STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

NORTH BROWARD HEALTH, d/b/a
BROWARD HEALTH,

Petitioner,

v.

CASE NO. 16-0495
RENDITION NO. DCF-16-056-FO

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.
_______________________________/

FILED
MAR 22 2016
DCF Department Clerk

FINAL ORDER

THIS CAUSE is before me for entry of an order upon consideration of a Recommended Order of Dismissal. The Recommended Order concluded that Petitioner failed to allege facts and law showing that the Department's action affected its substantial interests and that it would not be possible for Petitioner to amend its petition to make such allegations. Petitioner filed Exceptions, which are discussed herein.

Petitioners' Exceptions

In its exceptions, Petitioner takes issue with almost every paragraph in the Recommended Order of Dismissal. Petitioner initially asserts that the ALJ erred in concluding that this case involves an exempt procurement under Chapter 287, Florida Statutes. This assertion recurs throughout Petitioner's exceptions, as the Recommended Order of Dismissal repeats and relies on this conclusion throughout most of its discussion. Petitioner argues that the cases cited by the ALJ are inapplicable, and that the hearing requirements of the APA apply to this case because

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there is otherwise no opportunity to challenge the Department's allocation of grant funding.

Petitioner challenges the ALJ's rejection of the theory of jurisdiction by estoppel, arguing instead that the inclusion of appeal rights in the Request for Applications (RFA) and Notice of Intent to Award (NOI) evidence that DCF recognized its actions impacted Petitioner's substantial interests. Petitioner also asserts that its substantial interests will be determined by the Department's action, reciting its resulting injury and citing to the provisions of Specific Appropriation 377K of the 2015 General Appropriations Act (Specific Appropriation 377K) and Executive Order Nos. 15-134 and 15-175. Petitioner also asserts a right to a hearing to resolve disputed issues of material fact.

In addition to its exceptions, Petitioner argues that the Department is obliged to provide it the hearing that was promised in section 4.7 of the RFA and, if not, to grant it leave to amend.

1. Exceptions to Findings of Fact in Second and Third Paragraphs (pages 1 and 2)

Petitioner takes exception to the findings of fact set forth in the second and third paragraphs of the Recommended Order (pages 1 and 2). Petitioner's exceptions are well-taken to the extent that the ALJ erred in concluding that the Department was engaged in a procurement. The Department's action in this matter did not involve the procurement of commodities or contractual services as those terms are defined in section 287.012, Florida Statutes. However, the ALJ's error is not one of fact but of law.

The Department's RFA on its face was an implementation of the provisions of Specific Appropriation 377K. Chapter 287, Florida Statutes, governs the procurement

of commodities and contractual services. Section 287.012(5), Florida Statutes, defines a "commodity" as any of the various supplies, materials, goods, merchandise, food, equipment, information technology, and other personal property contracted for by the state and its agencies. Section 287.012(8), Florida Statutes, defines a "contractual service" as the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. In contrast, the Department's action here was to create a grant program to provide funding for the costs of centralized receiving facilities. Thus, the Department was simply issuing grants and not procuring commodities or contractual services.

Thus, while Petitioner's exceptions to the second and third paragraphs are granted, it is because of an error in law, not an error in fact.

2. Exceptions to Conclusions of Law in the Fifth through Eighth Paragraphs (pages 3 and 4)

Broward Health takes exception to conclusions of law set forth in the fifth through eighth paragraphs of the Recommended Order (pages 3 and 4). Petitioner's exceptions overstate the distinction between the facts in *USF* and this case. The point in the *USF* case was not that there is no entitlement to a hearing for an exempt procurement but that there is no substantial interest in an agency decision in which there is nothing more than a unilateral expectation of a benefit.[1] As in this case, USF involved an agency action in which no statute recognized any substantial interests of the petitioner in the agency's decision. As in *USF*, Specific Appropriation 377K provides a potential grantee no more than a unilateral expectation of funding.

[1]See also *Diaz v. State of Fla., Agency for Health Care Admin.*, 65 So.3d 78, 82 (Fla. 3rd DCA 2011), *Herold v. University of South Florida*, 806 So.2d 638, 641 (Fla. 2d DCA 2002).

Contrary to Petitioner's argument, the *USF* case is actually a classic APA standing case. The original case law establishing the rights of bidders to an APA proceeding rested on the same principles as applied in *USF*, that the agency's decision must affect a petitioner's substantial interests as established by a statute being implemented by the agency.

In the early years of the modern APA, the First District Court of Appeal held, in *Dickerson Inc. v. Rose*, 398 So.2d 922, 926 (Fla. 1st DCA 1981), that bidders for low-bid state agency contracts had standing for a hearing under the APA. The court reasoned that they had standing because, "it is plain that a determination among bidders as to the lowest responsible bidder, is a matter of substantial interest." Quoting *Couch Construction Co., Inc. v. Dept. of Transportation*, 361 So.2d 184 (Fla. 1st DCA 1978), the court explained, "(T)he right of a bidder for a public contract to a fair consideration of his bid and his right to an award of the contract if his is the lowest, responsible bid are matters of 'substantial interest' to him, thus entitling him to a hearing pursuant to s 120.57 ..."

In comparison, the *USF* case addressed standing to challenge a procurement that was exempted from competitive procurement:

> To qualify as having a substantial interest, one must show that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing and that this injury is of the type or nature which the proceeding is designed to protect. *Royal Palm Square Ass'n v. Sevco Land Corp.*, 623 So.2d 533 (Fla. 2d DCA 1993); *Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981).For these purposes a substantial interest is something more than a mere unilateral expectation of receiving a benefit See *Fertally v. Miami-Dade Cmty. Coll.*, 651 So.2d 1283 (Fla. 3d DCA 1995) (holding that nonrenewal of community college professor's annual contract did not affect her substantial

> interests for purposes of section 120.57); *Metsch v. Univ. of Fla.*, 550 So.2d 1149 (Fla. 3d DCA 1989) (holding applicant's desire to attend law school was not a substantial interest entitling him to a section 120.57 hearing upon denial of his application). . . .

Univ. of S. Fla. Coll. of Nursing v. State Dep't of Health, 812 So.2d 572, 574 (Fla. 2d DCA 2002).

Thus, under *Dickerson v. Rose*, a disappointed bidder has a substantial interest in an award subject to competitive bidding requirements because it has a statutory right to an award of the contract if his is the lowest, responsible bid, <u>but</u> under *USF*, there is no substantial interest in an award exempted from such requirement, because the "bidder" merely has a unilateral expectation of a benefit.

Notably, a disappointed bidder must still prove its standing to pursue a particular bid protest. For example, a protestor challenging an award to another bidder must prove that, but for the agency's errors, it would have been awarded the contract. See *Preston Carrol Co., Inc. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981). Thus, statutory entitlement remains a governing principle in determining whether a substantial interest is affected under sections 120.569 and 120.57, Florida Statutes.

Broward Health's exceptions to the conclusions of law set forth in the fifth through eighth paragraph are denied.

3. <u>Exceptions to Conclusions of Law in the Ninth Paragraph (page 4)</u>

Broward Health takes exception to the conclusions of law set forth in the ninth paragraph of the Recommended Order (page 4), which provides:

> Another case suggests an alternative path to the same result. In <u>Palm Beach County Classroom Teachers Association v. School Board of Palm Beach County</u>, 406 So. 2d 1208 (Fla. 4th DCA 1981), the legislature appropriated

> additional funds for school boards, primarily to supplement the salaries of teachers. The teachers union demanded a hearing under section 120.57(1) on the allocation of the funds, and the school board denied the request. The court affirmed, holding that the matter in dispute fell within the "agency budgets" statutory exception to a rule--now, section 120.52(16)(c)1.--and thus the statutory exception to a final order--now, section 120.52(7)--so that the union was not entitled to a hearing under section 120.57.

Broward Health's exception is well-taken to the extent that the ALJ relied on *Palm Beach County Classroom Teachers Association v. School Board of Palm Beach County*, 406 So. 2d 1208 (Fla. 4th DCA 1981), which involved an express statutory exemption to an agency decision from the definition of an order or rule. However, as further discussed below, the APA's policy of providing a forum to challenge agency decisions is predicated upon a showing of standing. It is not to provide a hearing to anyone simply aggrieved.

4. Exceptions to Conclusions of Law in the Tenth Paragraph (pages 4-5)

Broward Health takes exception to the conclusions of law set forth in the tenth paragraph of the Recommended Order (pages 4-5). Petitioner's exception is well-taken to the extent that the ALJ erred in describing this case as involving a procurement. However, Petitioner's argument that inclusion of a notice of appeal rights in the RFA and NOI acknowledged its substantial interests is misplaced. Petitioner's claim contradicts the APA which requires every agency to provide notice of a point of entry to challenge its decisions and places the burden on the petitioner responding to that notice to explain how its substantial interests are affected and that there are statutes and rules that entitle them to relief.

Agencies are required to provide notice to affected parties of a point of entry to challenge their decisions.[2] This is exactly what the notice of appeal rights in the RFA and the NOI did. Yet, the APA also requires every petitioner relying on such clear point of entry to allege and prove facts and law showing that their substantial interests are affected by the agency decision and that there are statutes and rules that entitle the petitioner to relief.[3] The Legislature made clear in the 1998 amendments to section 120.54(5)(b)4., Florida Statutes, that an agency's notice of a point of entry does not constitute an agency acknowledgement that substantial interests are affected.[4] Under the APA and the Uniform Rules, the burden was on Petitioner to allege and prove how its substantial interests were affected and that there are statutes and rules that entitled it to relief. [5]

Petitioner cites *Tuckman v. Fla. State Univ.*, 489 So. 2d 133, 135 (Fla. 1st DCA 1986), but that case provides no guidance and is superseded by legislation to the

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[2]See *Gopman v. Department of Education, State of Fla.*, 908 So.2d 1118 (Fla. 1st DCA 2005), ("[A]n agency must grant affected parties a clear point of entry") quoting *Capeletti Bros., Inc. v. State, Dep't of Transp.*, 362 So.2d 346, 348 (Fla. 1st DCA 1978). See also *Burleson v. Department of Administration*, 410 So.2d 581, 583 (Fla. 1st DCA 1982).

[3]See section 120.54(5)(b)4., Florida Statutes (2015).

[4]See section 3, Chapter 98-200, Laws of Florida. Rule 28-106.201(2), Florida Administrative Code, was amended in 1998 to implement those requirements.

[5] See *Department of Health and Rehabilitative Services v. Alice P.*, 367 So.2d 1045, 1053 (Fla. 1st DCA 1979), citing *Agrico Chemical Co., et al. v. State of Florida, Department of Environmental Regulation, et al.*, 365 So.2d 759 (Fla. 1st DCA 1978). See also *Young v. Dept. of Comty. Affairs*, 625 So.2d 831, 833–34 (Fla. 1993). (The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal.") citing *Balino v. Department of Health & Rehabilitative Servs.*, 348 So.2d 349 (Fla. 1st DCA 1977).

extent it stands for the proposition offered by Petitioner.[6] *Tuckman* is silent on the timing of the university's offer of an informal hearing to *Tuckman*, but it seems more plausible that it was made after *Tuckman* submitted his request for "a due process hearing."[7] Moreover, the thrust of the *Tuckman* case was that an agency's acknowledgment of standing for an informal hearing was an acknowledgment of standing for a formal hearing as well. Nevertheless, *Tuckman* predated the 1998 amendment to the APA and the Uniform Rules, requiring petitioners to specifically allege how their substantial interests are affected and that there are statutes and rules that entitle them to relief.

The Department includes a Notice of Appeal Rights in its RFA's for grant funding as a matter of practice, because it some of its grant programs are prescribed by statutes that expressly require competitive or comparative awards and specify statutory criteria for making such awards. For example, section 414.161(2), Florida Statutes, mandates a competitive ranking of grant applicants and lists specific award criteria. The Department had adopted a practice of including a standard notice of appeal rights in an RFA and NOI for its grant programs because a petitioner might be able to allege facts and law sufficient to show standing and it would be inappropriate to foreclose such an opportunity from the outset. In retrospect it may well have been inappropriate to include a Notice of Appeal Rights in the RFA in this case, as there are no competitive or

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[6]See section 3, Chapter 98-200, Laws of Florida. To the extent that *Tuckman* can be read as implying that a mere notice of appeal rights acknowledges standing, that implication has been superseded by that legislation.

[7]Notably, *Iazzo v. Dep't of Prof'l Reg., Bd. of Psychological Exam'rs*, 638 So.2d 583, 586 (Fla. 1st DCA 1994), which paraphrased *Tuckman*, made clear that the offer of an informal hearing was made after Iazzo had filed his a request for formal hearing.

comparative terms in the language of Specific Appropriation 377K. Nevertheless, the notice of appeal rights is simply form language.

Petitioner's exception is granted to the extent that the ALJ erred in describing this case as involving a procurement, but is otherwise denied. Notice of a point of entry is not an acknowledgment of a petitioner's substantial interests in an agency's decision. By statute, rule and case law, the burden to show standing remains on Petitioners responding to any agency's notice of a point of entry.

5. Exceptions to Conclusions of Law in the Eleventh Paragraph (page 5)

Petitioner takes exception to the conclusions of law set forth in the eleventh paragraph of the Recommended Order (page 5). Petitioner's exception is well-taken to the extent that the ALJ incorrectly characterized this case as involving a procurement. However, Petitioner's assertion that it is entitled to a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, fails to acknowledge its statutory burden to explain how its substantial interests were determined by the Department. Sections 120.569 and 120.57(1), Florida Statutes, do not themselves confer standing. They merely provide for the potential of standing to seek a hearing. See *Diaz v. State of Fla., Agency for Health Care Admin.*, 65 So.3d 78, 82 (Fla. 3rd DCA 2011), (Section 120.57(1) provides for a full evidentiary hearing before an administrative law judge when an agency's determinations affect a party's substantial interests).

Injury alone is insufficient to establish a substantial interest, and thus the right to a hearing. The injury must be of the type that the statute pursuant to which the agency has acted is designed to protect (*Id.*). See also *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So.3d 1220, 1231 (Fla. 2009), (A party's substantial

interests are involved "where '(1) the proposed action will result in injury-in-fact which is of sufficient immediacy to justify a hearing; and (2) the injury is of the type that the statute pursuant to which the agency has acted is designed to protect." (quoting *Fairbanks, Inc. v. State, Dep't of Transp.*, 635 So.2d 58, 59 (Fla. 1st DCA 1994).

In this case, the Department is implementing Specific Appropriation 377K. That Specific Appropriation makes no reference to Executive Orders 15-134 or 15-175 and neither of those Executive Orders (which are neither statutes nor laws) refer to funding centralized receiving facilities. Petitioner was therefore obliged to show that the Department's grant decision will result in injury to Petitioner and that such injury is of the type that Specific Appropriation 377K was designed to protect.[8]

Petitioner has on three separated occasions explained how its substantial interests will be affected by the Departments' determination. First, Petitioner's request for an administrative hearing, received January 5, 2016, provided the following explanation of how its substantial interests will be affected by the Departments' determination:

> Broward Health is the safety-net provider for the northern two-thirds of Broward County. This project will serve the entirety of Broward County, the second most populous county in the state, which covers 1,220 square miles and has a population of more than 1.8 million. Within the county, lies a high need for addressing recidivism for mental health, as well as the epicenter for the Flakka epidemic. Broward

[8]Petitioner's citation to *Peace River Center for Personal Development, Inc. vs. Dept' of Legal Affairs*, DOAH Case No. 94-4048 (Jan. 26, 1995), is inapposite, as there is no information in the Recommended Order as to the statutory or other basis for the grant at issue, and there is actually no ruling on standing. The statement quoted by Petitioner is a standard statement that appears in practically every recommended order issued by an Administrative Law Judge, including those that find a lack of standing. See paragraph 97 in *Little Havana Activities and Nutrition Centers of Dade County, Inc. vs. Agency for Health Care Administration*, DOAH Case 13-0706BID (Recommended Order, May 15, 2013).

> County was noted in the Governor's Executive Orders 15-134 and 15-175 as needing measures to impact recidivism and as a site to pilot supporting individuals with mental health needs before being committed to custody or supervision of the state. Broward Health's application is supported by key organizations in Broward County. These organizations are creating a collaborative network to enhance the delivery of mental health and substance abuse services, as well as improve the care and long term outcomes for patients who require these needed services. The agency's determination will affect Broward Health's substantial interests by providing the needed funding to create a central receiving facility and an enhanced collaborative system of care for the residents of Broward who are in need of these critical mental health services.

The foregoing explains how the Department's determination will provide the needed funding to create a central receiving facility and an enhanced collaborative system of care for Broward residents. It does not allege an injury to Petitioner or how that injury was of the type that a statute pursuant to which the Department has acted is designed to protect.

Second, Petitioner's response to the ALJ's January 29, 2016, Order to Show Cause provided the following explanation of how its substantial interests will be affected by the Departments' determination:

> 10. Broward Health's substantial interests will be determined by the agency action at issue, as the Department's action will result in certain entities receiving full funding, while Broward Health is provided only very limited funding with which to accomplish the important state purposes intended by the legislative appropriation. Broward Health seeks, via this proceeding, to demonstrate that the Department's grant funding actions are not consistent with (1) the intent of the Legislature as demonstrated by the appropriation, (2) Executive Orders 15-134 and 15-175, and (3) the Department's Request for Applications. If Broward Health is not permitted to challenge the Department's intended action, it will suffer an injury in fact, as it will be providing services to the State without adequate funding. This injury is of the type which this administrative proceeding is designed to protect,

> as the Department itself has recognized by including within the Request for Applications, and in its Notice of Intent, a notice of chapter 120 rights. See, e.g., *Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981); see also *Peace River Center for Personal Development, Inc. v. Dep't of Legal Affairs, Bureau of Advocacy & Grants*, DOAH Case No. 94-4048 (Rec. Order Jan. 26, 1995) (administrative proceeding reviewing agency's denial of grant funding).

Third, in its exceptions, Petitioner repeated the above-quoted explanation of how its substantial interests will be affected by the Departments' determination.

The injury alleged by Petitioner in these last two submittals is that it will be "providing services to the State without adequate funding." However, the above quoted allegations do not explain how Specific Appropriation 377K was designed to protect the interests of an applicant "providing services to the State without adequate funding."

Petitioner cannot point to any language of Specific Appropriation 377K that prescribes a competitive process, comparative award or expresses an intent to fund or even prefer any particular type or location of facility. The only intent expressed in Specific Appropriation 377K is for the Department to undertake a statewide initiative to fund centralized receiving facilities designed for individuals needing evaluation or stabilization under section 394.463 or section 397.675, Florida Statutes, or crisis services as defined in subsections 394.67(17)-(18), Florida Statutes. The language of Specific Appropriation 377K requires the Department to create a program to provide funding for the costs of centralized receiving facilities, for which a local agency may apply after the Department has approved its operational and financial plan, with each award to be matched at a one-to-one ratio of state and local funds.

There is no requirement in Specific Appropriation 377K that the Department publicly solicit applications or conduct a competitive or even comparative review of

applicants. There is no reference to partial or full funding. The only criteria for funding are Department approval of a local agency's operational and financial plan that specifies methods of coordination among providers and identifies proposed uses of the grant funds, that an award be matched at a one-to-one ratio of state and local funds, and that funding may be used to support start-up or on-going operational costs of centralized receiving facilities that provide the services described in the Specific Appropriation.

There is nothing to be gleaned from the language of Specific Appropriation 377K showing an intent to protect Petitioner from the type of injury that it has alleged. As in *USF*, the Department's implementation of Special Appropriation 477K was an agency decision to expend funds where no statute provided an applicant any entitlement to any funding, any particular application process, award process or award criteria.

6. Exceptions to Conclusions of Law in the Twelfth and Thirteenth Paragraphs (page s 5-7)

Broward Health takes exception to the conclusions of law set forth in the eleventh paragraph of the Recommended Order (pages 5-7). Petitioner's contention that dismissal would deprive it of its statutorily created right to a hearing fails to recognize that it must first meet its burden to allege how its substantial interests are affected by the agency's decision and that there are statutes and rules that entitle it to relief.[9] As discussed, it cannot meet the two-pronged standing test and, therefore, it has failed to establish a statutory right to proceed to hearing.

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[9]Petitioner cites to *Burleson v. Department of Administration*, 410 So.2d 581 (Fla. 1st DCA 1982), to support its right to a hearing. However, in this case, there are no disputed issues of material fact affecting standing. The nature of the Department's action is defined by Specific Appropriation 377K, the Department's RFA and NOI are matters of record and Petitioner has

(footnote cont.)

Petitioner's Entitlement to Exercise the Appeal Rights Guaranteed by the Department

In addition to its exceptions to specific portions of the Recommended Order of Dismissal, Petitioner has included an argument that the Department may not deprive it of the appeal rights it has promised. In this argument, Petitioner quotes the introductory paragraph of section 4.7 of the RFA. That paragraph includes the phrase "as described below," which is an unavoidable reference to the balance of the section 4.7, which makes clear that any "appeal" was subject to specific pleading requirements, including the requirement (per section 120.54(5)(b)4., Florida Statutes, that Petitioner first meet its burden to allege how its substantial interests are affected by the agency's decision and that there are statutes and rules that entitle it to relief.

Section 4.7 of the RFA only "promises" that Petitioner can ask for a hearing but, in order to obtain one, it must demonstrate standing. There is no promise that it will get a hearing. The requirement to provide an explanation of how the petitioner's substantial interests will be affected by the agency determination is a clear reference to the APA standing test, which required that Petitioner show an injury in fact that Specific Appropriation 377K was designed to protect.

(footnote cont.)
three times explained how the Department's action affects its substantial interests. There may be disputed facts over the wisdom of the Department's decision, but those are only heard if standing is established. *Friends of the Hatchineha, Inc. v. State Dep't of Envtl. Regulation*, 580 So.2d 267 (Fla. 1st DCA 1991), stands for the proposition that the APA grants the right to challenge agency decisions to those who have standing to do so. In that case, the Court noted that no contention had been raised that Friends did not have standing to contest the agency's decision.

Petitioner cites to *Citizens of Fla. v. Mayo*, 333 So. 2d 1, 7 (Fla. 1976), but *Citizens* involved rulings in a formal utility rate proceeding after intervention had been granted and public hearings had been set. Here, no administrative proceeding had yet been initiated by the Department, there was no "promise" of a hearing to Petitioner, and the only process described by the Department required Petitioner to meet its burden to show standing under the APA. Petitioner is not entitled to a hearing unless it meets that burden.

Finally, Petitioner requests leave to amend its petition, which effectively admits both, that it has yet to demonstrate standing, and that the Department has not yet actually acknowledged its standing. However, for the reasons stated in this Order, it is determined that, instead, the Petition should be dismissed without leave to amend because it conclusively appears from the face of the petition and Petitioner's other pleadings that the defect cannot be cured. Petitioner has already explained three separate times how its substantial interests are affected by the Department's decision. In the last two, the explanation was provided in response to a clear notice that its entitlement to a hearing was at issue. Simply put, Petitioner's substantial interests are not affected by the Department's action because its injury is not of the type that Specific Appropriation 377K was designed to protect. At best, Petitioner had a unilateral expectation of an award, which is insufficient to establish standing under sections 120.569 and 120.57, Florida Statutes.

The Recommended Order

The first paragraph of the recommended order is approved and incorporated herein. The remaining paragraphs of the Recommended Order and their conclusions of

law are modified by the following paragraphs, which I find to be as or more reasonable than those which were modified and are approved:

> As the parties agree, this case does not involve the procurement of commodities or contractual services as defined by section 287.012, Florida Statutes, but implementation of a matching grant program governed by Specific Appropriation 377K of the 2015 General Appropriations Act (Specific Appropriation 377K). Petitioner contends that it is entitled to a formal hearing because its substantial interests were affected by the Department's action as reflected in the NOI and because it was promised an appeal process in the Request for Applications (RFA).
>
> Petitioner's exceptions are well-taken to the extent that the ALJ erred in concluding that the Department was engaged in a procurement. The Department's action in this matter did not involve the procurement of commodities or contractual services as those terms are defined in section 287.012, Florida Statutes. The ALJ erred as a matter of law in concluding that the Department was engaged in a procurement.
>
> The ALJ erred as a matter of law in concluding that the Department was engaged in a procurement. The Department's RFA on its face was an implementation of the provisions of Specific Appropriation 377K. Chapter 287, Florida Statutes, governs the procurement of commodities and contractual services. The Department's decision here was to create a grant program to provide funding for the costs of centralized receiving

facilities. Thus, the Department was simply issuing funding facilities and not procuring commodities or contractual services.

Sections 120.569 and 120.57(1), Florida Statutes, do not themselves confer standing. They merely provide for the potential of standing to seek a hearing. Injury alone is insufficient to establish a substantial interest, and thus the right to a hearing. The injury must be of the type that the statute pursuant to which the agency has acted is designed to protect (*Id.*). See also *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So.3d 1220, 1231 (Fla. 2009), (A party's substantial interests are involved "where '(1) the proposed action will result in injury-in-fact which is of sufficient immediacy to justify a hearing; and (2) the injury is of the type that the statute pursuant to which the agency has acted is designed to protect."

In this case, the Department is implementing Specific Appropriation 377K:

> 377K SPECIAL CATEGORIES
>
> GRANTS AND AIDS - CENTRAL RECEIVING FACILITIES
>
> FROM GENERAL REVENUE FUND 10,000,000
>
> From the funds in Specific Appropriation 377K, the recurring sum of $10,000,000 from the General Revenue Fund is provided for a statewide initiative to fund centralized receiving facilities designed for individuals needing evaluation or stabilization under section 394.463 or section 397.675, Florida Statutes, or crisis services as defined in subsections 394.67(17)-(18), Florida Statutes. The Department of Children and Families shall create a matching grant program to provide funding for the costs of a centralized receiving facility. Each award must be matched at a one-to-one ratio of state and local funds. The funding

> may be used to support start-up or on-going operational costs. Centralized receiving facilities provide a single point of entry for multiple behavioral health providers, conduct initial assessments and triage, and provide case management and related services, including jail diversion programs for individuals with mental health or substance abuse disorders. The department shall work with local agencies to encourage and support the development of centralized receiving facilities. A local agency may apply for grant funds after the department has approved its operational and financial plan that specifies methods of coordination among providers and identifies proposed uses of the grant funds.

The foregoing language makes no reference to Executive Orders 15-134 or 15-175 and neither of those Executive Orders (which are neither statutes nor laws) refer to funding centralized receiving facilities. Petitioner was therefore obliged to show that the Department's grant decision will result in injury to Petitioner and that such injury is of the type that Specific Appropriation 377K was designed to protect.

Petitioner has on three separated occasions explained how its substantial interests will be affected by the Departments' determination. First, Petitioner's request for an administrative hearing, received January 5, 2016, provided the following explanation of how its substantial interests will be affected by the Departments' determination:

> Broward Health is the safety-net provider for the northern two-thirds of Broward County. This project will serve the entirety of Broward County, the second most populous county in the state, which covers 1,220 square miles and has a population of more than 1.8 million. Within the county, lies a high need for addressing recidivism for mental health, as well as the epicenter for the Flakka epidemic. Broward County was noted in the Governor's Executive Orders 15-134 and 15-175 as needing measures to impact recidivism and as a site to pilot supporting individuals with mental health needs before being committed to custody or supervision of the state. Broward Health's application is

> supported by key organizations in Broward County. These organizations are creating a collaborative network to enhance the delivery of mental health and substance abuse services, as well as improve the care and long term outcomes for patients who require these needed services. The agency's determination will affect Broward Health's substantial interests by providing the needed funding to create a central receiving facility and an enhanced collaborative system of care for the residents of Broward who are in need of these critical mental health services.

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> 10. Broward Health's substantial interests will be determined by the agency action at issue, as the Department's action will result in certain entities receiving full funding, while Broward Health is provided only very limited funding with which to accomplish the important state purposes intended by the legislative appropriation. Broward Health seeks, via this proceeding, to demonstrate that the Department's grant funding actions are not consistent with (1) the intent of the Legislature as demonstrated by the appropriation, (2) Executive Orders 15-134 and 15-175, and (3) the Department's Request for Applications. If Broward Health is not permitted to challenge the Department's intended action, it will suffer an injury in fact, as it will be providing services to the State without adequate funding. This injury is of the type which this administrative proceeding is designed to protect, as the Department itself has recognized by including within the Request for Applications, and in its Notice of Intent, a notice of chapter 120 rights. See, e.g., *Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981); see also *Peace River Center for Personal*

Development, Inc. v. Dep't of Legal Affairs, Bureau of Advocacy & Grants, DOAH Case No. 94-4048 (Rec. Order Jan. 26, 1995) (administrative proceeding reviewing agency's denial of grant funding).

Third, in its exceptions, Petitioner repeated the above-quoted explanation of how its substantial interests will be affected by the Departments' determination.

The injury alleged by Petitioner in these last two submittals is that it will be "providing services to the State without adequate funding." However, there is nothing to be gleaned from the language of Specific Appropriation 377K showing an intent to protect Petitioner from the type of injury that it has alleged. The intent expressed in Specific Appropriation 377K is for the Department to undertake a statewide initiative to fund centralized receiving facilities designed for individuals needing evaluation or stabilization under section 394.463 or section 397.675, Florida Statutes, or crisis services as defined in subsections 394.67(17)-(18), Florida Statutes. The language of Specific Appropriation 377K requires the Department to create a create a matching grant program to provide funding for the costs of a centralized receiving facility, for which a local agency may apply after the Department has approved its operational and financial plan, with each award to be matched at a one-to-one ratio of state and local funds.

There is no requirement in Specific Appropriation 377K that the Department publicly solicit applications or conduct a competitive or even comparative review of applicants. There is no reference to partial or full

funding. The only criteria for funding are Department approval of a local agency's operational and financial plan that specifies methods of coordination among providers and identifies proposed uses of the grant funds, that an award be matched at a one-to-one ratio of state and local funds, and that funding may be used to support start-up or on-going operational costs of centralized receiving facilities that provide certain services. It is apparent from the face of Specific Appropriation 377K that the injury alleged by Petitioner is not of the type that Specific Appropriation 377K is designed to protect.

The inclusion of a notice of appeal rights in the RFA and NOI was neither an acknowledgement of Petitioner's standing nor a promise of a hearing. Notice of a point of entry is not an acknowledgment of a petitioner's substantial interests in an agency's decision, but a notice required by law.[10] The notice of appeal rights included in the RFA and NOI was simply form language. At most, it was an offer of a remedy under chapter 120, Florida Statutes; but the offer clearly required Petitioner to meet the standing requirements set forth in chapter 120, Florida Statutes. The APA's policy of providing a forum to challenge agency decisions is predicated upon a showing of standing; it is not to provide a hearing to anyone simply aggrieved. By statute, rule and case law, the burden to show standing remains on Petitioners responding to

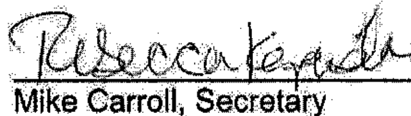
[10]See *Gopman v. Department of Education, State of Fla.*, 908 So.2d 1118 (Fla. 1st DCA 2005), *Burleson v. Department of Administration*, 410 So.2d 581, 583 (Fla. 1st DCA 1982), and *Capeletti Bros., Inc. v. State, Dep't of Transp.*, 362 So.2d 346, 348 (Fla. 1st DCA 1978).

any agency's notice of a point of entry.[11] As discussed above, it has failed to meet its burden.

It is not appropriate to allow amendment of the request for hearing, as it conclusively appears from the face of that request and Petitioner's subsequent pleadings that the defect cannot be cured. Petitioner has already explained three separate times how its substantial interests are affected by the Department's decision. In the last two, the explanation was provided in response to a clear notice that its entitlement to a hearing was at issue. Simply put, Petitioner's substantial interests are not affected by the Department's action because its injury is not of the type that Specific Appropriation 377K was designed to protect. At best, Petitioner had a unilateral expectation of an award, which is insufficient to establish standing under sections 120.569 and 120.57, Florida Statutes.

Accordingly, the Recommended Order is approved and adopted as modified and Petitioner's request for an administrative hearing is **DISMISSED** with prejudice.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 22nd day of March, 2016.



Mike Carroll, Secretary

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[11] See *Department of Health and Rehabilitative Services v. Alice P.*, 367 So.2d 1045, 1053 (Fla. 1st DCA 1979), and *Agrico Chemical Co., et al. v. State of Florida, Department of Environmental Regulation, et al.*, 365 So.2d 759 (Fla. 1st DCA 1978). See also Young v. Dept. of Comty. Affairs, 625 So.2d 831, 833–34 (Fla. 1993), and Balino v. Department of Health & Rehabilitative Servs., 348 So.2d 349 (Fla. 1st DCA 1977).

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY A PARTY PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE. SUCH APPEAL IS INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED (RECEIVED) WITHIN 30 DAYS OF RENDITION OF THIS ORDER.[12]

Copies furnished to the following via U.S. Mail on date of Rendition of this Order.

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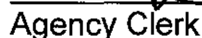

Agency Clerk

[12]The date of the "rendition" of this Order is the date that is stamped on its first page.