adoption of, not the existing, but a prior, version of that rule provision. It would seem that the window for pursuing a challenge based upon this alleged procedural defect in the 2002 rulemaking process closed when rule 11D-8.003(2) was amended and readopted effective December 9, 2004, and that from that time onward, the only possible procedural errors theoretically capable of forming the basis of a challenge to rule 11D-8.003(2) on the ground that it is an "invalid exercise of delegated legislative authority," within the meaning of section 120.52(8)(a), have been those errors, if any, that may have been made during the 2004 rulemaking process[16/] (which produced the existing version of the rule). Cf. Ellis v. Hunter, 3 So. 3d 373, 381 (Fla. 5th DCA 2009)("We note,

parenthetically, that even if a single subject violation had occurred, section 903.286 was enacted effective July 1, 2005, by chapter 05-236, Laws of Florida, and was reenacted by chapter 06-3, as part of the adoption act, which is now submitted to the Legislature annually. Because Simpkins posted bond for Hunter on January 22, 2007, any single subject violation in section 903.286 was cured before Simpkins posted bond.")(citations omitted); Dep't of High. Saf. & Motor Veh. v. Johnson, 980 So. 2d 1118, 1120 (Fla. 5th DCA 2008)("We conclude, as have the First, Second, and Fourth District Courts, that the single subject rule violation contained in chapter 98-223 was cured by the enactment of chapter 03-25. Accordingly, the amended version of section 322.271(4) became effective on July 1, 2003, and Johnson had a window period, which closed on that date, to obtain reinstatement of his license from the Department.")(citations omitted); Dep't of High. Saf. & Motor Veh. v. Fountain, 883 So. 2d 300, 301 n.1 (Fla. 1st DCA 2004)("We would note that, by the time Fountain sought certiorari review, the Legislature had reenacted the 1999 version of the Florida Statutes, effective July 1, 2003, curing the previous constitutional defect to the 1998 version of the statutes."); and Parrish v. Moss, 200 Misc. 375, 378 (N.Y. Sup. Ct. 1951)("[W]hen the board of education at its regular meeting on May 31, 1951, by the unanimous consent of the eight members

present, voted to add to the calendar the matter of the regulations submitted by the superintendent of schools and then, by a vote of seven to zero, readopted these regulations, the board cured any procedural defects that may have existed in the resolutions adopted on May 24, 1951.").

29. In any event, even if were possible, in theory, for a procedural defect in the 2002 rulemaking process to support a declaration of the invalidity of the existing version of rule 11D-8.003(2), the making of such a declaration would be unwarranted in the instant case. This is so because the record evidence fails to establish that, during the 2002 rulemaking process, FDLE actually violated the "detailed written statement of the facts and circumstances" requirement of section 120.54(3)(a) and (e), as Petitioners have alleged. An examination of the justification statement that FDLE provided to JAPC and later to the Secretary of State reveals that, while succinct, it was sufficiently detailed, notwithstanding its failure to make specific mention of the April 2002 and May 2002 Evaluations, to enable JAPC to have performed its review function and therefore fulfilled the legislatively-intended functional purpose of section 120.54(3)'s "detailed written statement of the facts and circumstances" requirement--which is "[t]o facilitate [JAPC] review."[17/] Adam Smith Enters. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1267 (Fla. 1st DCA 1989); see

also Hamner v. Dep't of Prof'l Reg., Case No. 81-967RX, 1981 Fla. Div. Adm. Hear. LEXIS 4505 **17-18 (Fla. DOAH Nov. 20, 1981)("[The justification statement is] require[d] to be filed with the Joint Administrative Procedures Committee and the Secretary of State, and not noticed to the general public. It is merely to be used by the committee in its review of the agency rules."); and Stephen T. Maher, We're No Angels: Rulemaking and Judicial Review in Florida, 18 Fla. St. U.L. Rev. 767 (1991)(section 120.54(11)(a), which then contained the "detailed written statement of the facts and circumstances" requirement now found in section 120.54(3), described as "a section designed to facilitate JAPC review"). Particularly when read together with the proposed rule amendments to rule chapter 11D-8 that JAPC was reviewing, FDLE's justification statement clearly conveyed to JAPC, in plain and simple terms, that the reason FDLE was proposing to amend that portion of rule chapter 11D-8 containing a listing of breath test instruments approved by FDLE for evidentiary use (rule 11D-8.003(2)) was to add to this listing a "new breath test instrument [specifically, the Intoxilyzer 8000] . . . that contain[ed] new technology with expanded capabilities." If JAPC needed additional details from FDLE on the matter "[t]o facilitate [its] review" of this proposed rule amendment, it could have, pursuant to section 120.545(2), "request[ed] from [FDLE] such information." That it

did not do so (as far as the evidentiary record in this case reveals) is strong, if not compelling, evidence that FDLE's justification statement served its intended purpose and therefore was not legally deficient. Who better to determine whether the statement was detailed enough "[t]o facilitate [JAPC] review" than JAPC itself.

30. In support of their argument to the contrary that FDLE's justification statement was legally deficient, Petitioners have relied on Manasota-88, Inc. v. Dep't of Envtl. Reg., 567 So.2d 895, 898 (Fla. 1st DCA 1990), a case involving direct appellate court review of the validity of a non-emergency agency rule, an avenue of redress (hereinafter referred to as the "Direct Appeal Option") that, since 1992, has been unavailable to those seeking to challenge adopted non-emergency agency rules on other than constitutional grounds.[18/] See § 120.68(9)("No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56 or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact."); see also Baillie v. Dep't of Nat. Res., 632 So. 2d

1114, 1116 (Fla. 1st DCA 1994)("Enacted by chapter 92-166, section 10, at 1679, Laws of Florida (1992), section 120.68(15), Florida Statutes (1993) [currently section 120.68(9)], now prohibits judicial scrutiny of an administrative rule to determine whether the rule constitutes an invalid exercise of delegated legislative authority 'except to review an order entered pursuant to a proceeding under s. 120.54(4) or s. 120.56, unless the sole issue presented by the petition [for review] is the constitutionality of a rule and there are no disputed issues of fact.' Proceedings under sections 120.54(4) and 120.56 are administrative rule challenges, initiated by filing petitions seeking determinations of invalidity with the Division of Administrative Hearings."); and Sellers, supra note 17, at 75 n.31 ("Direct appeals of agency rules were limited in 1992. 1992 Fla. Laws ch. 166, creating FLA. STAT. § 120.68(15) (now § 120.68(9)). This limitation on direct appeals has the effect of eliminating direct appeals such as those in Manasota-88 v. DER, 567 So. 2d 895 (Fla. 1st DCA 1990)(direct appeal from adoption of secondary ground-water quality standards)."). In Manasota-88, the appellate court, applying an "arbitrary and capricious standard of review," found that the rule being challenged therein was "invalid and ineffective" because, in the court's view, the "Facts and Circumstances" statement the agency had filed as part of the rulemaking process was insufficient to

meet the "detailed written statement of the facts and circumstances" requirement of section 120.54--a view that was driven by the court's belief, which it had earlier expressed in obiter dicta in Adam Smith Enterprises, 553 So.2d at 1273[19/] that, as part of the rulemaking process, an agency was required to develop a record sufficiently robust and revealing to enable a reviewing appellate court, on direct review, to properly perform its review function. To suffice, according to the Manasota-88 court, the rulemaking record had to "include a statement of the relevant facts considered by the [agency]" and, in addition, "reveal 'if and how the [agency] considered each factor throughout the process of policy formation,' detailing for the reviewing court 'the actual attention [the agency] gave to the factors, and explain[ing] [its] final disposition with respect to each of them.'" Manasota-88, 567 So. 2d at 898. To the extent that Manasota-88 stands for the proposition that the "detailed written statement of the facts and circumstances" required by section 120.54 must contain sufficient information to facilitate, not only JAPC review, but also direct appellate court review, it has not been good law since the Legislature's elimination of the Direct Appeal Option in 1992. Accordingly, Petitioners' reliance on Manasota-88 is misplaced.

31. Because Petitioners have failed to prove by a preponderance of the evidence the allegation made in their

Petition that rule 11D-8.003(2), "to the extent it includes a provision approving the Intoxilyzer 8000 for use as an evidentiary breath test instrument in the State of Florida," is an "invalid exercise of delegated legislative authority," within the meaning of section 120.52(8)(a), based on FDLE's failure to have complied with the "detailed written statement of the facts and circumstances" requirement of section 120.54(3)(a) and (e) during the 2002 rulemaking process, their rule challenge cannot be sustained.

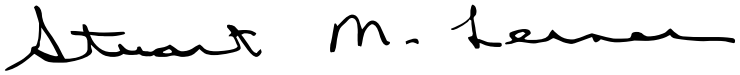
ORDER

Based on the foregoing, it is

ORDERED that:

The Petition filed by Petitioners pursuant to section 120.56(3) seeking an administrative determination that Florida Administrative Code Rule 11D-8.003(2) is an "invalid exercise of delegated legislative authority," as defined in section 120.52(8)(a), is hereby DISMISSED.

DONE AND ORDERED this 5th day of February, 2013, in Tallahassee, Leon County, Florida.



STUART M. LERNER
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 5th day of February, 2013.

ENDNOTES

[1/] Unless otherwise noted, all references in this Final Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

[2/] "An 'approved' test under this provision is one that is adopted [by FDLE] through rule promulgation in accordance with the APA." State v. Bodden, 877 So. 2d 680, 684 (Fla. 2004).

[3/] See § 316.1934(2) and (3), Florida Statutes, which presently provides, in pertinent part, as follows:

> (2) At the trial of any . . . criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal

faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood or breath at the time alleged, as shown by chemical analysis of the person's blood, or by chemical or physical test of the person's breath, gives rise to the following presumptions:

* * *

(c) If there was at that time a blood-alcohol level or breath-alcohol level of 0.08 or higher, that fact is prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired. Moreover, such person who has a blood-alcohol level or breath-alcohol level of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood-alcohol level or breath-alcohol level.

The presumptions provided in this subsection do not limit the introduction of any other competent evidence bearing upon the question of whether the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.

(3) A chemical analysis of a person's blood to determine alcoholic content or a chemical or physical test of a person's breath, in order to be considered valid under this section, must have been performed substantially in accordance with methods approved by the Department of Law Enforcement and by an individual possessing a valid permit issued by the department for this purpose. Any insubstantial differences between approved techniques and actual testing procedures or any insubstantial

> defects concerning the permit issued by the department, in any individual case do not render the test or test results invalid. The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation in accordance with rules adopted by the department.

[4/] Prior to this publication, the CPL had most recently been published in the Federal Register on July 21, 2000.

[5/] Prior to conducting this evaluation, FDLE had been telephonically advised by a representative of the NHTSA that the Intoxilyzer 8000 was "on [NHSTA's] list as an approved instrument," albeit not the list published in the Federal Register. FDLE had also done informal "field testing" on the Intoxilyzer 8000 and four other breath instrument models. Of the five models tested, the Intoxilyzer 8000 was the only one chosen by FDLE, pursuant to subsection (4) of rule 11D-8.003, for formal assessment in accordance with Form 34.

[6/] The "Report" (which was offered and received into evidence as Joint Exhibit 6) was prepared on February 10, 2005, almost three years after the evaluation had been conducted.

[7/] JAPC was then a standing committee of the Legislature created, and vested with powers and duties, by section 11.60, which has since been repealed. JAPC still exists, but as a creature, not of statute, but of the Joint Rules of the Florida Legislature, specifically 4.1 thereof.

[8/] The review was conducted pursuant to section 120.545, subsections (1) through (3) of which then provided as follows:

> (1) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.81(1)(e) and (2), and its accompanying material, and each emergency rule, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority.

(b) The statutory authority for the rule has been repealed.

(c) The rule reiterates or paraphrases statutory material.

(d) The rule is in proper form.

(e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule.

(f) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.

(g) The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.

(h) The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule.

(i) The rule could be made less complex or more easily comprehensible to the general public.

(j) The rule does not impose 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.

(k) The rule will require additional appropriations.

(l) If the rule is an emergency rule, there exists an emergency justifying the

promulgation of such rule, the agency has exceeded the scope of its statutory authority, and the rule was promulgated in compliance with the requirements and limitations of s. 120.54(4).

(2) The committee may request from an agency such information as is reasonably necessary for examination of a rule as required by subsection (1). The committee shall consult with legislative standing committees with jurisdiction over the subject areas. If the committee objects to an emergency rule or a proposed or existing rule, it shall, within 5 days of the objection, certify that fact to the agency whose rule has been examined and include with the certification a statement detailing its objections with particularity. The committee shall notify the Speaker of the House of Representatives and the President of the Senate of any objection to an agency rule concurrent with certification of that fact to the agency. Such notice shall include a copy of the rule and the statement detailing the committee's objections to the rule.

(3) Within 30 days of receipt of the objection, if the agency is headed by an individual, or within 45 days of receipt of the objection, if the agency is headed by a collegial body, the agency shall:

(a) If the rule is a proposed rule:

1. Modify the rule to meet the committee's objection;

2. Withdraw the rule in its entirety; or

3. Refuse to modify or withdraw the rule.

(b) If the rule is an existing rule:

1. Notify the committee that it has elected to amend the rule to meet the committee's objection and initiate the amendment procedure;

2. Notify the committee that it has elected to repeal the rule and initiate the repeal procedure; or

3. Notify the committee that it refuses to amend or repeal the rule.

(c) If the rule is either an existing or a proposed rule and the objection is to the statement of estimated regulatory costs:

1. Prepare a corrected statement of estimated regulatory costs, give notice of the availability of the corrected statement in the first available issue of the Florida Administrative Weekly, and file a copy of the corrected statement with the committee; or

2. Notify the committee that it refuses to prepare a corrected statement of estimated regulatory costs.

[9/] See § 120.54(3)(e)4, which then provided as follows:

> At the time a rule is filed, the [Joint Administrative Procedures] [C]ommittee shall certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The department shall reject any rule not filed within the prescribed time limits; that does not satisfy all statutory rulemaking requirements; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is pending; or which does not include a statement of estimated regulatory costs, if required.

[10/] See § 120.54(3)(e)6, which then provided, in pertinent part, that "[t]he proposed rule shall be adopted on being filed [by the adopting agency] with the Department of State and become effective 20 days after being filed."

[11/] Whether the granting of such prospective relief in the instant case would render inadmissible in pending criminal cases, such as Petitioners', the results of pre-declaration breath tests using the Intoxilyzer 8000 is an issue that the undersigned need not, and therefore will not, resolve.

[12/] In making this pronouncement (which has since been cited with approval in the 2007 case of Vale v. McDonough, 958 So. 2d 966, 967 (Fla. 1st DCA 2007), and the above-referenced 2009 Abbott Labs. case), the court relied on the following language in the 1987 version of section 120.56(3) (which is substantially similar to the language found in the current version of the statute):

> The hearing officer may declare all or part of a rule invalid. The rules or part thereof declared invalid shall become void when the time for filing an appeal expires or at a later date specified in the decision.

Id. To the extent that, as Petitioners argue in their Proposed Final Order, the case of Lanoue v. Dep't of Law Enf., 751 So. 2d 94, 98 (Fla. 1st DCA 1999) supports the contrary proposition that "retrospective relief" is available in a section 120.56(3) rule challenge proceeding, it is at odds with the plain meaning of the language in the second sentence of subsection (3)(b) of the current version of section 120.56 providing that "the rule or part thereof declared invalid [by the administrative law judge] shall become void when the time for filing an appeal expires."

[13/] For example, an administrative law judge may not invalidate an existing rule simply because, in the judge's opinion, it does not represent the wisest or best policy choice. See Bd. of Trs. of the Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995)("The issue before the hearing officer in this [rule challenge] case was not whether the Trustees made the best choice in limiting the lengths of docks within the preserve, or whether their choice is one that the appellee finds desirable for his particular location.").

[14/] As Petitioners correctly point out in paragraph 61 of their Proposed Final Order, among the other bases upon which an administrative law judge may find an existing rule to be an "invalid exercise of delegated legislative authority," as that term is defined in section 120.52(8), is that the rule is "arbitrary or capricious." § 120.52(8)(e). In ruling on the merits of such a challenge, the administrative law judge must consider "all of the available evidence, regardless of whether the evidence was presented to the [agency] during its rulemaking proceedings or was presented for the first time during the section 120.56 hearing." Dep't of Health v. Merritt, 919 So. 2d 561, 564 (Fla. 1st DCA 2006). Stated differently, in such a rule challenge proceeding, neither the challenger nor the agency is "constrained by the evidence that it can demonstrate was actually before [the agency] during rulemaking (or included in the rulemaking record), [rather they both are] free to offer new evidence . . . before the [administrative law judge], even if not initially considered" by the agency. Id. at n.1 (citing with approval Lawrence E. Sellers, Jr., The 2003 Amendments to the Florida APA, 77 Fla. B. J. 74 (Oct. 2003)). It follows that, in defending against such a challenge, the agency is not bound by or limited to the "facts and circumstances" contained in the "detailed written statement of the facts and circumstances" it submitted to JAPC and the Secretary of State pursuant to section 120.54(3)(a) and (e).

[15/] Petitioners have also argued in this proceeding (in paragraph 68 of their Proposed Final Order) that FDLE "deviated from [its] own rules [that were in effect prior to the adoption of the 2002 version of rule 11D-8.003(2)] in approving the Intoxilyzer 8000 based on an evaluation where one instrument completed the Form 34 protocol and one did not." Even assuming, without deciding, that Petitioners are correct that such a deviation occurred, the failure to follow the "agency's own rules" or policies in the rulemaking process is not a basis upon which a rule may be declared an "invalid exercise of delegated legislative authority" in a section 120.56(3) proceeding. The only "rulemaking procedures or requirements," deviation from which warrants a finding of invalidity in such a proceeding, are those set forth in chapter 120.

[16/] Petitioners have neither alleged, nor proven, that any such error was committed.

[17/] Absent any language in section 120.54(3) specifying the amount of detail that must be included in an agency's

justification statement, it is appropriate for the undersigned to use this "legislatively-intended functional purpose" test to evaluate the sufficiency of FDLE's statement. Cf. Bailey v. Van Pelt, 82 So. 789, 792 (Fla. 1919)("[T]he statute should be interpreted and applied so as to effectuate its purpose."); State v. Hoyt, 609 So. 2d 744, 748 (Fla. 1st DCA 1992)("[A] statute should be construed to effectuate the purpose for which it was enacted."); Johnson v. Johnson, 385 F.3d 503, 516 (5th Cir. 2004)("Section 1997e(a) does not say how specific a prisoner's administrative grievances must be, and this court has so far given relatively little guidance regarding what a prisoner must say in his grievances to exhaust his claims properly. . . . In deciding how much detail is required in a given case, we believe that a court must interpret the exhaustion requirement in light of its purposes . . . ."); Alward v. Comm'r of Soc. Sec., Case No. 08-3373 (WJM), 2009 U.S. Dist. LEXIS 114107 *12 (D.N.J. Dec. 7, 2009) ("These findings, while not overwhelming in their amount of detail, are sufficient for the purposes of judicial review . . . ."); State v. Marshall, 130 N.J. 109, 132 (N.J. 1992)("How detailed a compilation of homicide cases is required to facilitate an adequate proportionality review of a given death sentence depends on the purposes to be served by that review."); and United Refrigerator Co. v. Applebaum, 410 Pa. 210, 213 (Pa. 1963)("[T]he lower court has broad discretion in determining the amount of detail that must be averred since the standard of pleading set forth in Rule 1019(a) is incapable of precise measurement.").

[18/] Section 120.54(4)(a)3 (formerly section 120.54(8)(a)3) "explicitly makes agency determinations of 'immediate danger, necessity, and procedural fairness' in the adoption of emergency rules judicially reviewable without an intervening administrative challenge." Postal Colony Co. v. Askew, 348 So. 2d 338, 339 (Fla. 1st DCA 1977)(emphasis supplied).

[19/] As was pointed out in Baillie, 632 So. 2d at 1117, "[t]he Adam Smith case came to the [appellate] court for review of a hearing officer's final order in a rule challenge case, not directly from the rulemaking agency."

COPIES FURNISHED:

Robert Ralph Berry, Esquire
Eisenmenger, Berry and Peters, P.A.
5450 Village Drive
Rockledge, Florida 32955

Ann Marie Johnson, Esquire
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

Michael Ramage, General Counsel
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489
(eServed)

Gerald M. Bailey, Commissioner
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489
(eServed)

Mr. Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399
(eServed)

Liz Cloud, Program Administrator
Administrative Code
Department of State
R.A. Gray Building, Suite 101
Tallahassee, Florida 32399
(eServed)

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 Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.