STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 16-1986

DONALD KEHR, d/b/a JNK FRAMING, INC., A DISSOLVED FLORIDA CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on June 27, 2016, via video teleconference in Daytona Beach and Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Joaquin Alvarez, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Donald Kehr, pro se
Donald Kehr, d/b/a JNK Framing, Inc.
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent had a sufficient amount of workers' compensation coverage during the

time period in question; and, if not, what penalty should be imposed.

PRELIMINARY STATEMENT

On December 10, 2015, the Department of Financial Services, Division of Workers' Compensation ("the Division"), served a Stop-Work Order and Order of Penalty Assessment on Donald Kehr, d/b/a JNK Framing Inc., a dissolved Florida corporation. ("JNK").

The Division served an Amended Order of Penalty Assessment on January 19, 2016, requiring JNK to pay a $61,424.04 penalty.

Donald Kehr (acting on JNK's behalf) requested an administrative hearing, and the Division referred this matter to DOAH on April 12, 2016.

The final hearing was commenced as scheduled on June 27, 2016. The Division presented the testimony of Investigator Kent Howe and Penalty Auditor Phillip Sley. In addition, the Division offered Exhibits 1 through 9 that were admitted into evidence without objection. Mr. Kehr testified on JNK's behalf and offered no exhibits.

A one-volume Transcript was filed with DOAH on July 6, 2016.

The Division submitted a timely Proposed Recommended Order on July 18, 2016, that was considered in the preparation of this Recommended Order.

JNK submitted an untimely Proposed Recommended Order on July 20, 2016. Because the Division would not be prejudiced, the undersigned considered JNK's Proposed Recommended Order in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division is the state agency responsible for enforcing the requirement in chapter 440, Florida Statutes (2015),[1/] that employers in Florida secure workers' compensation coverage for their employees.

2. While an exemption can be obtained for up to three corporate officers, any employer in the construction industry with at least one employee must have workers' compensation coverage. § 440.02(15), Fla. Stat.

3. Kent Howe works for the Division as a compliance investigator based in Orlando, Florida. As part of his job responsibilities, Mr. Howe visits construction sites in order to verify that employers in the construction industry have obtained workers' compensation coverage for their employees.

4. Mr. Kehr was the owner and sole corporate officer of JNK.

5. Mr. Howe visited a construction site in Port Orange, Florida, on the morning of December 10, 2015, and saw Mr. Kehr and two other men building the interior walls/frames of a house.

6. Mr. Howe talked to the two men (James Hicks and James Garthwait) working with Mr. Kehr, and they reported that Mr. Kehr was paying them approximately $8.00 an hour.

7. Mr. Kehr told Mr. Howe that Messrs. Hicks and Garthwait had been working for him for approximately two hours that morning. Mr. Kehr also stated that he had not obtained workers' compensation coverage for Messrs. Hicks and Garthwait.

8. Following those conversations, Mr. Howe returned to his car and accessed the Division's Coverage and Compliance Automated System ("CCAS") and learned that JNK had no workers' compensation coverage.

9. Mr. Howe also determined from CCAS that Mr. Kehr had obtained an exemption from workers' compensation coverage that had been in effect from November 18, 2014, through November of 2016.[2/]

10. After relaying that information to his supervisor, Mr. Howe received authorization to serve Mr. Kehr with a Stop-Work Order, and he did so on December 10, 2015.

11. That Stop-Work Order required JNK to "cease all business operations for all worksites in the State" based on the Division's determination that JNK had failed to obtain workers' compensation coverage.

12. In addition, the Stop-Work Order stated that JNK would be penalized an amount "[e]qual to 2 times the amount [JNK]

would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it [had] failed to secure the payment of compensation within the preceding 2-year period."

13. Along with the Stop-Work Order, Mr. Howe also served a "Request for Production of Business Records for Penalty Assessment Calculation" ("the BRR") on Mr. Kehr. In order to ascertain JNK's payroll disbursements during the relevant time period and the resulting penalty for JNK's failure to obtain workers' compensation coverage, the BRR requested that JNK remit several different types of business records covering the period from November 10, 2014, through December 10, 2015.

14. Mr. Howe explained during the final hearing that the Division usually reviews business records pertaining to the two years preceding the Stop Work Order.[3/] Because JNK came into existence on November 10, 2014, the Division's review was limited to examining the period between November 10, 2014, and December 10, 2015.

15. The business records sought by the Division included items such as time sheets, payroll summaries, check journals, certificates of exemption, and evidence that any JNK subcontractors had obtained workers' compensation coverage.

16. Section 440.107(7)(e) provides that if an employer fails to provide business records sufficient to enable the

Department to ascertain the employer's actual payroll for the time period in question, then the Division will estimate the employer's actual payroll for that time period by imputing the employer's payroll based on the statewide average weekly wage. The Division then multiplies that amount by two.

17. JNK did not provide business records typically sought by the Division. Instead, JNK responded to the BRR by producing a written statement from Mr. Kehr indicating that he founded JNK in November of 2014, but did no work until July of 2015. That initial job involved fixing a set of stairs for $200. Afterwards, Mr. Kehr performed three separate small jobs between July and November of 2015, earning approximately $550.

18. Because the Division could not ascertain JNK's actual payroll from the documentation provided by JNK, the Division imputed JNK's payroll for the time period in question and issued an Amended Order of Penalty Assessment on January 19, 2016, seeking to impose a penalty of $61,424.04.

19. Phillip Sley calculated the aforementioned penalty amount by filling out a worksheet that has been adopted by the Division through Florida Administrative Code Rule 69L-6.027.

20. The first step in completing the worksheet required Mr. Sley to assign a classification code to the type of work that Mr. Howe witnessed Messrs. Kehr, Hicks and Garthwait performing at the Port Orange worksite on December 10, 2015.

21. Classification codes come from the Scopes® Manual, which has been adopted by the Department through rule 69L-6.021.

22. Each code within the Scopes® Manual pertains to an occupation or type of work, and each code has an approved manual rate used by insurance companies to assist in the calculation of workers' compensation insurance premiums. The imputed weekly payroll for each employee and corporate officer "shall be assigned to the highest rated workers' compensation classification code for an employee based upon records or the investigator's physical observation of that employee's activities." See Fla. Admin. Code. R. 69L-6.028(3)(d).

23. In the instant case, Mr. Sley determined "5645" was the appropriate classification code. According to the Scopes Manual,

> [w]hen all of the carpentry work in connection with the construction of residential dwellings not exceeding three stories in height is performed by employees of the same carpentry contractor or general contractor responsible for the entire dwelling construction project, the work is assigned to Code 5645. This includes the construction of the sill, rough framework, rough floor, wood or light-gauge steel studs, wood or lighted-gauge steel joists, rafters, roof deck, all types of roofing materials, sidewall sheathing, siding, doors, wallboard installation, lathing, windows, stairs, finished flooring, cabinet installation, fencing, detached structures, and all interior wood trim.

24. Mr. Sley's next step in calculating the penalty amount was to determine the period of non-compliance. With regard to

Mr. Kehr, the Department asserted that JNK failed to have workers' compensation coverage between the date of JNK's inception (November 10, 2014) and the date that Mr. Kehr received an exemption from the workers' compensation coverage requirement (November 18, 2014).

25. Despite having no evidence that Messrs. Hicks and Garthwait worked for JNK on any day other than December 10, 2015, the Division's penalty calculation was based on an assumption that Messrs. Hicks and Garthwait worked for JNK from November 10, 2014, through December 10, 2015.

26. Mr. Sley's next step was to calculate JNK's gross payroll for the time period in question. Because JNK did not provide the Division with business records that would have enabled the Division to calculate JNK's actual payroll, Mr. Sley based JNK's payroll on the statewide average weekly wage determined by the Department of Economic Opportunity for the time period in question.[4/] Mr. Sley then multiplied that amount by two.[5/]

27. After converting the payroll numbers into a percentage, Mr. Sley multiplied the payroll amounts by the approved manual rate.

28. As noted above, every classification code is associated with a particular manual rate determined by the Office of Insurance Regulation, and a manual rate corresponds to the risk

associated with a particular occupation or type of work. Manual rates associated with potentially dangerous activities will have higher manual rates than activities with little or no potential danger.

29. Mr. Sley's next step was to calculate a premium for obtaining workers compensation coverage for Messrs. Kehr, Hicks, and Garthwait. Mr. Sley then multiplied that premium by two in order to calculate the individual penalties resulting from JNK not having workers' compensation coverage for Messrs. Kehr, Hicks, and Garthwait. The sum of those amounts was $61,424.04.

30. The evidence produced at the final hearing established that Mr. Sley utilized the correct class code, average weekly wage, and manual rates in his calculation of the penalty set forth in the Amended Order of Penalty Assessment.

31. The Division has demonstrated by clear and convincing evidence that JNK was in violation of the workers' compensation coverage requirements of chapter 440. In particular, the Division proved by clear and convincing evidence that Mr. Kehr had no workers' compensation coverage for himself and no exemption from November 10, 2014, through November 17, 2014.

32. However, the Division did not demonstrate by clear and convincing evidence that Messrs. Hicks and Garthwait were employees of JNK on any day other than December 10, 2015.

33. Mr. Kehr testified during the final hearing that Messrs. Hicks and Garthwait were working for him on December 10, 2015. He also testified that he was paying them at a rate of $8.00 an hour.

34. However, Mr. Kehr persuasively testified that Messrs. Hicks and Garthwait had not worked for him at any other time between November 10, 2014, and December 10, 2015.

35. The undersigned finds Mr. Kehr's testimony on this point to be credible.

36. Messrs. Hicks and Garthwait did not testify during the final hearing in this matter.

37. There is no evidence that Messrs. Hicks and Garthwait worked for JNK at any time other than December 10, 2015.

38. Because there is no evidence indicating that Messrs. Hicks and Garthwait were employees of JNK at any time other than December 10, 2015, during the time period in question, the undersigned finds that the Department failed to carry its burden of proving that $61,424.04 is the appropriate penalty.

39. Based on the above findings, the undersigned finds that the correct penalty resulting from Mr. Kehr's lack of coverage is $627.48. The worksheet completed by Mr. Sley indicates that is the amount of the $61,424.04 penalty associated with Mr. Kehr's lack of coverage.

40. As for the penalties associated with the lack of coverage for Messrs. Hicks and Garthwait on December 10, 2015, the undersigned multiplied the average weekly wage utilized by the Division ($841.57) by two. That results in a weekly gross payroll amount of $1,683.14. Dividing $1,683.14 by five results in a daily gross payroll amount of $336.63. Dividing $336.63 by 100 and then multiplying the result by 15.91 (the approved manual rate utilized by the Division for the period from January 1, 2015, through December 10, 2015) yields a daily premium of $53.62. Multiplying $53.62 by two results in a penalty of $107.23. Multiplying $107.23 by two yields $214.46, JNK's penalty for not having workers' compensation coverage for Messrs. Hicks and Garthwait on December 10, 2015.

41. JNK's total penalty is $841.94. Because section 440.107(7)(d)1. mandates a minimum penalty of $1,000, the undersigned finds that $1,000 is the correct penalty for the instant case.

CONCLUSIONS OF LAW

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

43. Because the Division seeks to impose an administrative penalty or fine against JNK, the Division has the burden of

proving the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). Clear and convincing evidence must make the facts "highly probable" and produce in the mind of the trier of fact "a firm belief or conviction as to the truth of the facts sought to be established," leaving "no substantial doubt." Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983).

44. Pursuant to sections 440.10 and 440.38, every employer is required to secure the payment of workers' compensation for the benefit of its employees, unless the employee is exempted or excluded under chapter 440. See C & L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

45. Section 440.107(7)(a) states, in relevant part:

> Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

46. "Employee" is defined in section 440.02(15) as:

> [A]ny person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

47. The Division enforces the requirement that an employer secure the payment of workers' compensation. § 440.107(3), Fla. Stat. The Division is authorized to order the production of business records, section 440.107(3)(f) and (5), and to issue penalty assessment orders. § 440.107(3)(g), Fla. Stat. The Division is authorized to issue a Stop-Work Order when it determines that an employer has failed to secure the payment of workers' compensation or has failed to produce business records within ten business days after receipt of a request. § 440.107(7)(a), Fla. Stat. The Division is required to release a Stop-Work Order when an employer complies with the coverage requirements, apparently even though an independent reason for issuing a Stop-Work Order--the failure to produce business records--may persist or emerge after coverage is secured. Id. However, the Division has the power to subpoena business records, and a court may punish noncompliance with the Division's subpoena by civil or criminal contempt. § 440.107(6), Fla. Stat.

48. The Division is required to assess against any employer that has failed to secure the payment of workers' compensation "a penalty equal to" the greater of $1,000 or "2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation . . . within the preceding 2-year period." (emphasis added). § 440.107(7)(d)1, Fla. Stat. This is a penal statute that, if ambiguous, must be construed against Petitioner. See, e.g., Osborne Stern, supra; and Lester v. Dep't of Prof'l & Occ. Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

49. The Division has adopted a rule that provides for a shorter alternative period to a two-year period of noncompliance. Rule 69L-6.028(2) states:

> The employer's period of non-compliance shall be either the same as the time period requested in the business records request for the calculation of penalty or an alternative period of non-compliance as determined by the department, whichever is less. The department shall determine an alternative period of non-compliance by obtaining records from other sources, including, but not limited to, the Department of State, Division of Corporations, the Department of Business and Professional Regulation, licensing offices, building permitting offices and contracts, that evidence a period of noncompliance different than the time period requested in

> the business records request for the calculation of penalty.

50. As noted above, the Division proved that Messrs. Hicks and Garthwait were employees of JNK on no day other than December 10, 2015, and the penalty associated with the lack of coverage for Messrs. Hicks and Garthwait should be based only on December 10, 2015, rather than November 10, 2014, through December 10, 2015. This conclusion is consistent with the results reached in previous DOAH cases. See Rex Neil, Inc. v. Dep't of Fin. Serv., Div. of Workers' Comp., Case No. 08-4129 (Fla. DOAH Nov. 21, 2008; Fla. DFS Dec. 29, 2008)(determining that a penalty be reduced from $21,690.61 to $223.80 after concluding that the Division only established that the employee in question had been employed for one day); Dep't of Fin. Serv. v. George Washington Beatty, III, Case No. 15-3653 (Fla. DOAH July 6, 2016; final order pending)(finding that the Division "did not demonstrate by clear and convincing evidence that Tommy Mahone, Dennis Deal, and Michael Leneave were employees of Mr. Beatty on September 8, 2014. There is direct evidence that Mr. Woodall saw the men working in the house, but the only evidence as to whether or how they were being paid are the hearsay statements of the three men as relayed by Mr. Woodall. The men were not available for cross-examination; their purported statements to Mr. Woodall could not be tested in

an adversarial fashion. Mr. Beatty's testimony that the men were not working for him and that he was merely supervising their work as a favor to Mr. Daffin is the only sworn, admissible evidence before this tribunal on that point. Mr. Beatty was adamant in maintaining that he did not hire the men, and his testimony raises sufficient ambiguity in the mind of the factfinder to preclude a finding that Messrs. Mahone, Deal, and Leneave were his employees.").

51. However, the Division argues in its Proposed Recommended Order that it should be presumed that Messrs. Hicks and Garthwait worked for JNK from November 10, 2014, through December 10, 2015:

> The [Division] properly identified Respondent's period of non-compliance as the period requested in the Business Records Request, pursuant to Fla. Admin. Code. R. 69L-6.028(2) ("For purposes of this rule, 'non-compliance' means the employer's failure to secure the payment of workers' compensation pursuant to Chapter 440, F.S." (emphasis added)). It would lead to an "absurd result" to limit the period of noncompliance to one day, as it would mean that "a noncompliant employer could simply provide . . . records demonstrating that the employees observed by the Department were only employed on the date of the investigation, and the Department would be precluded from imputing payroll for each of those employees for the remaining periods of noncompliance." Dep't of Fin. Servs. v. Aleluya Roofing Plus Constr., Inc., Case No. 15-2801 (Fla. DOAH Nov. 13, 2015; Fla. DFS Jan. 29, 2016). Thus, the period of non-compliance cannot be limited to the non-

> compliance for employees found on site, but rather must be the period of noncompliance based upon the employer's non-compliance.

52. Administrative Law Judge Robert E. Meale recently addressed that argument in Department of Financial Services, Division of Workers' Compensation v. Soler and Son Roofing, Case No. 15-7356 (Fla. DOAH July 19, 2016; final order pending) by concluding as follows:

> 34. Petitioner's argument is unpersuasive. Obviously, noncompliance is a failure of an employer, not an employee, so the focus is on the employer in this sense. But the point of the inquiry is to identify the periods of noncompliance; this requires a determination of when particular employees were uncovered and for how long. Properly interpreted, the rule says that the period of noncompliance is the two years stated in the Request or, if shorter, the period or periods within these two years that the employer was in noncompliance.
>
> 35. Quoting from its final order in Department of Financial Services v. Aleluya Roofing Plus Construction, Inc., 2016 Fla. Div. Admin. Hear. LEXIS 109 (Fla. DOAH Jan. 29, 2016), Petitioner again worries that "a non-compliant employer could simply provide . . . records demonstrating that the employees observed by the Department were only employed on the date of the investigation, and the Department would be precluded from imputing payroll for each of those employees for the remaining periods of non-compliance." Along these lines, as quoted in Petitioner's proposed recommended order, one of its witnesses testified that she could not use a shorter alternative period of non-compliance for Respondent because "[n]o records were provided to show payroll and payroll records [that] are

> needed to show if any payments occurred outside of leasing of employees." (Tr. 46).
>
> 36. These concerns and suspicions do not warrant Petitioner's imputation of a two-year period of noncompliance when an employer fails to produce business records. Understandably, Petitioner prefers the expedience of the imputation of a two-year period of noncompliance to the proof of an actual period of noncompliance. If it matters, these concerns and suspicions fail to account for the remedies that are available to Petitioner if an uncooperative employer tries to shorten the penalty period by doling out selected business records. Although the statutory requirement of releasing [a stop work order] when an employee secures the payment of workers' compensation probably undermines the utility of [a stop work order] in obtaining business records, Petitioner still has the explicit authority to obtain an adjudication of civil or even criminal contempt, presumably of the principals of a corporate employer. And the de novo hearing provides the opportunity for discovery and sanctions for the failure to respond to discovery, including the sanction of striking the employer's request for hearing, thus leaving Petitioner's proposed penalty assessment intact and the employer subject to the more onerous penalty-calculation provisions that apply prior to the transmittal of the file to DOAH . . . .

53. Judge Meale also concluded that the Division's position amounts to an invalid evidentiary presumption:

> More importantly, Petitioner's preference for imputation over proof, as reflected in its unsustainable interpretation of rule 69L-6.028(2), effectively creates an evidentiary presumption: if an employer fails to provide its business records, its failure to have secured the payment of workers' compensation will be presumed to

> have persisted for the entire two years. However, the power to create evidentiary presumptions is reserved to the legislature and the courts and does not extend to the executive branch. See, e.g., McDonald v. Dep't of Prof'l Reg., 582 So. 2d 660 (Fla. 1st DCA 1991).

54. Finally, the Division is interpreting rule 69L-6.028(2) in a way that contravenes section 440.107(7)(d)1., by arguing in its Proposed Recommended Order that it should be presumed that Messrs. Hicks and Garthwait worked for JNK from November 10, 2014, through December 10, 2015, when the evidence demonstrates that Messrs. Hicks and Garthwait only worked for JNK on December 10, 2015. Under the aforementioned statute, an employer is only subject to being penalized "during periods for which it failed to secure the payment of workers' compensation . . . within the preceding 2-year period." If Messrs. Hicks and Garthwait only worked for JNK on December 10, 2015, then JNK did not fail to secure workers' compensation for Messrs. Hicks and Garthwait prior to December 10, 2015, and JNK cannot be penalized for any such failure occurring prior to December 10, 2015. Interpreting rule 69L-6.028(2) as requiring a presumption that JNK was noncompliant prior to December 10, 2015, under the facts of the instant case contravenes section 440.107(7)(d)1. The aforementioned statute clearly contemplates a penalty assessment for all periods of noncompliance within the relevant two-year period, but only for such periods.

55. The appropriate penalty for the proven period of noncompliance is $841.94. Thus, the minimum statutory penalty of $1,000.00 is warranted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation enter a final order imposing impose a $1,000 penalty on Donald Kehr, d/b/a JNK Framing Inc., a Dissolved Florida Corporation.

DONE AND ENTERED this 10th day of August, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2016.

ENDNOTES

[1/] Unless stated otherwise, all statutory citations are to the 2015 version of the Florida Statutes.

[2/] Section 440.02(15)(b)2., Florida Statutes, provides that "[a]s to officers of a corporation who are engaged in the

construction industry, no more than three officers of a corporation or of any group of affiliated corporations may elect to be exempt from this chapter by filing a notice of election with the [Department of Financial Services] as provided in s. 440.05."

[3/] Section 440.107(7)(d)1. requires the Division to evaluate whether the business that is the subject of a Stop-Work Order had workers' compensation coverage in place during the two-year period preceding the Stop-Work Order.

[4/] Section 440.12(2) defines the "statewide average weekly wage" to be "the average weekly wage paid by employers subject to the Florida Reemployment Assistance Program Law as reported by the Department of Economic Opportunity for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Department of Economic Opportunity on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following."

[5/] Section 440.107(7)(e) provides that "[w]hen an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 2."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.