STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RON BEERMUNDER,

Petitioner,

vs. Case No. 14-6037RU

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES, DIVISION OF
LICENSING,

Respondent.
_______________________________/

## FINAL ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings heard this case on February 11, 2015, in Tallahassee, Florida.

## APPEARANCES

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For Respondent: Staci A. Bienvenu, Esquire
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## STATEMENT OF THE ISSUES

A. Does Petitioner, Captain Ronald G. Beermunder, have standing to bring this action?

B. Does the Division of Administrative Hearings (DOAH) have jurisdiction over this matter?

C. Do the 2008 Firearms Instructor's Training Manual and the 2011 Certificate of Firearms Proficiency for Statewide Firearm License constitute agency statements that amount to a rule as defined in section 120.52(16), Florida Statutes (2014)?[1/]

D. If so, has the Division adopted the statements through the chapter 120 rulemaking procedure?

## PRELIMINARY STATEMENT

This is the fifth effort by firearms instructor Captain Ronald G. Beermunder, proceeding pro se, to challenge in various ways the Department of Agriculture and Consumer Services (Department), Division of Licensing's (Division), use of the 2008 Firearms Instructor's Training Manual (2008 Manual) and the 2011 Certificate of Firearms Proficiency for Statewide Firearm License (2011 Certificate).[2/] His efforts resulted in the Department initiating rulemaking to adopt an updated training manual and certificate. On May 1, 2014, the Department filed updated Florida Administrative Code Rules 5N-1.100 and 5N-1.134, curing the failure to adopt rules incorporating the manual and certificate issues alleged by Captain Beermunder.

Because the Division no longer relies on the 2008 Manual and the 2011 Certificate and because the Department adopted rules incorporating later versions of the documents, the Division has

persistently sought to have this case dismissed, as moot, for lack of jurisdiction and for lack of standing of Captain Beermunder. Those issues are addressed in this Final Order.

The undersigned conducted the final hearing in this matter on February 11, 2015. Captain Beermunder's Exhibits 1A, 8A through 8G, and 8J were admitted; Exhibits 8H, 8I, and 8K were not admitted. Captain Beermunder testified on his own behalf and called Ed Warren and Ken Wilkinson of the Department to testify. The Division's Exhibits 1 through 7 were admitted. The Division requested and was granted official recognition of existing rule 5N-1.134. The Division also presented testimony from Ken Wilkinson. In addition, the record contains, filed as ordered by the undersigned, the following documents which were considered: a warrant request (probable cause statement); an Amended Information; a sentence recommendation; and Clerk's notes in a criminal proceeding against Captain Beermunder with multiple charges of providing individuals fraudulent firearms training certificates of proficiency.

The parties ordered a Transcript, which was filed February 24, 2015. Captain Beermunder timely filed his proposed final order on March 6, 2015. The Division filed its proposed final order untimely on March 9, 2015. Captain Beermunder moved to strike the proposed final order for being untimely. The undersigned denied the motion to strike. The time period for

filing proposed orders is extended nunc pro tunc to March 9, 2015. The Department's proposed final order is accepted as timely.

## FINDINGS OF FACT

### The Parties

1. The Division licenses and regulates private investigative, security, and repossession services in Florida. §§ 493.6100 and 493.6101, Fla. Stat. Some Division licensees may bear firearms in the course of regulated activities. § 493.6115(2), Fla. Stat. A licensee who bears a firearm must also possess a Class "G" license. § 493.6115(2), Fla. Stat.

2. An applicant for a Class "G" license must satisfy minimum training criteria for firearms established by statute and rule of the Department. The criteria include 28 hours of range and classroom training taught and administered by a Class "K" licensee. § 493.6105(5), Fla. Stat. Additionally, each Class "G" licensee must submit proof annually that he or she has received a minimum of four hours of firearms recertification training, also taught by a Class "K" licensee during each year of the license period. § 493.6113(3)(b), Fla. Stat.

3. Captain Beermunder has been a licensed Class "K" firearms instructor since 2009.

A Brief History of the Manual, the Certificate, and Rules

4. Over the years, the Division has prepared various versions of a Firearms Instructor's Training Manual for Class "K" instructors to use when teaching Class "G" students.

5. The Division has also prepared various versions of a Certificate of Firearms Proficiency for Statewide Firearm License for use by Class "K" instructors to certify a Class "G" student's completion of training.

6. In 1996, the Division, housed, at the time, at the Secretary of State, incorporated the existing versions of the manual and the certificate in Florida Administrative Code Rule 1C-3.1000(6), now rule 5N-1.100.

7. Over the following years, the Division prepared and relied upon various updated versions of the manual and the certificate, including the 2008 version of the Manual and the 2011 Certificate. It did not adopt these versions by reference in a rule.

8. In the euphemistic words of Mr. Wilkinson, the assistant director of the Division, who took that position in 2011[3/]: "Well, I have to acknowledge that my predecessors were not observant in their duties to update manuals and go through the proper rulemaking process."

9. In 2014, after Captain Beermunder began his challenges to use of the 2008 Manual and the 2011 Certificate, the

Department amended rule 5N-1.134. The amendment incorporated revised versions of the manual and the certificate as permitted by section 120.54(1)(h). The rule, as amended, became effective May 21, 2014.

10. The Division stopped relying on the 2008 Manual on May 21, 2014, upon adoption of the 2014 version.

11. On May 20, 2014, the Division sent all Class "K" instructors an "Important Notice," along with a compact disc (CD) containing an electronic version of the 2014 Firearms Instructor's Training Manual. The notice informed instructors of the changes to the 2008 Manual and that a supply of revised 2011 Certificates would be forwarded in June 2014.

12. On June 25, 2014, the Division issued another "Important Notice" to Class "K" instructors, along with a supply of the newly adopted 2014 Certificates. It sent a second CD because the one sent in May contained typographical errors.

13. The "Important Notice" informed Class "K" instructors that they could continue using the 2011 Certificate until their stock of certificates ran out.

14. If an applicant submitted the 2011 Certificate, the Division would accept it.

New Criminal Statute in 2013 and Investigation of Beermunder

15. The Legislature amended section 493.6120, Florida Statutes (2012), in 2013 to make it a third-degree felony to

knowingly possess, issue, sell, submit, or offer "a fraudulent training certificate, proficiency form, or other official document that declares an applicant to have successfully completed any course of training required for licensure under this chapter." § 493.6120(5), Fla. Stat.; Ch. 2013-251, § 6, Laws of Fla.

16. The Division began investigating several Class "K" instructors, including Captain Beermunder, for violation of the new statute.

17. The Division turned the investigation of Captain Beermunder over to the Department of Agriculture Law Enforcement unit. Investigator Padgett issued a probable cause statement that led to the State Attorney of Santa Rosa County charging Captain Beermunder with multiple felony violations.

18. During the Department's investigation and determination of probable cause, the Division relied upon the 2008 Manual and the 2011 Certificate, neither of which were ever adopted as rules.

19. Before this rule challenge hearing, Captain Beermunder entered a no contest plea to nine felony counts of issuing fraudulent certificates, reserving the right to appeal the ruling on a motion in limine raising an issue of whether charges relied upon an unpromulgated rule. The Division is acting against Captain Beermunder's license on the basis of his no contest plea.

20. The nine counts of amended information that Captain Beermunder pled no contest to in criminal case no. 13001343CFMXAX charged him, using identical language except for the differing names of the applicants and different dates in 2013, with issuing a Certificate of Proficiency for the Security Officer G-License applicants when he "knew or reasonably should have known that the certificate, form, or document was fraudulent in violation of Sections 493.6120(7) and 493.6105(5), Florida Statutes."

21. Section 493.6105(5) states among other things:

> In addition to the requirements outlined in subsection (3), an applicant for a Class "G" license must satisfy minimum training criteria for firearms established by rule of the department, which training criteria includes, but is not limited to, 28 hours of range and classroom training taught and administered by a Class "K" licensee; however, no more than 8 hours of such training shall consist of range training.

22. Every one of the charges to which Captain Beermunder pled no contest were based upon issuing certificates of firearms proficiency fraudulently stating that the applicant had completed 28 hours of training.

23. The Legislature established the requirement for 28 hours of training in 1997 when chapter 97-248, section 3, Laws of Florida, amended section 493.6105, Florida Statutes (1996), to raise the hours of training requirement to 28. The requirement

has been in effect ever since. It was in effect when Captain Beermunder was first licensed in 2009.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569 and 120.57(1), Florida Statutes.

25. An "unpromulgated rule challenge" presents a narrow and limited issue. That issue is whether an agency has, by declaration or action, established a statement of general applicability that is a "rule," as defined in section 120.52(16), without going through the required public rulemaking process required by section 120.54. The validity of the agency's statement is not an issue decided in an "unpromulgated rule challenge." The petitioner bears the burden of establishing by a preponderance of the evidence that the challenged agency statements are unpromulgated rules. See Dravo Basic Material Co., Inc. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2d DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

26. The Division argues that DOAH does not have jurisdiction because the Division is no longer using the 2008 Manual and 2011 Certificate challenged as unpromulgated rules and has adopted rules incorporating more current versions of both.

This defense does not raise a jurisdictional issue. It raises a factual defense of whether the person claiming an agency has an unadopted rule has successfully proved the existence and application of it. The plain language of the statute requires a petitioner to prove "agency statement of general applicability that implements, interprets, or prescribes law or policy." § 120.52(16), Fla. Stat.

27. The Division relies upon Department of Revenue v. Sheraton Bal Harbor Association, LTD, 864 So. 2d 454 (Fla. 1st DCA 2003), to support its argument. That brief one-paragraph per curiam opinion did not explain the court's reasoning. It advised that section 120.56, Florida Statutes (2003), "does not authorize a rule challenge to a rule that is no longer in existence, and therefore, DOAH [lacks jurisdiction to hear a challenge to the no longer extant rule]." Section 120.56(1), Florida Statutes (2003), provided for a challenge to a rule or proposed rule. The situation is different for an unadopted rule. A rule exists or it does not. If it does, it is subject to official notice in a legal proceeding. § 90.202(9), Fla. Stat. The existence of an agency statement meeting the definition of rule that has not been adopted as a rule must be proven.

28. The Division also cites Hulmes v. Division of Retirement, Department of Administration, 418 So. 2d 269 (Fla. 1st DCA 1982), to support its theory. The court held in that

case that a rule defining employees eligible for membership in the state retirement system promulgated under a system established by section 134.11, Florida Statutes (1945-53), was not automatically re-promulgated when the Legislature substantially re-worked the system by enacting a successor statute, chapter 122, in 1955. The 1955 law passed before the employee began the employment he relied upon to establish eligibility. The issue decided was whether the rule relied upon automatically carried over into the successor system. The court held that it did not. The holding did not address the validity of a rule or the jurisdiction of DOAH. In fact, the case was a section 120.57 proceeding in which the Division of Retirement had adopted the findings of a chapter 120 hearing officer. The case did not involve a challenge to an unpromulgated rule under section 120.56(3)(a).

29. The Division argues that the reasoning of these cases should result in a finding of no jurisdiction here. It posits that the only relief authorized is requiring the agency to "immediately discontinue all reliance upon the statement [determined to be an unpromulgated rule] or any substantially similar statement as a basis for agency action." § 120.56(4)(d), Fla. Stat. Since the Division claims it is not using the statement, it argues the case is moot. Whether the Division is

using the statement is a matter of proof, not a matter of jurisdiction.

30. The Division also cites NAACP Inc. v. Florida Board of Regents, 876 So. 2d 636 (Fla. 1st DCA 2004), to support its mootness claim. Again, this is a different sort of case. In NAACP, the State Board of Education, the entity that adopted the challenged rules affecting admission to state universities, had authority over university admissions at the time of the challenge. But a constitutional amendment, adopted while the case was pending at the Florida Supreme Court, had vested the authority to make rules on the university admissions with a new entity, the Board of Governors of the State University System. As a constitutional entity, the Board was not subject to the Administrative Procedure Act. Consequently, neither the court nor DOAH had jurisdiction to grant any relief after the constitutional change.

31. Witmer v. Department of Business and Professional Regulation, 662 So. 2d 1299 (Fla. 4th DCA 1995), offers a different view of challenges to expired rules. It is quite analogous to this case because the challenge was by a licensee disputing a rule under which the Department was acting to suspend his license.

32. Witmer was the subject of an action to suspend his license for violation of emergency rules. The DOAH hearing

officer ruled that Witmer did not have standing to challenge the validity of an emergency rule that he was charged with violating, because the emergency rules had been replaced by permanent rules. The Opinion reversed the Final Order and went on to find the challenged emergency rules invalid. But see Off. of Ins. Reg. v. Serv. Ins. Co., 50 So. 3d 637, 638 (Fla. 1st DCA 2010) (rejecting the reasoning of Witmer).

33. Captain Beermunder argues that his situation is much like Witmer's because the criminal prosecution against him and the licensure action based upon his plea in the criminal proceeding rest upon the 2008 Manual and 2011 Certificate that had not been adopted as rule or incorporated into a rule by reference. Even if one accepts the theory, the evidence did not prove it.

34. The Findings of Fact establish that the specific fraudulent act with which Captain Beermunder is charged is linked to the long standing statutory requirement for 28 hours of training found in section 493.610(5). Consequently, Captain Beermunder is not presently suffering from the effects of the policy that the Division has replaced by rule. Nor was he when he brought this action. Captain Beermunder is not a "person substantially affected by an agency statement" authorized to challenge the statement by section 120.56(4).

35. The Findings of Fact likewise establish that even under Captain Beermunder's theory, the criminal prosecution and license actions do not rely upon the alleged unpromulgated rules. They rely upon a statute. Consequently, Captain Beermunder has not proven the present existence or application of the alleged unadopted rule. This also means he has not proven he is substantially affected by the statement. Therefore, he lacks standing to bring this proceeding.

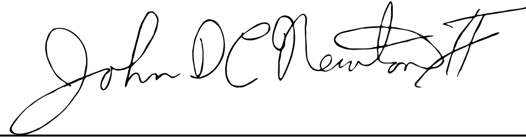
36. The Division also makes a "no harm, no foul" argument. That theory basically says the 2008 Manual and 2011 Certificate are substantially similar to the manual and certificate last adopted in 1996. In light of the resolution of this matter on other grounds, there is no need to address this argument.

37. Captain Beermunder also argues that the Division never gave him notice of the 28-hour requirement. That is not relevant to the existence of an asserted unadopted rule and is not addressed in this proceeding. This does not preclude it being raised in section 120.57 proceedings involving his license.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that this case is dismissed.

DONE AND ORDERED this 10th day of April, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of April, 2015.

ENDNOTES

[1/] All references to Florida Statutes are to the 2014 version, unless otherwise indicated.

[2/] Beermunder v. Dep't Agric. & Consumer Servs., Case Nos. 13-3861, 13-4239RX, 13-4252RU, and 14-001203RP.

[3/] It was not until January 2014 that the Department initiated rulemaking to adopt by incorporation the current manual and certificate. Fla. Admin. Reg., Vol. 40, No. 07 (Jan. 10, 2014).

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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.