

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CHOICE PLUS, LLC,

Petitioner,

vs.

Case No. 16-1019RP

DEPARTMENT OF FINANCIAL  
SERVICES,

Respondent.

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FINAL ORDER

Pursuant to notice, a final hearing was held in this case on March 21 and March 28, 2016, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Seann M. Frazier, Esquire  
Parker, Hudson, Rainer and Dobbs, LLP  
215 South Monroe Street, Suite 750  
Tallahassee, Florida 32301

For Respondent: Marion Drew Parker, General Counsel  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399

Lori Lynn Jobe, Esquire  
Department of Financial Services  
Larson Building, Room 612-K  
200 East Gaines Street  
Tallahassee, Florida 32399-4247

STATEMENT OF THE ISSUE

Whether the proposed repeal of Florida Administrative Code Rule 69I-44.021 amounts to an invalid exercise of delegated legislative authority within the meaning of sections 120.52(8) (b) and/or (e), Florida Statutes, (2015).<sup>1/</sup>

PRELIMINARY STATEMENT

The Department of Financial Services ("the Department") published a Notice of Proposed Rule on January 13, 2016, proposing to repeal rule 69I-44.021. On February 19, 2016, Choice Plus, LLC ("Choice Plus") filed a petition alleging that the proposed repeal of rule 69I-44.021 is an invalid exercise of delegated legislative authority on the grounds that the proposed action would: (1) exceed the Department's grant of rulemaking authority; and (2) be arbitrary and capricious.

On March 17, 2016, the Department filed a Motion to Dismiss asserting that Choice Plus failed to state a cause of action and lacked standing to challenge the proposed repeal of rule 69I-44.021.

The final hearing was commenced as scheduled on March 21, 2016, but the undersigned granted Choice Plus's request for a short continuance so that Choice Plus could arrange for its president to testify via telephone. In addition, the undersigned deferred ruling on Choice Plus's Motion to Dismiss.<sup>2/</sup>

The final hearing resumed on March 28, 2016, and concluded that day.

During the final hearing, Choice Plus presented the testimony of two witnesses, and Choice Plus's Exhibits 1 through 3 and 5 through 7 were accepted into evidence. The Department did not present any witnesses, but the Department's Exhibits 1 through 3 were accepted into evidence.

The proceedings were recorded and a two-volume Transcript was filed on April 21, 2016. The parties filed timely Proposed Final Orders that were carefully considered in the preparation of this Final Order

#### FINDINGS OF FACT

##### Unclaimed Property

1. The Department is responsible for administering and enforcing chapter 717, Florida Statutes. The aforementioned chapter is entitled as the "Florida Disposition of Unclaimed Property Act," and it requires the Department to: (a) receive unclaimed property; (b) safeguard unclaimed property; and (c) process claims for the return of unclaimed property to its rightful owner. See generally ch. 717, Fla. Stat.

2. Chapter 717 applies to property such as traveler's checks, money orders, gift certificates, bank deposits, and proceeds from life insurance policies that have been

outstanding, unredeemed, or inactive for a certain number of years. See §§ 717.104(1) & (2), .1045, .106, & .107, Fla. Stat.

3. In return for a fee, licensed private investigators, certified public accountants, and attorneys research the Department's unclaimed property records in order to assist their clients with making claims on unclaimed property.

See §§ 717.124, .135 & .1400, Fla. Stat.

4. Pursuant to sections 717.124 and 717.126, Florida Statutes, the Department is authorized to require proof of entitlement, personal identification, and (if applicable) proof of the filer's authority to act as the claimant's agent.

See § 717.124, .126, Fla. Stat. Also, "the burden shall be upon the claimant to establish entitlement to the property by a preponderance of evidence." § 717.126(1), Fla. Stat.

5. Section 717.138, Florida Statutes, authorizes the Department to adopt rules to implement the provisions of chapter 717.

6. The Department has utilized that authority to adopt Florida Administrative Code Rule 69I-20.0021, which sets forth the procedures for filing unclaimed property claims.

7. Rule 69I-20.0021 has several provisions requiring claimants to demonstrate to the Department that they are entitled to the unclaimed property at issue.

8. For instance, rule 69I-20.0021(1) provides that “[c]laims for unclaimed property in the custody of the Department shall be submitted to the Department on the form(s) prescribed and supplied by the Department, together with documentation **proving entitlement** to the unclaimed property.” (emphasis added).

9. Rule 69I-20.0021(1)(b) mandates that “[a] complete paper format claim shall include the correct claim form identified in this rule, fully completed with all blanks filled in and manually signed and dated by all claimants or the Claimants’ Representative, **proof of entitlement**, and all supporting documentation as described and required by this rule, and Rule 69I-20.00022, F.A.C.” (emphasis added).

10. Also, rule 69I-20.0021(2) provides that “[t]he Department will only review the merits of a claim that has been deemed complete as filed. The Department will determine whether the claimant has established ownership and **entitlement** to the unclaimed property.” (emphasis added).

11. Rule 69I-20.0021 also incorporates by reference certain forms.

12. For example, rule 69I-20.0021(4)(a) states that “[c]laims by apparent owners for unclaimed property shall be submitted on Form DFS-UP-106, entitled Claim Filed by Apparent Owner, which is hereby incorporated by reference, effective

1-3-05." This form must be accompanied by "[p]roof demonstrating that the claimant is the owner and is **entitled** to the unclaimed property as required by Rule 69I-20.0022, F.A.C." See Fla. Admin. Code R. 69I-20.0021(4)(c)2. (emphasis added).

13. Also, rule 69I-20.0021(6) states that "[a]ll claims for unclaimed property filed by a Claimant's Representative shall be submitted on Form DFS-UP-108, entitled Claim Filed by Claimant's Representative on Behalf of the Claimant, which is hereby incorporated by reference, effective 1-3-05." This form must be accompanied by "[p]roof demonstrating that the person(s) or entity being represented is **entitled** to the property being claimed consistent with Rule 69I-20.0022, F.A.C."

See Fla. Admin. Code R. 69I-20.0021(6)(b)4. (emphasis added).

#### Escheated Property

14. The Department also plays a role in administering (and returning to its rightful owner) other types of property governed by other chapters within the Florida Statutes. For instance, the Department is involved with: (a) property resulting from judgments deposited with a court pursuant to section 43.19, Florida Statutes; (b) escheated property gathered pursuant to section 732.107, Florida Statutes; (c) property held by a personal representative pursuant to section 733.816, Florida Statutes; and (d) funds held by a guardian following the death of a ward pursuant to section 744.534, Florida Statutes.

15. When a person dies with an estate but has no known heirs, the decedent's property escheats to the state. See § 732.107(1), Fla. Stat. That property is sold, and the proceeds (i.e., the "escheated funds") are paid to the Department for deposit into the State School Fund pursuant to section 732.107(2), Florida Statutes.

16. In 2009, the Department was receiving repeated inquiries from claimants regarding the proper claim forms for property governed by sections 43.19, 732.107, 733.816, and 744.534, Florida Statutes. The Department responded by adopting rule 69I-44.021 which establishes a hard copy claim form specifically for the aforementioned properties.

17. Unlike rule 69I-20.0021 which requires a claimant to demonstrate to the Department that he or she is entitled to the unclaimed property in question, rule 69I-44.021(1) requires a potential claimant to simply prove his or her entitlement to a court. That is consistent with provisions within chapter 732 that require courts (rather than the Department) to determine whether a claimant is entitled to escheated property. See §§ 732.107(3) and (4), Fla. Stat. (requiring an action to re-open the administration of probate and prove entitlement to a probate judge, while allowing the Department of Legal Affairs the right of intervention to protect the state's interests).

18. For those claimants who successfully demonstrate to a court that they are entitled to particular funds, rule 69I-44.021 incorporates by reference a form (Form #198) that those claimants are to file with the Department.<sup>3/</sup> Unlike the situation with claimants using the forms incorporated by reference in rule 69I-20.0021, claimants using the form incorporated by reference in rule 69I-44.021 are not required to prove to the Department that they are entitled to the property in question.

19. In 2013, the Florida Legislature amended section 717.124, to provide that the claims procedure for unclaimed property also applies to property governed by sections 43.19, 732.107, 733.816, and 744.534. See § 717.124(8), Fla. Stat. (providing that “[t]his section applies to all unclaimed property reported and remitted to the Chief Financial Officer, including, but not limited to, property reported pursuant to ss. 43.19, 45.032, 732.107, 733.816, and 744.534.”).

20. As a result of an internal review of its rules, the Department determined that rule 69I-44.021 should be repealed given that section 717.124(8), effectively made the procedure set forth in rule 69I-20.0021 applicable to escheated property.

Choice Plus Pursues Escheated Property for its Clients

21. Choice Plus is a private investigative agency licensed pursuant to chapter 493 that files claims with the Department as



a claimant's representative ("locator"). In exchange for its services, Choice Plus receives a fee paid from approved property claims.

22. In addition to seeking the recovery of unclaimed property pursuant to chapter 717, Choice Plus also assists in the recovery of funds that have escheated to the State of Florida pursuant to section 732.107.

23. Choice Plus files several hundred claims in Florida for unclaimed property each year. It files five to 10 claims in Florida each year for escheated property.

24. The President of Choice Plus testified during the final hearing that Choice Plus had filed 19 claims for escheated property with the Department using Form #198 and attaching the pertinent documentation. See Fla. Admin. Code R. 69I-44.021(2)(a) (providing that "[t]he claim form must be accompanied by a certified copy of the final order or judgment awarding the funds to each claimant, supporting documentation establishing each claimant's right to the funds, and a government-issued photographic identification issued to each claimant.").

25. According to the President of Choice Plus, the Department began to require Choice Plus to re-establish entitlement to escheated funds in 2013. In other words, the Department now allegedly conducts its own review of the evidence

that a court already found to be sufficient for establishing entitlement.

26. Choice Plus asserts that proving entitlement to escheated funds a second time causes it to spend additional time and money in making a claim. According to Choice Plus, this extra effort adds \$5,000 to the cost of the average claim for escheated property.

27. In fact, Choice Plus is currently appealing the Department's denial of an escheated property claim.

28. That appeal is proceeding under appellate case number 1D15-3184 before the First District Court of Appeal and involves the estate of a deceased Florida resident named Eleanor Rigley.<sup>4/</sup>

29. Because Ms. Rigley died intestate and without any known living heirs, the proceeds from the sale of her residence escheated to the State of Florida and were paid to the Department for deposit in the State School Fund.

See § 732.107, Fla. Stat.

30. Choice Plus learned of Ms. Rigley's escheated property and hired a genealogist who found ten individuals related to Ms. Rigley.

31. Choice Plus subsequently entered into contracts with each of the ten individual claimants authorizing Choice Plus to obtain the escheated funds on their behalf. In accord with section 732.107 and rule 69I-44.021, Choice Plus then petitioned

the Pinellas County Circuit Court to reopen Ms. Rigley's estate and declare that the ten Choice Plus clients were Ms. Rigley's heirs.

32. On June 12, 2013, the Pinellas County Circuit Court entered an Order reopening Ms. Rigley's estate and declaring the ten Choice Plus clients to be Ms. Rigley's heirs. The Circuit Court then directed the Department to distribute the funds from Ms. Rigley's estate to the claimants.

33. On July 12, 2013 and as required by rule 69I-44.021, Choice Plus filed with the Department Form #198, a certified copy of the Pinellas County Circuit Court's Order awarding the escheated funds to the claimants, supporting documentation submitted to the Circuit Court, and a photocopy of each claimant's government-issued photo identification.

34. However, the Department issued a Notice of Intent to deny Choice Plus's claim on January 23, 2014, and ultimately issued a Final Order on June 29, 2015, denying the claim. In that Final Order, the Department allegedly concluded that it has sole jurisdiction to determine the disposition of funds within its possession, including escheated funds held pursuant to section 732.107. Accordingly, the Department concluded that the Circuit Court's ruling was not binding on it. The Department also allegedly concluded that the denial was justified because Choice Plus failed to submit "appropriate documentation"

connecting the individual claimants to Ms. Rigley by a preponderance of the evidence.

35. In the ensuing appeal, Choice Plus argued that the Department's Final Order must be reversed because the Department does not have the authority to determine entitlement to escheated funds held by the Department pursuant to section 732.107.

36. As for why the Department lacks the necessary authority, Choice Plus argued that section 717.124 is the only provision within chapter 717 that applies to escheated funds held by the Department. The 2013 amendment to section 717.124, which added subsection (8), merely stated that "[t]his section applies to all unclaimed property reported and remitted to the Chief Financial Officer, including, but not limited to, property reported pursuant to ss. 43.19, 45.032, 732.107, 733.816, and 744.534." (emphasis added). In contrast, the amendment did not state that "[t]his chapter applies to all unclaimed property reported and remitted to the Chief Financial Officer, including, but not limited to, property reported pursuant to ss. 43.19, 45.032, 732.107, 733.816, and 744.534." (emphasis added).

37. Thus, Choice Plus argued that the Department cannot apply section 717.126 to escheated fund claims because the Florida Legislature only made section 717.124 applicable to such claims. As noted above, section 717.126 mandates that "the

burden shall be upon the claimant to establish entitlement to the property by a preponderance of evidence.”

38. In other words, Choice Plus argued that the Department cannot second-guess the Pinellas County Circuit Court, an argument that carries over into this proceeding.

39. The Department responded in its Answer Brief by asserting that it has correctly determined that the chapter 717 claims process applies to all unclaimed property once it is transferred to the Department, including unclaimed estate proceeds that may eventually escheat to the State of Florida.<sup>5/</sup>

#### CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.56, and 120.57(1), Fla. Stat.

41. The Department has asserted that Choice Plus lacks standing to challenge the proposed repeal of rule 69I-44.021. Accordingly, the undersigned will address the standing issue prior to considering the merits of Choice Plus’s challenge to rule 69I-44.021. See generally Ferreiro v. Phila. Indem. Ins. Co., 928 So. 2d 374, 376 (Fla. 3d DCA 2006) (noting that “[t]he issue of standing is a threshold inquiry which must be made at the outset of the case before addressing whether the case is properly maintainable as a class action.”).

42. In order to have standing to challenge the validity of an administrative rule, a person must be "substantially affected" by the rule in question. § 120.56(1)(a), Fla. Stat.

43. As the First District Court of Appeal has observed,

[t]o establish standing under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

Off. of Ins. Reg. v. Secure Enters., LLC., 124 So. 3d 332, 336 (Fla. 1st DCA 2013; see also Fla. Med. Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983)).

44. With regard to the second prong of the substantially affected test, rule 69I-44.021 clearly regulates Choice Plus's industry. Thus, Choice Plus satisfies the zone of interest test. See Televisual Commc'ns v. Dep't of Labor & Emp. Sec./Div. of Workers' Comp., 667 So. 2d 372, 374 (Fla. 1st DCA 1995) (concluding that "[t]he hearing officer correctly noted that TVC was not a health care provider affected by section 440.13(3), Florida Statutes (Supp. 1994), but failed to recognize that TVC was indeed affected by the proposed rule which has the collateral effect of regulating TVC's industry.")

45. As for the first prong of the substantially-affected test, the First District Court of Appeal has noted that economic

injury can amount to an injury in fact. See Secure Enters. LLC, 124 So. 3d at 338.

46. In the instant case, Choice Plus alleges that proving entitlement to escheated funds a second time causes Choice Plus to spend additional time and money in order to obtain escheated funds that a court previously ordered to be disbursed.

According to Choice Plus, this extra effort adds \$5,000 to the cost of the average claim for escheated funds.

47. However, even if Choice Plus's allegations regarding increased costs were accepted as true, that alleged injury is not the result of the proposed repeal of rule 69I-44.021. Instead, Choice Plus's alleged injury results from the fact that the Department interprets the relevant statutes (especially the 2013 amendment which added subsection (8) to section 717.124) as giving it the authority to require a claimant to prove to the Department by a preponderance of the evidence that he or she is entitled to escheated funds.

48. Indeed, and as illustrated by the case involving the alleged heirs to the Eleanor Rigley estate, Choice Plus began experiencing this alleged injury long before the Department moved to repeal rule 69I-44.021. Therefore, even if the Department were not moving to repeal rule 69I-44.021, the alleged injury to Choice Plus would still be occurring.

49. In sum, even if Choice Plus's allegations were to be accepted as true, its alleged injury in fact does not result from the proposed repeal of rule 69I-44.021. Accordingly, Choice Plus fails to demonstrate that it has standing to challenge the proposed repeal of rule 69I-44.021.

50. In the alternative, even if Choice Plus could demonstrate that it has standing, Choice Plus fails to demonstrate that the proposed repeal would amount to an invalid exercise of legislative authority on the grounds set forth in Choice Plus's Petition.

51. A "rule" within the meaning of chapter 120, Florida Statutes, "includes the amendment or repeal of a rule." § 120.52(16), Fla. Stat.

52. As noted above, Choice Plus alleges in its Petition that the proposed repeal of rule 69I-44.021 is an invalid exercise of delegated authority because the proposed action would: (a) exceed the Department's grant of rulemaking authority; and (b) be arbitrary and capricious. See § 120.52(8)(b) & (e), Fla. Stat. (providing in pertinent part that a proposed or existing rule is an invalid exercise of delegated legislative authority if the agency has exceeded its grant of rulemaking authority or if the rule is arbitrary or capricious).



53. Choice Plus's argument regarding the Department's alleged lack of authority to repeal the rule is circular. If the Department lacks the authority to repeal the rule, then it lacks the authority to adopt the rule in the first place, and the rule should be repealed. Therefore, Choice Plus's argument based on section 120.52(8)(b) is meritless.

54. As for Choice Plus's assertion that repeal of rule 69I-44.021 is arbitrary or capricious, section 120.52(8) specifies that "[a] rule is arbitrary if it is not supported by logic or the necessary facts; [and] a rule is capricious if it is adopted without thought or reason or is irrational . . . ."

55. While Choice Plus has made a reasonable argument that the Department lacks the authority to second-guess a court's determination that a particular claimant is entitled to escheated property, Choice Plus has not demonstrated that the Department's proposed repeal of rule 69I-44.021 is illogical or irrational.<sup>6/</sup>

56. The repeal of rule 69I-44.021 may contravene section 732.107, one of the laws implemented by the rule. See §120.52(8)(c). However, that argument was not set forth in Choice Plus's petition, nor was it otherwise raised in this proceeding. Nevertheless, it appears that the First District Court of Appeal may soon address whether the Department is misinterpreting the relevant statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Choice Plus, LLC's challenge to the repeal of rule 69I-44.021 is dismissed.

DONE AND ORDERED this 19th day of May, 2016, in Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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G.W. Chisenhall  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of May, 2016.

ENDNOTES

<sup>1/</sup> Unless stated otherwise, all statutory references will be to the 2015 version of the Florida Statutes.

<sup>2/</sup> The substance of the Department's Motion to Dismiss is addressed herein.

<sup>3/</sup> Rule 69I-44.021(2) identifies this form as DFS-A4-1988. However, the President of Choice Plus testified during the final hearing that the aforementioned form has actually been numbered as 198 rather than 1988. In addition, Petitioner's Exhibit 7 indicates that this form has been numbered as 198. As a result, all references to that form herein will utilize "Form #198" rather than "Form #1988."

<sup>4/</sup> The findings regarding Choice Plus's pending appeal were derived from the appellate briefs that the undersigned received into evidence through official recognition. Because the undersigned does not have access to the Record on Appeal in case number 1D15-3184, the undersigned cannot independently verify the assertions set forth in those briefs. Nevertheless, the assertions therein are helpful for illustrating Choice Plus's argument in the instant case.

<sup>5/</sup> The First District Court of Appeal heard oral argument on Choice Plus's appeal on May 11, 2016. However, the appeal was still pending when the instant Final Order was rendered.

<sup>6/</sup> The ruling set forth herein should not be interpreted as an indication that the undersigned agrees that the Department has the authority to determine whether a claimant is entitled to escheated property.

COPIES FURNISHED:

Seann M. Frazier, Esquire  
Parker, Hudson, Rainer and Dobbs, LLP  
215 South Monroe Street, Suite 750  
Tallahassee, Florida 32301  
(eServed)

Marion Drew Parker, General Counsel  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399  
(eServed)

Lori Lynn Jobe, Esquire  
Department of Financial Services  
Larson Building, Room 612-K  
200 East Gaines Street  
Tallahassee, Florida 32399-4247  
(eServed)

Julie Jones, CP, FRP, Agency Clerk  
Division of Legal Services  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0390  
(eServed)

Ken Plante, Coordinator  
Joint Administrative Procedures Committee  
Room 680, Pepper Building  
111 West Madison Street  
Tallahassee, Florida 32399-1400  
(eServed)

Ernest Reddick, Chief  
Alexandra Nam  
Department of State  
R. A. Gray Building  
500 South Bronough Street  
Tallahassee, Florida 32399-0250  
(eServed)

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.