

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PO BOYS, INC.,

Petitioner,

vs.

Case No. 13-3338RU

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Respondent.

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FINAL ORDER OF DISMISSAL

This cause came before the undersigned on Respondent's Motion to Dismiss Petition (Motion). Petitioner filed a Response in opposition to the Motion.

On September 4, 2013, Petitioner, Po Boys, Inc., filed a pleading entitled Rule Challenge of an Unadopted Agency Rule (the Petition). The case was initially assigned to Administrative Law Judge F. Scott Boyd. Judge Boyd had presided over a related section 120.57(1), Florida Statutes, proceeding and had entered a Recommended Order which was subsequently adopted by the Department of Financial Services. Dep't of Fin. Servs., Div. of Workers' Comp. v. Po Boys, Inc., Case No. 13-0605 (Fla. DOAH May 23, 2013; Fla. DFS, July 30, 2013).

Petitioner filed a Motion to Disqualify, which was granted by Judge Boyd. The case was reassigned to the undersigned.

On September 18, 2013, Respondent, the Department of Financial Services, Division of Workers' Compensation (the Department), filed a Motion to Dismiss Petition, asserting that this purported challenge to an unadopted rule should be dismissed because "it is nothing more than a challenge to a ruling, the proper remedy for which is a plenary appeal which Petitioner has forsaken." The Department argues that this case is no more than a collateral attack on the Final Order from the underlying 120.57(1) case, and an appeal pursuant to

section 120.68 should have been filed if Petitioner was dissatisfied with the outcome. The undersigned agrees.

At first reading, this case appears to be a rule challenge filed pursuant to section 120.56(4). However, upon closer review, the Petition does not reference section 120.56(4), nor does it include the required elements set forth in that statute. Instead, the Petition incorrectly cites as authority section 120.57(1)(e).

Petitioner's reliance on section 120.57(1)(e) is misplaced in this proceeding. That provision places a duty on the administrative law judge not to "base agency action that determines the substantial interests of a party on an unadopted rule." § 120.57(1)(e)1. This duty is within the context of a section 120.57(1) proceeding, which, in this instance, has concluded and has not been appealed.

The Petition challenges the Fourth Amended Order of Penalty Assessment, which was the direct result of the underlying 120.57 case, and expressly seeks the "revocation" of the accompanying Stop-Work Order. Even if the Petition was properly pled and was not essentially seeking to revisit the underlying 120.57(1) case, this remedy is unavailable under section 120.56(4).

Upon consideration of the above, the undersigned finds that allowing amendment to the Petition would be futile, as the defects in the Petition are not curable. See Undereducated Children of Fla. v. Fla. Senate et al., 700 So. 2d 66 (Fla. 1st DCA 1997).

Accordingly, it is

ORDERED:

1. The Department's Motion to Dismiss Petition is granted.
2. The hearing scheduled for October 7, 2013, is canceled.
3. This case is hereby dismissed.

DONE AND ORDERED this 26th day of September, 2013, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 26th day of September, 2013.

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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 Appeal with the agency Clerk of the Division of Administrative Hearings and a 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.