

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ENRIQUE G. ESTEVEZ,

Petitioner,

vs.

Case No. 15-4726RU

DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND BOARD OF
TRUSTEES OF THE INTERNAL
IMPROVEMENT FUND,

Respondents.

FINAL ORDER

Pursuant to a stipulated record, this matter is before
E. Gary Early, an Administrative Law Judge with the Division of
Administrative Hearings.

APPEARANCES

For Petitioner: Enrique G. Estevez, pro se
705 Canadice Lane
Winter Springs, Florida 32708

For Respondents: Jeff Brown, Esquire
Glenn Wallace Rininger, Esquire
Department of Environmental Protection
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3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue for disposition in this case is whether
Respondent has implemented an agency statement that meets the

definition of a rule, but which has not been adopted pursuant to section 120.54, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner, Enrique G. Estevez (Petitioner), filed his Petition Challenging Agency Statement as Unadopted Rule (Petition) on August 21, 2015. The Petition alleged:

that the Board's definition of a "liveaboard vessel" as set forth in a Lease for use of submerged sovereignty lands for a Marina in Titusville, Florida, . . . constitutes agency policy unadopted as a rule and an invalid exercise of delegated legislative authority which contravenes Florida law.

A prehearing conference was held on August 28, 2015, during which the parties agreed that this case was suitable for a summary final order based on a stipulated record and proposed final orders. The record and proposed orders were to be filed by September 30, 2015.

On September 24, 2015, Respondents filed a Motion to Extend Filing Deadline, which requested that the date for filing be extended to October 15, 2015, a request that Petitioner supported. The Motion was granted.

On October 15, 2015, the parties filed a Joint Stipulation, along with Stipulated Exhibits A through E. Petitioner filed a Proposed Summary Final Order, a Memorandum of Law in Support of a Proposed Summary Final Order, and an Affidavit. The Affidavit was not opposed by Respondents, and is accepted as Stipulated

Exhibit F. Respondent filed a Proposed Final Order. All documents have been considered in the preparation of this Final Order.

References to statutes are to Florida Statutes (2015) unless otherwise noted.

FINDINGS OF FACT

1. The Board of Trustees of the Internal Improvement Trust Fund (Board) is charged with the management of state lands, including sovereign submerged lands. § 253.03(1), Fla. Stat.

2. The Department of Environmental Protection (Department) is charged with the duty to "perform all staff duties and functions related to the acquisition, administration, and disposition of state lands, title to which is or will be vested in the Board of Trustees of the Internal Improvement Trust Fund." § 253.002(1), Fla. Stat.

3. The City of Titusville operates a municipal marina, which includes a 205-slip docking facility for mooring of commercial and recreational vessels (Marina), on sovereignty submerged lands leased from the Board.

4. Petitioner owns a Florida-registered vessel which he keeps at the Marina pursuant to an annual mooring/dockage agreement.

5. On June 9, 2009, the City of Titusville and the Board entered into a "fee waived" lease renewal and modification for a

parcel of sovereignty submerged land in the Indian River (Lease). The Lease allows the Marina to operate "with liveaboards as defined in paragraph 26, as shown and conditioned in Attachment A, and the State of Florida Department of Environmental Protection, Consolidated Environmental Resource Permit No. 05-287409-001, dated December 31, 2008, incorporated herein and made a part of this lease by reference."

6. Paragraph 26 of the Lease provides that:

26. LIVEABOARDS: The term "liveaboard" is defined as a vessel docked at the facility and inhabited by a person or persons for any five (5) consecutive days or a total of ten (10) days within a thirty (30) day period. If liveaboards are authorized by paragraph one (1) of this lease, in no event shall such "liveaboard" status exceed six (6) months within any twelve (12) month period, nor shall any such vessel constitute a legal or primary residence.

7. On or about July 31, 2015, Petitioner and the City of Titusville entered into the annual contractual mooring/dockage agreement, paragraph 4 of which provides that:

4. LIVEABOARDS: For the purposes of this Agreement, the term "liveaboard" is defined herein as a vessel docked at the facility and inhabited by a person or persons for any five (5) consecutive days or a total of ten (10) days within a thirty (30) day period. Pursuant to requirements of the City's Submerged Land Lease with the State of Florida, no vessel shall occupy the Marina in this "liveaboard" status for more than six (6) months within any twelve (12) month period, nor shall the Marina Facility

constitute a legal or primary residence of the OWNER.

8. Petitioner asserts that the alleged agency statement regarding "liveaboard" vessels "unreasonably and arbitrarily denies me the unrestricted right to stay on my vessel by limiting the number of consecutive days during which I may occupy the vessel," and that "[t]he Board's non-rule policy denies me the unrestricted freedom to enjoy my vessel as a second home."

CONCLUSIONS OF LAW

9. 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 (2014).

10. Section 120.52(16) defines a rule as:

each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

11. An "unadopted rule" is defined as an agency statement that meets the definition of the term rule, but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

12. Agencies must adopt, as rules, those statements meeting the definition of a rule. As set forth in section 120.54(1):

(1)(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

13. When a person is substantially affected by an unadopted rule, a remedy to challenge the application of the unadopted rule is established in section 120.56(4), which provides, in pertinent part, that:

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

* * *

(d) If an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

14. Petitioner has the burden of demonstrating that the agency statement regarding "liveaboard" vessels meets the

definition of a rule, and that the agency has not adopted the statement by rulemaking procedures. S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001); see also Ag. for Pers. with Disab. v. C.B., 130 So. 3d 713, 717 (Fla. 1st DCA 2013).

15. The standard of proof is by a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

16. The parties have raised a number of issues in this proceeding, including Petitioner's standing; and the extent to which a submerged land lease renewal is subject to notice, publication, and ultimately challenge. However, even before delving into a more comprehensive analysis, it is clear that the Petition must be dismissed because Petitioner has failed to prove the fundamental issue of whether the alleged statement is one of "general applicability."

17. An agency statement is "generally applicable" if it is intended by its own effect "to create rights, or to require compliance, or otherwise have the direct and consistent effect of law." Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200 (Fla. 1st DCA 2010) (quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). Furthermore:

"[a]n agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, is a rule." When deciding whether a

challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law.

Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel

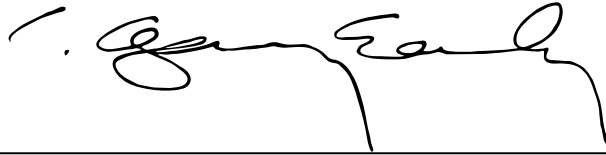
Middle Region, 969 So. 2d 527, 530 (Fla. 1st DCA 2007)

(citations omitted); see also State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010).

18. The evidence in this case as to the application of the "liveaboard" statement is limited to its use in a single submerged land lease. There was no evidence that the Board uniformly requires the statement in all of its submerged land leases, whether the statement is replicated in any other lease, or whether the statement is a lease term that is subject to negotiation. Thus, there is no evidence that the alleged agency statement has the direct and consistent effect of law. Therefore, Petitioner has failed to demonstrate the existence of an agency statement of "general applicability" that would be the proper subject of a challenge under section 120.56(4).

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition Challenging Agency Statement as Unadopted Rule is hereby DISMISSED.

DONE AND ORDERED this 2nd day of November, 2015, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of November, 2015.

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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.