

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOA VUONG, on behalf of himself)
and other Palm Beach County DUI)
Defendants,)
)
Petitioners,)
)
vs.) Case No. 12-3898RX
)
DEPARTMENT OF LAW ENFORCEMENT,)
)
Respondent.)
_____)

FINAL ORDER

An administrative hearing in this case was held on March 7 and 8, 2013, in Tallahassee, Florida, before Administrative Law Judge (ALJ) William F. Quattlebaum, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian P. Gabriel, Esquire
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Jupiter, Florida 33458-4837

For Respondent: Ann Marie Johnson, Esquire
Department of Law Enforcement
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STATEMENT OF THE ISSUE

The issue in this case is whether Florida Administrative Code rules cited herein are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On December 4, 2012, Hoa Vuong and others (Petitioners) filed a Petition Challenging Florida Administrative Code Rules 11D-8.003, 11D-8.004, 11D-8.006 and 11D-8.017 as invalid pursuant to section 120.56(1), Florida Statutes (2012).^{1/}

On December 7, 2012, a Notice of Hearing was issued scheduling the administrative hearing to commence on January 2, 2013. On December 11, 2012, the parties filed an Agreed Motion for Continuance that was granted, and the hearing was rescheduled to commence on March 7, 2013.

On March 5, 2013, the parties filed a Pre-Hearing Stipulation containing a Statement of Admitted Facts. The stipulated facts have been adopted and are incorporated herein as necessary.

The case was transferred to the undersigned Administrative Law Judge on March 7, 2013.

At the hearing, the Petitioners presented the testimony of two witnesses and had Exhibits numbered 1 through 4, 7 through 38, 40 through 50, 52, 53, 58, 60, 62 through 65, 68, 70 through 73, 76, 77, 82, 84 through 87, 90, 92, 95, 97, 112, and 113

admitted into evidence. The Respondent presented the testimony of two witnesses.

The Transcript of the hearing was filed on March 25, 2013. According to the schedule adopted at the hearing, both parties filed proposed orders that have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Petitioners are defendants in "driving under the influence" (DUI) criminal prosecutions pending in Palm Beach County.

2. The "Intoxilyzer 8000" is an alcohol breath testing instrument manufactured by "CMI, Inc." (CMI).

3. Each of the Petitioners was arrested and charged with DUI after having submitted to an alcohol breath test on an Intoxilyzer 8000 instrument.

4. The State of Florida intends to utilize the results of the breath tests in prosecuting the charges filed against the Petitioners.

5. The Respondent's Alcohol Testing Program (ATP) is responsible for the operation, inspection and registration of alcohol breath testing instruments used for purposes of DUI prosecutions in Florida. Section 316.1932(1)(a)2., Florida Statutes, provides 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 is responsible for the regulation of the individuals who operate, inspect, and instruct on the breath test instruments utilized in the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program is further responsible for the regulation of blood analysts who conduct blood testing to be 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:

- a. Establish uniform criteria for the issuance of permits to breath test operators, agency inspectors, instructors, blood analysts, and instruments.
- b. Have the authority to permit breath test operators, agency inspectors, instructors, blood analysts, and instruments.
- c. Have the authority to discipline and suspend, revoke, or renew the permits of breath test operators, agency inspectors, instructors, blood analysts, and instruments.
- d. Establish uniform requirements for instruction and curricula for the operation and inspection of approved instruments.
- e. Have the authority to specify one approved curriculum for the operation and inspection of approved instruments.
- f. Establish a procedure for the approval of breath test operator and agency inspector classes.

- 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.
- h. With the approval of the executive director of the Department of Law Enforcement, make and enter into contracts and agreements with other agencies, organizations, associations, corporations, individuals, or federal agencies as are necessary, expedient, or incidental to the performance of duties.
- i. Issue final orders which include findings of fact and conclusions of law and which constitute final agency action for the purpose of chapter 120.
- j. Enforce compliance with the provisions of this section through civil or administrative proceedings.
- k. Make recommendations concerning any matter within the purview of this section, this chapter, chapter 322, or chapter 327.
- l. Promulgate rules for the administration and implementation of this section, including definitions of terms.
- m. Consult and cooperate with other entities for the purpose of implementing the mandates of this section.
- n. Have the authority to approve the type of blood test utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.
- o. Have the authority to specify techniques and methods for breath alcohol testing and blood testing utilized under the driving and boating under the influence provisions and

related provisions located in this chapter and chapters 322 and 327.

p. Have the authority to approve repair facilities for the approved breath test instruments, including the authority to set criteria for approval.

Nothing in this section shall be construed to supersede provisions in this chapter and chapters 322 and 327. The specifications in this section are derived from the power and authority previously and currently possessed by the Department of Law Enforcement and are enumerated to conform with the mandates of chapter 99-379, Laws of Florida.

6. The U.S. Department of Transportation maintains a "Conforming Products List of Evidential Breath Measurement Devices" (CPL) identifying various alcohol breath testing instruments that ostensibly meet applicable federal regulations.

7. Pursuant to FDLE/ATP Form 34, incorporated by reference in rule 11D-8.017, the only alcohol breath test instruments that may be evaluated for use in Florida are those included on the CPL.

8. On November 26, 2001, the Respondent received notice that the Intoxilyzer 8000 met applicable requirements of the National Highway Traffic Safety Administration's model specifications for evidentiary alcohol breath testers and that the instrument was expected to be on the next published CPL.

9. Thereafter, the Respondent began to review the instrument's suitability for use in Florida. The Respondent's

evaluation was governed by the versions of rule 11D-8.003(4) and Form 34 in effect at that time.

10. To the extent that the Petitioners' challenge is to specific rule requirements that have been deleted or superseded, such a challenge is outside the scope of this proceeding.

11. In April 2002, the Respondent began testing the operation of two Intoxilyzer 8000 instruments received from CMI (serial numbers 80-00208 and 80-00209), but the tests were not completed due to software issues.

12. In May 2002, the Respondent resumed testing the same two instruments, software malfunctions apparently having been resolved. One of the instruments (serial number 80-00208) successfully completed the testing process. An electrical problem halted the testing of the second instrument (serial number 80-00209).

13. On October 3, 2002, the CPL that included the Intoxilyzer 8000 was published in the Federal Register (Vol. 67, No. 192).

14. On November 5, 2002, the Respondent adopted rule 11D-8.003(2) identifying the Intoxilyzer 8000 as an approved alcohol breath test instrument. The rule currently provides as follows:

Approval of Breath Test Methods and Instruments.

(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.
(emphasis added).

15. Although the Respondent had approved the Intoxilyzer 8000 through the rule, it was not placed into service because development of Florida-specific software had not been completed at the time the rule was adopted.

The Exhaust Purge Valve

16. In August 2004, several of the Respondent's employees, including Inspectors Matthew Malhiot and Roger Skipper, traveled to the Kentucky headquarters of CMI to participate in development of software specifically applicable to the Intoxilyzer 8000 instruments that would be placed into service in Florida.

17. CMI was in the process of testing a Florida-specific Intoxilyzer 8000 at the time of the trip. The instrument was being subjected to tests using gas samples containing known alcohol concentrations. The reports produced by the instrument were inaccurate, with the alcohol levels being underreported by the instrument.

18. The Respondent's employees Malhiot and Skipper were aware of the issue and CMI's attempts to identify and remedy the cause of the inaccurate reporting. CMI implemented a variety of alterations to the instrument, changing out various hoses and connectors, and drilling a small hole through the instrument's "exhaust purge valve." The instrument eventually produced reports that accurately reflected the gas samples being used in the tests.

19. Based on the CMI tests, the version of the Intoxilyzer 8000 placed into service in Florida includes a hole drilled into the exhaust purge valve.

20. The decision to drill the hole was made by a CMI engineer. There was no evidence presented at the hearing as to the rationale underlying the engineer's decision to drill the hole.

21. The exhaust purge valve is a mechanism utilized only during simulation testing and is not involved in actual alcohol breath testing as would be performed on someone suspected of DUI.

22. The evidence is insufficient to establish that CMI's drilling of the hole in the exhaust purge valve caused the instrument to produce the expected results when tests were performed with gas samples of known alcohol levels.

23. The Respondent has subsequently conducted tests to compare the operation of an Intoxilyzer 8000 with a hole drilled through its exhaust purge valve and the operation of an Intoxilyzer 8000 with an intact exhaust purge valve, and has found both instruments to perform accurately.

24. The evidence fails to establish that breath test results are affected in any manner by the exhaust purge valve, whether or not there is a hole drilled through the valve.

25. The Petitioners have asserted that the Respondent's "failure" to "re-approve" the Intoxilyzer 8000 after the hole was

drilled in 2004, constitutes an invalid exercise of delegated legislative authority. The evidence does not establish that such a process was authorized or required by statute.

26. An administrative rule in effect at the time of the April 2004 tests required that the manufacturer provide written notice to the Respondent as to "modifications" of approved devices. CMI did not provide the Respondent with written notice of the hole being drilled in the exhaust purge valve.

27. Despite the lack of written notice, the Respondent was well aware of the drilled hole. The Respondent's employees Malhiot and Skipper both were present at CMI headquarters during the testing and were aware of the CMI engineer's decision to drill the hole. Laura Barfield, the manager of the ATP, was notified by a telephone call from Mr. Skipper that CMI had drilled the hole in the exhaust purge valve.

28. In December 2004, the Respondent's rules were revised to delete the requirement that notice of written modification of approved instruments be provided to the Respondent.

29. The Petitioners have asserted that the 2004 deletion of the required notification from the rule was an invalid exercise of delegated legislative authority. The assertion is outside the jurisdiction of this proceeding, which is limited to a determination as to whether the Respondent's currently existing

rules constitute an invalid exercise of delegated legislative authority.

30. In March 2006, the Respondent approved the Intoxilyzer 8000 for evidentiary breath testing usage in the State of Florida. An update to the software programmed into the instruments occurred in October 2006.

31. The Petitioners have noted that case law has held modifications to the Intoxilyzer 8000 to render the test results unreliable. The Petitioners assert that, accordingly, the instrument should have been subjected anew to the approval process after a hole was drilled in the exhaust purge valve.

32. On at least two occasions, local law enforcement agencies altered specific Intoxilyzer 8000 instruments after the Respondent had approved the specific instruments for use in evidentiary breath testing in 2006. Test results from such altered instruments have been determined by the courts to lack scientific reliability.

33. The evidence fails to establish that local law enforcement agency alterations of individual Intoxilyzer 8000 instruments renders the Intoxilyzer 8000 model, as approved by the Respondent and placed into service in 2006, unreliable for its intended use when breath alcohol tests are properly administered by trained operators.

34. The Petitioners' assertion that CMI's drilling of the hole in the exhaust purge valve requires that the Intoxilyzer 8000 be removed from the U.S. Department of Transportation's CPL is outside the jurisdiction of this proceeding.

The Flow Sensor

35. In order to obtain a scientifically reliable breath test result, a test subject must provide a continuous sample of "deep lung air" through the breath test instrument. A "flow sensor" in the instrument monitors the flow of lung air through the instrument and signals a constant "tone" when the air pressure being generated by a test subject is sufficient to provide an adequate breath sample.

36. Pursuant to section 316.1932(1)(a)2., cited above, the Respondent is responsible for the curriculum used to train the local agency inspectors, as well as operators of the breath test instruments. The curriculum states that "a minimum acceptable record sample is defined as a breath sample that has met the minimum criteria of the instrument's analysis to ensure that the breath sample is reliable, including that the subject must provide a continuous breath sample of at least 1.1 liters of breath."

37. Prior to use of a specific breath test machine by a local law enforcement agency for evidentiary purposes, the actual instrument must be inspected by, and registered with, the

Respondent, pursuant to rule 11D-8.004, which provides as follows:

Department Inspection and Registration of
Breath Test Instruments.

(1) The Department shall register and inspect a breath test instrument prior to such instrument being initially placed into evidentiary use by an agency. The inspection validates the instrument's approval for evidentiary use, and the registration denotes an instrument approved pursuant to these rules and shall reflect the registration date, the owner of the instrument, the instrument serial number, the manufacturer, and the model designation.

(2) Registered breath test instruments shall be inspected by the Department at least once each calendar year, and must be accessible to the Department for inspection. Any evidentiary breath test instrument returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use. The inspection validates the instrument's approval for evidentiary use.

(3) Department inspections shall be conducted in accordance with Department Inspection Procedures FDLE/ATP Form 35--Rev. August 2005 for the Intoxilyzer 5000 Series, or Department Inspection Procedures--Intoxilyzer 8000 FDLE/ATP Form 36--Rev. August 2005 for the Intoxilyzer 8000; and the results reported on FDLE/ATP Form 26--Department Inspection Report--Rev. March 2004 for the Intoxilyzer 5000 Series, or FDLE/ATP Form 41--Department Inspection Report--Intoxilyzer 8000--Rev. August 2005 for the Intoxilyzer 8000.

(4) Department Inspectors shall be employed by the Department to register evidentiary breath test instruments, to conduct inspections and maintenance of breath test

instruments and related equipment and facilities, to conduct and monitor training classes, and to otherwise ensure compliance with Chapter 11D-8, F.A.C. (emphasis added).

38. Each instrument is also inspected on a monthly basis by a local agency inspector pursuant to rule 11D-8.006, which provides in relevant part as follows:

Agency Inspection of Breath Test Instruments.

(1) Evidentiary breath test instruments shall be inspected by an agency inspector at least once each calendar month. The agency inspection shall be conducted in accordance with Agency Inspection Procedures FDLE/ATP Form 16--Rev. March 2004 for the Intoxilyzer--5000 Series, or Agency Inspection Procedures--Intoxilyzer 8000 FDLE/ATP Form 39--Rev. August 2005 for the Intoxilyzer 8000; and the results reported on FDLE/ATP Form 24--Agency Inspection Report--Rev. March 2001 for the Intoxilyzer 5000 Series, or FDLE/ATP Form 40--Agency Inspection Report--Intoxilyzer 8000--March 2004 for the Intoxilyzer 8000.

* * *

(3) Whenever an instrument is taken out of evidentiary use, the agency shall conduct an agency inspection. The agency shall also conduct an agency inspection prior to returning an instrument to evidentiary use. (emphasis added).

39. Flow sensor testing and calibration during an inspection is not specifically required by statute or rule.

40. The Petitioners have asserted that the challenged rules are vague and fail to establish adequate standards for agency

decisions because they do not require calibration of flow sensors during inspections.

41. The evidence fails to establish that the absence of a specific rule requirement that flow sensors be calibrated renders the rules an invalid exercise of delegated legislative authority.

42. The Respondent currently tests and, if necessary, recalibrates flow sensors as part of a quality control process during an annual inspection performed on each instrument being used in Florida in evidentiary breath testing. The Respondent developed the current method by which flow sensors are examined. Examination of flow sensors requires specialized equipment that is not presently available to local agency inspectors.

43. The evidence is insufficient to establish that the scientific reliability of reported breath test results is related to the function of an instrument's flow sensor. The evidence establishes that the instrument will not report results of a breath alcohol test if the quantity of air provided by a test subject is insufficient.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.56, Fla. Stat.

45. The Petitioners have asserted that rules 11D-8.003, 11D-8.004, 11D-8.006 and 11D-8.017 are invalid exercises of

delegated legislative authority. Section 120.52(8) provides the following relevant definition:

"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.

46. In a challenge to an existing agency rule, the Petitioner 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 Petitioners have asserted that rules 11D-8.003, 11D-8.004, 11D-8.006 and 11D-8.017 are invalid exercises of delegated legislative authority. In this case, the burden has not been met.

47. Rules 11D-8.003, 11D-8.004 and 11D-8.006 have been set forth herein. Rule 11D-8.017 incorporates by reference the forms otherwise identified herein.

48. There was no evidence presented that the Respondent failed to follow applicable rulemaking procedures in the adoption of the referenced rules or in the 2004 rule revision that eliminated the requirement that a manufacturer provide written notification of modifications to an instrument. The Petitioners'

challenge to the 2004 rule revision was not timely filed. See § 120.56(2), Fla. Stat.

49. The evidence fails to establish that the Respondent has exceeded its grant of rulemaking authority, or that any of the referenced rules enlarge, modify or contravene the specific provision of law being implemented. The evidence fails to establish that the rules are vague, that the rules fail to establish adequate standards, or that the rules vest unbridled discretion in the agency. The evidence fails to establish that the rules are arbitrary or capricious as those terms are defined. There was no evidence presented as to any potential reduction in regulatory costs.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by the Petitioners in this case pursuant to section 120.56(3)(a), Florida Statutes, and seeking a determination that Florida Administrative Code Rules 11D-8.003, 11D-8.004, 11D-8.006 and 11D-8.017 are invalid exercises of delegated legislative authority, is hereby DISMISSED.

DONE AND ORDERED this 21st day of May, 2013, in Tallahassee,
Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of May, 2013.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2012),
unless otherwise noted.

COPIES FURNISHED:

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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.