STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN DAVID ROUSE and
ELIZABETH G. YOSKIN,

Petitioners,

Case No. 16-2579RX

vs.

DEPARTMENT OF LAW ENFORCEMENT,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings, conducted a formal hearing in the above-styled case on June 16 and 17, 2016, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Christian Alexander Straile, Esquire
Post Office Box 5355
Gainesville, Florida 32627

For Respondent: Ann Marie Johnson, Esquire
Department of Law Enforcement
2331 Phillips Road
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 11D-8.002(1) constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On May 10, 2016, Petitioner, John David Rouse, filed a "Petition Seeking Determination that FDLE Rule 11D-8.002 is an Invalid Exercise of Delegated Legislative Authority" at the Division of Administrative Hearings ("DOAH"). On May 11, 2016, an "Amended Petition Seeking Determination that FDLE Rule 11D-8.002 is an Invalid Exercise of Delegated Legislative Authority" was filed at DOAH. The Amended Petition added a new Petitioner, Elizabeth G. Yoskin, to the case. The case was scheduled for hearing on June 2, 2016, in Tallahassee. One continuance was granted on motion of Petitioners and the case was rescheduled for June 16, 2016, on which date it was convened. The hearing could not be completed in the one day allotted, and so was carried over to June 17, 2016, on which date it was completed.

Rule 11D-8.002 sets forth the definitions used by the Department of Law Enforcement ("FDLE") in the regulation of the implied consent program authorized by section 316.1932(1)(a)2., Florida Statutes. Petitioners are challenging the validity of rule 11D-8.002(1), which defines the term "acceptable range."

At the hearing, Petitioners offered the testimony of Laura Barfield, a former manager of FDLE's Alcohol Testing Program, who now owns and operates Forensic Toxicology and Consulting Services; and Matthew Malhiot, the owner of Forensic Alcohol Consulting and Training and, from 2002 through 2010, an

employee of FDLE in various capacities related to inspection and maintenance of breath test instruments. Mr. Malhiot also testified in rebuttal. Petitioners' Exhibits 3, 4, 7, 12, 23, 24, 26 through 28, 31, and 33 were admitted into evidence.[1/] FDLE offered the testimony of Brett Kirkland, the current program manager of FDLE's Alcohol Testing Program. Dr. Kirkland was accepted as an expert in forensic alcohol toxicology, the pharmacology of alcohol, the operation and maintenance of the Intoxilyzer 8000, pharmacodynamics, pharmacokinetics, and instrument and data analysis related to breath test instruments. The parties stipulated to the admission of FDLE's Exhibits 1 through 13 and 15 through 43.

A two-volume Transcript of the hearing was filed at DOAH on July 7, 2016. By Order dated July 15, 2016, Petitioners' stipulated motion to extend the time for filing proposed orders was granted, and the parties were given until August 1, 2016, to file their proposed orders. Both parties timely filed their Proposed Final Orders. Both parties' proposals have been given careful consideration in the preparation of this Final Order.

Unless otherwise indicated, all statutory references in this Final Order are to the 2015 version of the Florida Statutes and all references to rules are to the current version of the Florida Administrative Code.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. FDLE is the state agency responsible for the regulation of the operation, inspection, and registration of breath test instruments utilized under the driving and boating under the influence and related provisions of chapters 316, 322, and 327, Florida Statutes. § 316.1932(1)(a)2., Fla. Stat. The cited statute enumerates FDLE's powers under the Alcohol Testing Program as follows, in relevant part:

> The program shall:
>
> a. Establish uniform criteria for the issuance of permits to breath test operators, agency inspectors, instructors, blood analysts, and instruments.
>
> b. Have the authority to permit breath test operators, agency inspectors, instructors, blood analysts, and instruments.
>
> c. Have the authority to discipline and suspend, revoke, or renew the permits of breath test operators, agency inspectors, instructors, blood analysts, and instruments.
>
> d. Establish uniform requirements for instruction and curricula for the operation and inspection of approved instruments.
>
> e. Have the authority to specify one approved curriculum for the operation and inspection of approved instruments.

> f. Establish a procedure for the approval of breath test operator and agency inspector classes.
>
> g. Have the authority to approve or disapprove breath test instruments and accompanying paraphernalia for use pursuant to the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.
>
> * * *
>
> l. Promulgate rules for the administration and implementation of this section, including definitions of terms.
>
> * * *
>
> p. Have the authority to approve repair facilities for the approved breath test instruments, including the authority to set criteria for approval . . . .

2. Petitioners are defendants in pending criminal prosecutions in Marion County. Each has been charged with Driving Under the Influence ("DUI"), in violation of section 316.193. Pursuant to the implied consent law,[2/] each of the Petitioners took a breath alcohol test that utilized the Intoxilyzer 8000 breath alcohol testing instrument manufactured by CMI, Inc. FDLE has not contested the standing of Petitioners to initiate this proceeding.

3. In those criminal prosecutions, the state intends to use the results of the Intoxilyzer 8000 tests as evidence that

Petitioners had unlawful breath alcohol levels at the time of their respective charged offenses.

4. Florida Administrative Code Chapter 11D-8 sets forth rules governing the implied consent program. These include rules regarding the approval and disapproval of breath test methods and instruments, and regulation of the operation, inspection, and registration of breath test instruments for use pursuant to the DUI statute. Chapter 11D-8 also sets forth rules related to the regulation of individuals who operate, inspect, and instruct on breath test instruments.

5. Rule 11D-8.002 sets forth the operational definitions for the rule chapter. Section (1) of rule 11D-8.002 provides as follows:

> Acceptable Range--the results of alcohol reference solutions and dry gas standard analyses which fall within the following ranges at each alcohol vapor concentration: 0.05 g/210L range is 0.045 to 0.055 g/210L; 0.08 g/210L range is 0.075 to 0.085 g/210L; 0.20 g/210L range is 0.190 to 0.210 g/210L; or the Alcohol Reference Solution gas chromatographic results which fall within the following ranges: 0.0605 g/100mL range is 0.0586 to 0.0623 g/100mL; 0.0968 g/100 mL range is 0.0938 to 0.0997 g/100mL; 0.2420 g/100mL range is 0.2347 to 0.2492 g/100mL.

6. Rule 11D-8.002(9) defines "alcohol reference solution" as "a standard used to verify the calibration of a breath test instrument consisting of a mixture of alcohol and distilled or deionized water that will produce a known alcohol vapor

concentration at a specific temperature." Rule 11D-8.002(20) defines "dry gas standard" as "a National Institute of Standards and Technology or international equivalent traceable standard consisting of a mixture of alcohol and gas which produces a known alcohol vapor concentration used to verify the accuracy of a breath test instrument." Both alcohol reference solutions and a dry gas standard are used in conducting annual FDLE inspections of breath test instruments, as well as by local law enforcement agencies in conducting monthly inspections of their instruments.

7. The three alcohol vapor concentrations set forth in the rule are the alcohol reference solutions that FDLE uses during inspections to verify the calibration of the breath test instruments. A reference solution of a known value of alcohol vapor concentration is placed in the machine. If the machine fails to perform within the acceptable range for the reference solution, it is removed from service for corrective action. The acceptable range of error for an instrument is an average error of no more than plus or minus .005g/210L, or 5%, whichever is greater. For ease of reference, this range will henceforth be referenced as the "5% standard."

8. Prior to 1992, the former Department of Health and Rehabilitative Services ("HRS") was responsible for breath and blood testing compliance under the implied consent law. HRS'

rules, then Florida Administrative Code Chapter 10D-42, did not define an acceptable range of error for alcohol reference solutions and dry gas standard analyses. Sections 20 through 22 of Chapter 92-58, Laws of Florida, transferred the Alcohol Testing Program to FDLE. FDLE first adopted chapter 11D-8 on October 31, 1993. The original version of rule 11D-8.003(7) included the 5% standard as the "accuracy standard" for test instruments. The 5% standard's position in chapter 11D-8 has shifted since 1993, and the terminology has been changed from "accuracy standard" to "acceptable range," but the numerical value of the accepted range for accuracy has not changed since 1993.

9. Rule 8D-11.003 provides that all breath test instruments must be evaluated in accordance with the procedures set forth in FDLE/ATP Form 34[3/] prior to being approved for use in Florida. The first paragraph of Form 34 states, "[o]nly breath test instruments listed on the US Department of Transportation Conforming Products List of Evidential Breath Measurement Devices will be evaluated." The Conforming Products List is a catalog of all evidentiary breath testing instruments approved by the U.S. Department of Transportation as conforming to the model specifications of breath testing devices published in the Federal Register. See National Highway Traffic Safety Administration, Conforming Products List of Evidential Breath

Alcohol Measurement Devices, 77 Fed. Reg. 35747 (June 14, 2012); Model Specifications for Devices to Measure Breath Alcohol, 58 Fed. Reg. 48705 (Sept. 17, 1993).

10. The Intoxilyzer 8000 was added to the Conforming Products List in 2002. See 67 Fed. Reg. 62091 (Oct. 3, 2002).

11. The version of rule 11D-8.003(2) approving the Intoxilyzer 8000 for use in Florida was proposed in July 2002 and became effective on November 5, 2002. See Vol. 28, No. 30, Fla. Admin. W., p. 3238, 3239 (July 26, 2002); and Vol. 28, No. 44, Fla. Admin. W., p. 4811 (Nov. 1, 2002). At that time, a predecessor product, the Intoxilyzer 5000, was kept on the list of instruments approved for use in Florida.

12. The Intoxilyzer 5000 was deleted from the approved list by an amendment to rule 11D-8.003(2) that took effect on July 29, 2015. The Intoxilyzer 8000 is now the only breath test instrument approved by FDLE.

13. Despite its continued presence on the list of FDLE-approved instruments, the Intoxilyzer 5000 was in fact eliminated from evidentiary use in Florida on March 27, 2006. On the same date, the Intoxilyzer 8000 was placed into evidentiary use as the sole breath test instrument used in Florida.

14. Laura Barfield, who served as program manager of the Alcohol Testing Program from 2001 through the spring of 2013,

and Matthew Malhiot, who worked in the Alcohol Testing Program for eight years in various capacities related to inspection and maintenance of breath test instruments, testified at length about the transition from the Intoxilyzer 5000 to the Intoxilyzer 8000, and the similarities and differences between the machines. Both machines employ infrared spectroscopy to determine the amount of alcohol in a sample.

15. Ms. Barfield explained that molecules absorb infrared light at specific wavelengths. The infrared spectrum of a sample is obtained by passing a beam of infrared light through the sample. The alcohol molecule will absorb specific wavelengths of infrared light in a unique and consistent way. Based on the amount of absorption and the amount of transmittance, meaning the amount of light that remains after absorption, a measurement is correlated to a response from the calibration of the instrument.

16. The Intoxilyzer 5000 and the Intoxilyzer 8000 use different methods to measure infrared light. The Intoxilyzer 5000 had three filters mounted on a wheel that spun at approximately 2,100 revolutions per minute. The filters were each at a different wavelength: 3.39 µm, 3.48 µm, and 3.80 µm. It had a single detector that measured the light coming through each of the three filters. The Intoxilyzer 8000 has two

detectors with a filter in front of each, one set at 3.4 µm, and one at 9.4 µm.

17. The light source for the Intoxilyzer 5000 was a projector lamp similar to that found on a Power Point projector. The Intoxilyzer 8000 uses a pulsing infrared light source. The Intoxilyzer 5000's light source was separate and had to be focused into the sample chamber, then refocused out of the sample chamber to the detector as the light passed through the wheel. This system caused some inevitable dispersion of the light. In the Intoxilyzer 8000, all components are internal to the instrument, leaving no room for dispersion of the light.

18. Mr. Malhiot testified that the Intoxilyzer 5000 was developed in the 1970s and had computing power similar to an old Atari game system. The newer Intoxilyzer 8000 has much more computing power and data storage capability. The Intoxilyzer 8000 can be accessed remotely and is portable. A police officer can plug it into the cigarette lighter of his or her patrol car.

19. Mr. Malhiot described the Intoxilyzer 5000 as similar to a 1960s car with a V-8 engine and the Intoxilyzer 8000 as a "fuel-injected Ferrari." CMI, Inc.'s specifications sheet for the Intoxilyzer 8000 states that the instrument's accuracy is "± 3% or ± 0.003G/210L (whichever is higher)." The Intoxilyzer 5000 was represented as accurate within plus or minus 5%.

20. Local law enforcement agencies throughout the state own their breath test instruments. Rule 11D-8.004(1) provides that FDLE shall register and inspect each instrument for accuracy and reliability prior to its being placed into evidentiary use by an agency. Rule 11D-8.004(2) provides that registered breath test instruments shall be inspected by FDLE at least once each calendar year to ensure accuracy and reliability.

21. Rule 11D-8.006 provides that evidentiary breath test instruments must be inspected by an agency inspector at least once each calendar month. The agency is also required to inspect the instrument when it is taken out of evidentiary use and prior to returning it to evidentiary use.

22. Petitioners' contention is that the definition of "acceptable range," set forth in rule 11D-8.002(1), is outdated and obsolete. The numerical values in the definition of "acceptable range" have remained at the same 5% standard since rule 11D-8.002 was first adopted in 1993.

23. The federal standard for placement on the Conforming Products List is also the 5% standard.

24. Petitioners point to the fact that the specifications sheet for the Intoxilyzer 8000 states that the instrument's accuracy is "± 3% or ± 0.003G/210L (whichever is higher)." Petitioners argue that it is arbitrary and capricious for FDLE's

rule to continue employing the 5% standard, which predates even the Intoxilyzer 5000, when the manufacturer's specifications for the Intoxilyzer 8000 plainly state that it is accurate to within plus or minus 3%.

25. Petitioners further argue that FDLE is in fact applying the 3% standard in some of its own inspection procedures and that it should be required to codify its own internal standard and practice by rule. Petitioners note that FDLE's own Alcohol Testing Program Procedures Manual (the "Manual") provides a set of quality control checks that require the Intoxilyzer 8000 to meet the 3% standard.

26. Ms. Barfield testified that the Manual was written to standardize FDLE's lab practices. The Manual has never been adopted by reference in a rule. Dr. Brett Kirkland, the current program manager of the Alcohol Testing Program, credibly testified that it would be impractical and unproductive for FDLE to attempt to adopt all of its laboratory's standard operating procedures by rule. Current lab methodologies would be locked in place by rule and would not give the analyst discretion, should lab equipment or some other factor change. The agency would have to initiate rulemaking in order to make the smallest change in its methodologies. Dr. Kirkland opined that this would devolve into a hopeless endeavor because FDLE's rulemaking

could never keep up with the science that leads to modifications in laboratory operating procedures.

27. The portion of the Manual in question is section 2.19, titled, "Instrument Quality Control Check Procedures," which states by way of introduction: "For quality control purposes and prior to conducting a Department inspection, the following quality control checks will be conducted."

28. Among the listed quality control checks are "Stability Check Procedures." These procedures require the analyst to perform three repetitions each of 0.05, 0.08, and 0.20g/210L alcohol reference solutions and three repetitions of a 0.08g/210L dry gas standard. The results of these analyses must be as follows: for the 0.05 standard, within a lower limit of 0.047 and an upper limit of 0.053; for the 0.08 standard, within a lower limit of 0.077 and an upper limit of 0.083; and for the 0.20 standard, within a lower limit of 0.194 and an upper limit of 0.206. These values are consistent with the plus or minus 3% set forth in the manufacturer's specifications.

29. If any of the stability check measurements fall outside of the prescribed range, the analyst is directed first to determine whether the cause is user error or external equipment. If the cause is not external equipment or user error, the analyst must perform either an optical bench

calibration or have the instrument sent to an authorized repair facility of the owning agency's choice.

30. This repair is performed prior to the FDLE inspection, meaning that the agency is required to pay for repair of a machine that has failed to meet the Manual's 3% standard, without regard to whether it meets the 5% standard imposed by the rule. From this, Petitioners argue that FDLE is in fact imposing the 3% requirement on local law enforcement agencies and should be required to formally adopt the 3% standard in rule 11D-8.002(1).[4/]

31. Dr. Kirkland described the quality control procedures as providing a "snapshot" of a given instrument's function. FDLE uses the quality control check to determine whether to perform a calibration on an instrument. If the instrument is falling near the 3% margin, it is realigned to bring it closer to the target range. Dr. Kirkland described the quality control check as a good way to ensure that the instrument will meet the acceptable range criteria during the inspection. He noted that in any form of testing, it is good quality assurance to set slightly narrower constraints than what is allowable.

32. Only after the instrument has passed the FDLE quality control checks, including the stability check, may it proceed to the more complex FDLE inspection, which is conducted according to the 5% standard set forth in rule 11D-8.002(1).

33. The monthly agency inspections are also conducted using the 5% standard set forth in rule 11D-8.002(1).

34. Dr. Kirkland testified as to the differences between the FDLE quality control checks and annual inspections on the one hand and the monthly agency inspections on the other.[5/] First and foremost, the FDLE personnel are better trained. FDLE personnel have been trained specifically at the manufacturer's labs to work with the instruments they are inspecting. The FDLE inspections are performed in an ATP lab under better controlled conditions than the agency inspections, which are generally conducted in the same room where the breath testing occurs. The FDLE inspectors use simulators that they keep under strict temperature control and regularly calibrate.

35. Dr. Kirkland stated that the local agency personnel have been trained on how to use the breath test instrument, but not on how to take it apart and how it functions internally. They are trained to push a button and follow procedures. Agency inspectors are able to discover when a machine is not working properly but are not trained to diagnose the problem. Dr. Kirkland opined that the training of the FDLE inspectors is the main reason the agency is able to use the 3% standard for realigning an instrument.

36. Dr. Kirkland pointed out differences in the inspections themselves. The local agency inspection involves a

triplicate analysis of each individual standard. The FDLE inspection involves ten analyses of the individual standard, measures barometric pressure, and does a minimum volume sample check. Both inspections check for interference to make sure that ethanol is being measured rather than some other chemical in the breath.

37. Dr. Kirkland explained that FDLE sees a distinction between the accuracy statement set forth in the specifications for the Intoxilyzer 8000 and the acceptable range set forth in the rule. He testified that the specifications represent CMI, Inc.'s representation as to the instrument's accuracy as a stand-alone proposition, without reference to factors external to the instrument's analytical capability. Other variables include the dry gas standards and wet bath simulators used in the testing and the tubing and temperature controls associated with the simulators. The skill, training, and experience of the operator may have an effect on the measurement.

38. Dr. Kirkland testified that, while it is possible to achieve the 3% standard under controlled laboratory conditions, the 5% standard is more realistic in the day-to-day usage of the breath test instruments. The Intoxilyzer 8000 is capable of 3% "on really good days," but the specifications on the external items can introduce a variation to the measurements. In practice, the instrument would have to work <u>better</u> than its

specifications to stay in service if the acceptable range were lowered to the 3% standard.

39. Dr. Kirkland noted that the 5% standard is recommended as the acceptable range by the federal National Highway Traffic Safety Administration and by the International Organization of Legal Metrology, a treaty organization that sets international standards for measuring devices. Dr. Kirkland was unaware of any other state that uses an acceptable range criterion of less than 0.005 or 5%.

40. Dr. Kirkland testified that FDLE looks to the federal regulations promulgated by the National Highway Traffic Safety Administration for guidance as to whether the acceptable range defined in rule 11D-8.002(1) should be amended. FDLE also stays apprised of the scientific literature produced by individual laboratories and educational institutions. Dr. Kirkland testified that the 5% standard remains the consensus acceptable range of federal and state governments and of the scientific literature.

41. Ms. Barfield, the former manager of the Alcohol Testing Program, agreed that the "acceptable range" includes not only the instrument specifications, but also the accuracy of the simulators, the environment, and the uncertainty of the dry gas standards. However, she disagreed that the specification sheet for the Intoxilyzer 8000 excludes factors external to the

instrument's analytical capability. Ms. Barfield stated that the 3% standard of the specification by necessity incorporates all of the listed variables.

42. Ms. Barfield explained that in order to establish the accuracy standard for the Intoxilyzer 8000, the manufacturer had to make measurements using external devices and had to account for the environment in which the instrument was used. She testified that "You don't change the accuracy standard of an instrument because it's going to be used in a messy room. You need to account for that, control that, limit it, and then use the device."

43. Ms. Barfield opined that the rule should employ the manufacturer's accuracy specification because the manufacturer has established the 3% standard as the capability of its device, accounting for all the other variables. She had intended to change the rule to a 3% or 4% standard as part of her overall plan to automate the breath test instrument inspection process, but she left her position as manager of the Alcohol Testing Program before her plan could be enacted. Ms. Barfield believed that the lower standard would increase public confidence in the accuracy of the tests.

44. Mr. Malhiot testified that during the switch from the Intoxilyzer 5000 to the Intoxilyzer 8000 in 2006, FDLE had internal discussions about dropping the calibration of the

instrument down to a 3% standard for purposes of the "accepted range" in the rule. He stated that the decision was made to wait two years in order to collect data to establish how many more instruments would fail inspection under a 3% standard. He stated that the budget crisis of 2008 put an end to any ideas of wholesale rule changes at FDLE.

45. Mr. Malhiot could not name another state that uses the 3% standard, but stated that in his experience he believed that the Intoxilyzer 8000 could meet the 3% standard in the field.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding according to section 120.56(1) and (3), Florida Statutes.

47. Section 120.56, provides in pertinent part:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> (b) The petition challenging the validity of a proposed or adopted rule under this section must state:
>
> 1. The particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity.

> 2. Facts sufficient to show that the petitioner is substantially affected by the challenged adopted rule or would be substantially affected by the proposed rule.
>
> * * *
>
> (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
>
> (a) A petition alleging the invalidity of an existing rule may be filed at any time during which the rule is in effect. The petitioner has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

48. Petitioners, John David Rouse and Elizabeth G. Yoskin, have been charged with DUI and were subjected to a breath alcohol test pursuant to sections 316.1932, 316.1933, and 316.1934. As such, they are affected persons with standing to challenge the validity of rule 11D-8.002(1). See Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999).

49. As the moving party asserting the affirmative by attacking the validity of an existing agency rule, Petitioners in this case retain the burden of proof throughout the entire proceeding. Beshore v. Dep't of Fin. Servs., 928 So. 2d 411, 414 (Fla. 1st DCA 2006); Espinoza v. Dep't of Bus. & Prof'l Reg., 739 So. 2d. 1250, 1251 (Fla. 3d DCA 1999); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); § 120.56(3), Fla. Stat.

50. The party attacking an existing rule has the burden to prove that the rule constitutes an invalid exercise of delegated legislative authority. Cortes v. State Bd. of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995). The standard of proof is a preponderance of the evidence. See § 120.56(3), Fla. Stat.

51. An Administrative Law Judge may invalidate an existing rule only if it is an invalid exercise of delegated legislative authority. See § 120.56(1)(a) and (3)(a), Fla. Stat.

52. Section 120.52(8) defines "invalid exercise of delegated legislative authority" to mean:

> [A]ction that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or;
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

53. Petitioners specifically allege that rule 11D-8.002(1) was rendered invalid at the time FDLE adopted the Intoxilyzer 8000 as the sole approved breath testing instrument in the state. They contend that it is arbitrary and capricious for FDLE's rule to maintain a 5% acceptable range standard when the Intoxilyzer 8000's manufacturer specifications state that its accuracy range is plus or minus 3%.

54. Section 120.52(8)(e) provides: "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." Similarly, case law provides that an "arbitrary" decision is one not supported by facts or logic, or despotic, and a "capricious" decision is one taken irrationally, or without thought or reason. Bd. of Clinical Lab. Pers. v. Fla. Ass'n of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); Bd. of Trs. of the Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995). In undertaking this analysis, the undersigned is mindful that these definitions:

> [A]dd color and flavor to our traditionally dry legal vocabulary, but do not assist an objective legal analysis. If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.

Dravo Basic Materials Co., Inc. v. Dep't of Transp., 602 So. 2d 632, 635 n.3 (Fla. 2d DCA 1992).

55. Petitioners have not established that rule 11D-8.002(1) is arbitrary or capricious. Dr. Kirkland testified as to FDLE's rationale for declining a move to the 3% standard, including his opinion that the Intoxilyzer 8000 may not be capable of meeting the 3% standard under field conditions. It is one thing to meet the standard in the controlled conditions

of an FDLE lab with highly trained FDLE inspectors. It might be quite another thing to meet the standard at 3:00 a.m. in a local law enforcement agency's holding cell. Dr. Kirkland reasonably opined that the 5% standard takes into account all the variables external to the Intoxilyzer 8000 itself, and is consistent with the accuracy standards in force in nearly every other state and accepted by the National Highway Traffic Safety Administration.

56. Ms. Barfield and Mr. Malhiot disagreed with Dr. Kirkland.[6/] Ms. Barfield believed that CMI, Inc.'s manufacturer specifications for the Intoxilyzer 8000 included all external factors. Both Ms. Barfield and Mr. Malhiot credibly testified that FDLE actively considered changing the acceptable range standard subsequent to adoption of the Intoxilyzer 8000. They each made reasonable arguments as to why FDLE might consider changing the standard. They did not establish that rule 11D-8.002(1) was rendered arbitrary and capricious by FDLE's decision to adopt the 5% standard for the Intoxilyzer 8000.

57. Petitioners established that it would not be unreasonable for FDLE to commence rulemaking to change the "acceptable range" standard from plus or minus 5% to plus or minus 3%. Petitioners did not establish that the current rule 11D-9.002(1) is an invalid exercise of delegated legislative authority because it is arbitrary and capricious.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Petition Seeking Determination that FDLE Rule 11D-8.002 is an Invalid Exercise of Delegated Legislative Authority is dismissed.

DONE AND ORDERED this 9th day of September, 2016, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
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 9th day of September, 2016.

ENDNOTES

[1/] Some confusion was raised, at least in the mind of the undersigned, by Petitioners' numeration of their exhibits. Counsel numbered the exhibits, but during the hearing, often referenced them by the tab numbers in his exhibit notebook, which did not match the exhibit numbers. In Petitioners' exhibit notebook, the exhibit number plus six equals the tab number, as follows: Exhibit 3 is Tab 9; Exhibit 4 is Tab 10; Exhibit 7 is Tab 13; Exhibit 12 is Tab 18; Exhibit 23 is Tab 29; Exhibit 24 is Tab 30; Exhibit 26 is Tab 32; Exhibit 27 is Tab 33; Exhibit 28 is Tab 34; Exhibit 31 is Tab 37; and Exhibit 32 is Tab 38.

[2/] Sections 316.1932, 316.1933, and 316.1934, Florida Statutes, are collectively referred to as the implied consent law. See Robertson v. State, 604 So. 2d 783, 789 n.4 (Fla. 1992).

[3/] "ATP" stands for the Alcohol Testing Program within FDLE.

[4/] Petitioners' argument on this point raises the question whether FDLE is imposing an unadopted rule on local law enforcement agencies by requiring them to repair machines that have not been fully inspected and therefore are not definitively out of compliance with chapter 11D-8. Petitioners did not raise the question of the Manual being an agency statement that is an unadopted rule, and their standing to bring such a challenge is doubtful based on the record. See Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 99-100 (Fla. 1st DCA 1999)(DUI defendant had standing to challenge portions of chapter 11D-8, but did not have standing to challenge non-rule policies that did not have "direct impact" on defendant.).

[5/] FDLE prescribes different forms for the inspections. The agency inspection is referenced in FDLE/ATP Form 39. The Department inspection is set out in FDLE/ATP Form 36.

[6/] The undersigned declines FDLE's invitation to disregard the testimony of Ms. Barfield as tainted by the circumstances of her departure from FDLE. Given that her view did not prevail in any event, the undersigned sees no need to revisit Ms. Barfield's employment history.

COPIES FURNISHED:

Jason Jones, General Counsel
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302
(eServed)

Christian Alexander Straile, Esquire
Post Office Box 5355
Gainesville, Florida 32627
(eServed)

Ann Marie Johnson, Esquire
Department of Law Enforcement
2331 Phillips Road
Tallahassee, Florida 32308
(eServed)

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

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

Richard L. Swearingen, Commissioner
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489
(eServed)

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.