STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GBR ENTERPRISES, INC.,

Petitioner,

vs. Case Nos. 18-4475RX
18-4992RU

DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

This matter came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on October 26, 2018, by video teleconference with sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

As to DOAH Case No. 18-4475RX, whether Florida Administrative Code Rule 12A-1.044(5)(a) is an invalid exercise of delegated legislative authority in violation of section 120.52(8), Florida Statutes.[1/]

As to DOAH Case No. 18-4992RU, whether the Department of Revenue's ("Department") Standard Audit Plan, Vending and Amusement Machines--Industry Specific, section 1.1.3.3 ("SAP") is an unadopted rule in violation of sections 120.54 and 120.56, Florida Statutes.

PRELIMINARY STATEMENT

On October 16, 2016, GBR Enterprises, Inc. ("GBR"), filed a petition challenging the Department's Notice of Decision ("NOD") issued August 22, 2016, which assessed sales tax and interest against GBR in the amount of $298,977.10. On October 28, 2016, the Department referred the matter to DOAH to assign an administrative law judge to conduct the final hearing. The case was assigned to Judge Robert S. Cohen under DOAH Case No. 16-6331.

On November 3, 2016, the Department filed an Unopposed Motion to Relinquish Jurisdiction Without Prejudice to Reopen at a Later Date because the parties desired to explore the possibility of settlement. On that same date, Judge Cohen entered an Order Closing File and Relinquishing Jurisdiction.

On January 27, 2017, GBR filed its Amended Petition for Chapter 120 Hearing challenging the NOD. On May 30, 2018, the Department filed its unopposed Motion to Reopen Case. The matter was reopened under DOAH Case No. 18-2772 and reassigned to Judge Cohen.

On June 1, 2018, Judge Cohen entered an Order setting the final hearing for August 9, 2018. On July 10, 2018, the parties filed a joint motion to continue the final hearing. On July 16, 2018, Judge Cohen entered an Order granting the motion and resetting the final hearing for September 18, 2018.

On August 23, 2018, GBR filed a Petition to Determine the Invalidity of Existing Rule 12A-1.044. The petition was assigned to Judge Cohen under DOAH Case No. 18-4475RX. That same date, GBR filed an unopposed motion for continuance based on its filing of the rule challenge in DOAH Case No. 18-4475RX and its intent to file another petition at DOAH challenging an agency statement as an unadopted rule. On August 24, 2018, Judge Cohen entered an Order granting the motion and resetting the final hearing for October 26, 2018. On August 27, 2018, Judge Cohen entered an Order consolidating DOAH Case Nos. 18-2772 and 18-4475RX.

On September 17, 2018, GBR filed its Petition to Determine the Invalidity of Agency Statement. The petition was assigned to Judge Cathy M. Sellers under DOAH Case No. 18-4992RU. On September 21, 2018, the case was transferred to Judge Cohen. On

this same date, Judge Cohen entered an Order consolidating DOAH Case Nos. 18-2772, 18-4475RX, and 18-4992RU, and the three cases were transferred to the undersigned for all further proceedings. On October 8, 2018, the Department's Corrected Motion for Attorney's Fees Pursuant to Section 57.105 and 120.595 was filed, to which GBR responded on October 15, 2018. On October 25, 2018, GBR filed a request for official recognition.

The final hearing was held in all three cases on October 26, 2018, with both parties present. At the hearing, the undersigned granted GBR's request for official recognition as to Florida Administrative Code Rules 6A-1.012, 12A-1.044, and 1-1.010. However, the undersigned denied GBR's request for official recognition as to various purported school board policies. The undersigned also granted the Department's unopposed request for official recognition of rule 12A-1.44 (later transferred to rule 12A-1.044) in effect October 7, 1968, through October 31, 2005.

The Department presented the testimony of Amit Biegun, Mary Gray, Carrie Bowyer, and Mark Zych. The Department's Exhibits 1 through 25 were received in evidence based on the stipulation of the parties. GBR did not present the testimony of any additional live witnesses. However, the deposition transcripts of Mary Gray and Mark Zych (GBR's Exhibits 22 and 23) were received in evidence.[2/] GBR's Exhibits 1 through 7, 9, 10, 12, and 19 through 21 were also received in evidence based on the

stipulation of the parties. At the hearing, the parties waived the requirement under section 120.56(1)(d) for the undersigned to render this Final Order within 30 days of the hearing.

The one-volume final hearing Transcript was filed at DOAH on November 13, 2018. The parties timely filed proposed final orders, which were given consideration in the preparation of this Final Order.[3/]

FINDINGS OF FACT

The Parties and Audit Period

1. GBR is a Florida corporation with its principal place of business in Miami, Florida. Gilda Rosenberg is the owner of GBR and a related entity, Gilly Vending, Inc. ("Gilly"). GBR and Gilly are in the vending machine business. At all times material hereto, Amit Biegun served as the chief financial officer of the two entities.

2. The Department is the state agency responsible for administering Florida's sales tax laws pursuant to chapter 212, Florida Statutes.

3. This case concerns the audit period of January 1, 2012, to December 31, 2014.

GBR's Provision of Vending Machine Services

4. Prior to the audit period, the school boards of Broward and Palm Beach County issued written solicitations through

invitations to bid ("ITB"), seeking vendors to furnish, install, stock, and maintain vending machines on school property.

5. The bids required a "full turn-key operation." The stated objectives were to obtain the best vending service and percentage commission rates that will be most advantageous to the school boards, and to provide a contract that will be most profitable to the awarded vendor. The stated goal was that student choices from beverage and snack vending machines closely align with federal dietary guidelines.

6. GBR operates approximately 700 snack and beverage vending machines situated at 65 schools in Broward, Palm Beach, and Miami-Dade Counties. Of these 65 schools, 43 are in Broward County, 21 are in Palm Beach County, and one is in Miami-Dade County.

7. The snack vending machines are all owned by GBR. Beverage vending machines are owned by bottling companies, such as Coca-Cola and Pepsi. Of the 700 vending machines, approximately 60 percent of the machines are for beverages and the remaining 40 percent are for snacks.

8. GBR has written vending agreements with some schools. In these agreements, GBR is designated as a licensee, the school is designated as the licensor, and GBR is granted a license to install vending machines on school property in exchange for a commission. Furthermore, GBR is solely responsible to pay all

federal, state, and local taxes in connection with the operation of the vending machines.

9. Ownership of the vending machines does not transfer to the schools. However, in some cases the schools have keys to the machines. In addition, designated school board employees have access to the inside of the machines in order to review the meter, monitor all transactions, and reconcile the revenue from the machines.

10. GBR places the vending machines on school property.

11. However, the schools control the locations of the vending machines.

12. The schools also require timers on the machines so that the schools can control the times during the day when the machines are operational and accessible to students.

13. The schools also control the types of products to be placed in the machines to ensure that the products closely align with the federal dietary guidelines.

14. The schools also control pricing strategies.

15. GBR stocks, maintains, and services the vending machines. However, Coca-Cola and Pepsi may repair the beverage machines they own. GBR is solely responsible for repairing the machines it owns.

16. The schools require that any vendor service workers seeking access to the vending machines during school hours pass background checks.

17. GBR route drivers collect the revenue from all of the vending machines and the revenues are deposited into GBR's bank accounts.

18. In exchange for GBR's services, the schools receive from GBR, as a commission, a percentage of the gross receipts. However, neither GBR nor the schools are guaranteed any revenue unless sales occur from the machines.

19. On its federal income tax returns, GBR reports all sales revenue from the vending machines.

20. For the tax year 2012, GBR's federal income tax return reflects gross receipts or sales of $5,952,270. Of this amount, GBR paid the schools $1,363,207, a percentage of the gross receipts which GBR characterized on the tax return and its general ledger as a commission and equipment space fee and cost of goods sold.

21. For the tax year 2013, GBR's federal income tax return reflects gross receipts or sales of $6,535,362. Of this amount, GBR paid directly to the schools $1,122,211, a percentage of the gross receipts which GBR characterized on the tax return and its general ledger as a commission and equipment space fee and cost of goods sold.

22. For the tax year 2014, GBR's federal income tax return reflects gross receipts or sales of $6,076,255. Of this amount, GBR paid directly to the schools $1,279,682, a percentage of the gross receipts which GBR characterized on the tax return and its general ledger as a commission and equipment space fee and cost of goods sold.

23. Thus, for the audit period, and according to the federal tax returns and general ledgers, GBR's gross receipts or sales were $18,563,887. Of this amount, GBR paid directly to the schools $3,765,100, as a commission and equipment space fee and cost of goods sold.

The Department's Audit and Assessment

24. On January 27, 2015, the Department, through its tax auditor, Mary Gray, sent written notice to GBR of its intent to conduct the audit. This was Ms. Gray's first audit involving vending machines at schools.

25. Thereafter, GBR provided Ms. Gray with its general ledger, federal returns, and bid documents.

26. On October 28, 2015, Ms. Gray issued a draft assessment to GBR. The email transmittal by Ms. Gray to GBR's representative states that "[t]he case is being forwarded for supervisory review." In the draft, Ms. Gray determined that GBR owed additional tax in the amount of $28,589.65, but there was no

mention of any purported tax on the monies paid by GBR to the schools as a license fee to use real property.

27. However, very close to the end of the audit, within one week after issuing the draft, and after Ms. Gray did further research and conferred with her supervisor, Ms. Gray's supervisor advised her to issue the B03 assessment pursuant to section 212.031 and rule 12A-1.044, and tax the monies paid by GBR to the schools as a license fee to use real property.

28. Thus, according to the Department, GBR was now responsible for tax in the amount of $246,230.93, plus applicable interest. Of this alleged amount, $1,218.48 was for additional sales tax (A01); $4,181.41 was for purchase expenses (B02); $13,790 was for untaxed rent (B02); and $227.041.04 was for the purported license to use real property (B03).

29. Ms. Gray then prepared a Standard Audit Report detailing her position of the audit and forwarded the report to the Department's dispute resolution division.

30. On January 19, 2016, the Department issued the Notice of Proposed Assessment ("NOPA") against GBR for additional tax and interest due of $288,993.31. The Department does not seek a penalty against GBR.

31. At hearing, Ms. Gray testified that the Department's SAP is an audit planning tool or checklist which she used in conducting GBR's audit.

32. Employees of the Department are not bound to follow the SAP, and the SAP can be modified by the auditors on a word document.

33. The SAP was utilized by Ms. Gray during the audit, but it was not relied on in the NOD.[4/]

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the subject matter and parties pursuant to sections 120.54, 120.56, 120.569, and 120.57(1), Florida Statutes.

Case No. 18-4475RX--Challenge to Existing Rule 12A-1.044(5)(a)

35. Rule 12A-1.044(5)(a) provides in pertinent part as follows:

> (5) Lease or license to use real property; direct pay authority.
>
> (a) If the machine owner is also the operator and the operator places the machine at another person's location, the arrangement between the machine operator and location owner is a lease or license to use real property. The location owner shall collect the tax from the machine operator on the amount the location owner receives for the lease or license to use the real property. The tax must be separately stated from the amount of the lease or license payment.[5/]

36. Under section 120.56(1)(a), "[a]ny person substantially affected by a 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." An

existing rule may be challenged at any time during its existence. § 120.56(3)(a), Fla. Stat. "The administrative law judge may declare all or part of a rule invalid." § 120.56(3)(b), Fla. Stat.

37. A party is substantially affected if the rule will result in real or immediate injury in fact and 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). GBR is substantially affected by the rule and has standing to challenge the rule. GBR is a substantially affected party because the Department relied on the rule in determining the B03 assessment against GBR, and GBR is within the zone of interests to be protected. In its proposed final order, the Department concedes that GBR has standing to challenge the rule.

38. GBR 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. § 120.56(3)(a), Fla. Stat.

39. The definition of "invalid exercise of delegated legislative authority" is set forth in section 120.52(8), which provides in pertinent part:

> (8) "Invalid exercise of delegated legislative authority" means action 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:
>
> * * *
>
> (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.;
>
> * * *
>
> 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 enabling statute.

40. GBR contends that existing rule 12A-1.044(5)(a) is an invalid exercise of delegated legislative authority under section 120.52(8)(b) because the Department exceeded its grant of rulemaking authority.

41. In United Faculty of Florida v. State Board of Education, 157 So. 3d 514 (Fla. 1st DCA 2015), Judge Wetherell recently stated:

> A rule is invalid under section 120.52(8)(b) if the agency "exceed[s] its grant of rulemaking authority." A grant of rulemaking authority is the "statutory language that explicitly authorizes or requires an agency to adopt [a rule]." § 120.52(17), Fla. Stat. The scope of an agency's rulemaking authority is constrained by section 120.536(1) and the so-called "flush-left paragraph" in section 120.52(8), which provide that an agency may only adopt rules to "implement or interpret the specific powers and duties granted by the [agency's] enabling statute"; that an agency may not adopt rules to "implement statutory provisions setting forth general legislative intent or policy" or simply because the rule "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"; and that "[s]tatutory 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 enabling statute."
>
> Section 120.536(1) and the flush-left paragraph in section 120.52(8) require a close examination of the statutes cited by the agency as authority for the rule at issue to determine whether those statutes explicitly grant the agency authority to adopt the rule. As this court famously stated in *Save the Manatee Club*, the question is "whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not."

Id. at 516-517.

42. The issue of whether a rule is an invalid exercise of delegated legislative authority under section 120.52(8)(b) and the "flush-left" provision must be determined on a case-by-case basis. Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

43. In the instant case, the statutes cited as the rulemaking authority for the rule are sections 212.0515, 212.17(6), 212.18(2), and 213.06(1), Florida Statutes.

44. Section 212.0515 deals with "[s]ales from vending machines; sales to vending machine operators; special provisions; registration; [and] penalties." The statute provides definitions of the phrase "vending machine" and "operator" relating solely to the imposition of a sales tax on the gross proceeds from the sales of items of tangible personal property contained within the machines. The statute deals with tax on sales of items from the vending machines, registration of the machines, and other miscellaneous provisions (an exemption for churches, synagogues, nonprofit or charitable organizations, and penalties). The statute authorizes the Department to "adopt rules necessary to administer this section."

45. Section 212.17 deals with "[t]ax credits or refunds." Subsection (6)(a) requires the Department to design, prepare, print, and furnish to all dealers, except dealers filing through electronic data interchange, or make available or prescribe to

the dealers, all necessary forms for filing returns and instructions to ensure full collection from dealers and an accounting for the taxes due. Subsection (6)(b) prescribes the format and instructions necessary for filing returns in a manner that is initiated through an electronic data interchange to ensure a full collection from dealers and an accounting for the taxes due. Section 212.17(8) authorizes the Department to "adopt rules necessary to administer and enforce this section."

46. Section 212.18(2) requires the Department to "administer and enforce the assessment and collection of the taxes, interest, and penalties" imposed by chapter 212, and authorizes the Department to "adopt rules pursuant to ss. 120.536(1) and 120.54 to enforce the provisions of [Chapter 212] in order that there not be collected on the average more than the rate levied herein. The department is authorized to and it shall provide by rule a method for accomplishing this end."

47. Section 213.06(1) authorizes the Department to adopt rules pursuant to sections 120.536(1) and 120.54 to implement Florida's revenue laws.

48. Sections 212.0515, 212.17, 212.18(2), and 213.06(1) do not address any tax to be imposed on payments between the owner and operator of a vending machine and the owner of property where the vending machine may be placed. The statutes do not address

any tax to be imposed on payments for a lease or license to use real property.

49. Contrary to the Department's contention, statutes providing only general rulemaking authority do not confer the necessary specific authority required for a rule to be valid. Board of Trs. of the Int. Imp. Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001); Fla. Dep't of High. Saf. & Motor Veh. v. JM Auto, Inc., 977 So. 3d 733, 734 (Fla. 1st DCA 2008).

50. In sum, sections 212.0515, 212.17, 212.18(2), and 213.06(1) do not confer the Department with specific authority to enact the instant rule dealing with taxing payments between the owner and operator of a vending machine and the owner of the property where the vending machine may be placed as a license to use real property.

51. Accordingly, the Department exceeded its rulemaking authority, and the rule is an invalid exercise of delegated legislative authority.

52. In its proposed final order, the Department relies on a 1992 Final Order in Family Arcade Alliance v. Department of Revenue, Case No. 91-5338RP, 1992 Fla. Div. Adm. Hear. LEXIS 6111 (Fla. DOAH Mar. 17, 1992). In Family Arcade Alliance, a group composed primarily of businesses that operate amusement game machines challenged several proposed rules of the Department. In

paragraph 59 of the Final Order, Hearing Officer William R. Dorsey, Jr., addressed the group's contention that proposed rule 12A-1.004(10) (the predecessor to that portion of the rule challenged in the instant case) "impermissibly enlarges or modifies the statute implemented." Id. at *44. In response, Hearing Officer Dorsey stated the following:

> Section 212.05(1)(j)2.a, Florida Statutes (1991), says a machine owner who is also an operator cannot deduct from the sales tax due any rent or license fee paid to the location owner. The statutory language implicitly treats the arrangement as a lease or license to use real property. The statutory language is sufficient authority for the rule's presumption, when coupled with the language of Section 212.031, Florida Statutes (1991), which imposes sales tax on the business of leasing or granting a license to use real property. Both sections are cited in the portion of the rule disclosing the statutes the rule implements.

Id.

53. The Department's reliance on Family Arcade Alliance is misplaced. Family Arcade Alliance did not address whether the proposed rule was an invalid exercise of delegated legislative authority in violation of section 120.52(8)(b) and the "flush-left" provision. Rather, the issue in Family Arcade Alliance was whether the "rule impermissibly enlarges or modifies the statute implemented." (emphasis added). A claim that a rule enlarges, modifies, or contravenes the specific provisions of law implemented is a separate claim under section 120.52(8)(c).[6/]

54. Contrary to the Department's assertion, section 212.031 does not confer the Department with specific authority to enact the rule dealing with taxing payments between the owner and operator of a vending machine and the owner of the property where the vending machine may be placed as a lease or license to use real property. Section 212.031 is not cited in the rule as rulemaking authority. An agency cannot rely on statutory provisions not cited in the rule as rulemaking authority. State v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 726-727 (Fla. 1st DCA 2013); Dep't of Child. & Fam. Servs. v. I.B., 891 So. 2d 1168, 1172 (Fla. 1st DCA 2005). In any event, section 212.031 addresses taxation on a lease or license to use real property, but it does not address the taxation of vending machines. Finally, section 212.031 does not specifically grant any authority to enact rules.

55. GBR also contends that the rule is an invalid exercise of delegated legislative authority in violation of section 120.52(8)(c) because the rule enlarges, modifies, or contravenes the specific provisions of law implemented. Under section 120.52(8)(c), the test is whether the rule gives effect to the specific laws to be implemented and whether the rule implements or interprets specific powers and duties. Day Cruise Ass'n, Inc., 794 So. 2d at 704.

56. The statutes cited as the law implemented for the rule are sections 212.02(10)(g), (14), (15), (16), (19), (24); 212.031; 212.05(1)(h); 212.0515; 212.054(1), (2), and (3)(l.); 212.055; 212.07(1) and (2); 212.08(1), (7) and (8); 212.11(1); 212.12(2), (3), (4), and (9); 212.18(2) and (3).

57. The provisions in section 212.02 are definitions of terms referenced in the rule.

58. The Department principally relies on section 212.031. As discussed above, section 212.031 addresses taxation on a lease or license to use real property, but it does not address the taxation of vending machines. Not only does the rule address vending machines, but it goes even further dictating that a vending machine owner, who is also the operator, is automatically subject to a tax on payments to the property owner as a lease or license to use real property based solely on the owner/operator's "place[ment][of] the machine at another person's location." Accordingly, the rule enlarges, modifies, or contravenes section 212.031.

59. The Department concedes that section 212.05(1)(h) is a law imposing tax on coin-operated amusement machines, and was cited in error as the law implemented.

60. As discussed above, section 212.0515 does not address any tax to be imposed on payments between the owner and operator of a vending machine and the owner of property where the vending

machine may be placed, and it does not address any tax to be imposed on a lease or license to use real property. Accordingly, the rule enlarges, modifies, or contravenes section 212.0515.

61. Sections 212.054 and 212.055 relate to discretionary sales surtax. Section 212.07(1) and (2) relate to a privilege tax on retail sales and resales. Section 212.08 relates to exemptions. Section 212.11(1) relates to the method of calculating an estimated tax liability. Section 212.12(2), (3), (4), and (9) relates to penalties. Section 212.18(2) relates to the Department's authority to administer and enforce the assessment and collection of taxes and to adopt rules "to enforce the provisions of this chapter in order that there shall not be collected on the average more than the rate levied." Section 212.18(3) relates to registration certificates and penalties for failure to apply and obtain certificates of registration. These statutes do not address any tax to be imposed on payments between the owner and operator of a vending machine and the owner of property where the vending machine may be placed, and they do not address any tax to be imposed on a lease or license to use real property. Accordingly, the rule enlarges, modifies, or contravenes sections 212.054; 212.055; 212.07(1) and (2); 212.08; 212.11(1); 212.12(2), (3), (4) and (9); 212.18(2) and (3).

Case No. 18-4992RU--Challenge to Section 1.1.3.3 of the Department's SAP

62. Section 120.56(4)(a) authorizes any person who is substantially affected by an agency statement to seek an administrative determination that the statement is actually a rule whose existence violates section 120.54(1)(a) because the agency has not formally adopted the statement. GBR has standing to seek an administrative determination that section 1.1.3.3 of the SAP (the agency statement) is actually a rule because Ms. Gray considered the statement during the course of the audit.

63. Section 120.54(1)(a) declares that "[r]ulemaking is not a matter of agency discretion" and directs that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

64. Section 120.52(16) defines the term "rule," in pertinent part, as:

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

65. To be a rule, a statement of applicability must operate in the manner of a law. Thus, an agency statement is "generally applicable" if it is intended by its own effect to create rights,

or to require compliance, or otherwise to have the direct and consistent effect of law. Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 203 (Fla. 1st DCA 2010); Jenkins v. State, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003).

66. Section 120.56(4)(c) authorizes an administrative law judge ("ALJ") to enter a final order determining that all or part of a challenged statement violates section 120.54(1)(a). The ALJ is not authorized to decide, however, whether the statement is an invalid exercise of delegated legislative authority as defined in section 120.52(8). Thus, in a section 120.56(4) proceeding, it is not necessary or even appropriate for the ALJ to decide whether an unadopted rule exceeds the agency's grant of rulemaking authority, for example, or whether it enlarges, modifies, or contravenes the specific provisions of law implemented, or is otherwise "substantively" an invalid exercise of delegated legislative authority. Section 120.56(4) is forward-looking in its approach. It is designed to prevent future or recurring agency action based on an unadopted rule, not to provide relief from the final agency action that has already occurred.

67. In Department of Revenue v. Vanjaria Enterprises, 675 So. 2d 252 (Fla. 5th DCA 1996), the Department attempted to subject a taxpayer to sales tax based on calculations pursuant to a procedure set forth in its sales and use tax training manual.

The court held the Department's tax assessment procedure was a "rule" because it was a "statement of general applicability that implements, interprets, or prescribes law or policy." Id. at 255. Specifically, the court found that the Department's tax assessment procedure created its entitlement to taxes while adversely affecting property owners, with the training manual being the sole guide for auditors in their assessment of multiple-use properties. In determining exempt versus nonexempt uses of multiple-use properties, the Department's auditors strictly complied with the procedure set forth in the training manual for all audits performed. Moreover, the Department's auditors were not afforded any discretion to take action outside the scope of the training manual. Id.

68. However, in Coventry First, LLC, an insurance company challenged the Office of Insurance Regulation's policy and procedures requiring production of records regarding out-of-state transactions as an unpromulgated rule. The First District held that the evidence presented at hearing supported the ALJ's conclusion that the documents were internal management memoranda, not statements of general applicability, because their use was subject to the discretion of the examiners, and they did not solicit or require any information not required by statute. Id. at 204.

69. Moreover, in Department of Highway Safety & Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997), the First District held that three policies of the agency were not unpromulgated rules because the record established that they were only to apply under "certain circumstances." The court found such statements to be merely guidelines in that their application was subject to discretion, and, therefore, the policy did not have the direct and consistent effect of law. Id.

70. Finally, in Agency for Health Care Administration v. Custom Mobility, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008), the First District held that a formula was not an unpromulgated rule because it was subject to discretionary application in that the agency could choose whether or not to use the methodology.

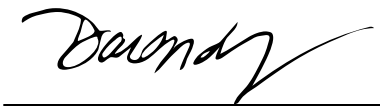
71. As detailed above, at hearing, Ms. Gray testified that the Department's SAP is an audit planning tool or checklist which she used in conducting GBR's audit. The SAP can be modified by the auditors on a word document, employees are not bound to follow the SAP, and the SAP was not relied on by Ms. Gray or the Department in the NOD.

72. Accordingly, the undersigned concludes that the Department's SAP is not an unpromulgated rule.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED as follows: (1) as to DOAH Case No. 18-4475RX, Florida Administrative Code Rule 12A-1.044(5)(a) is an invalid exercise of delegated legislative authority in violation of section 120.52(8), Florida Statutes (2018)[7/]; (2) as to DOAH Case No. 18-4992RU, GBR's Petition is dismissed; and (3) the undersigned retains jurisdiction to address issues regarding attorney's fees and costs.

DONE AND ORDERED this 14th day of January, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 14th day of January, 2019.

ENDNOTES

[1/] Unless otherwise indicated, citations to statutes and administrative rules are to the 2018 versions of the Florida Statutes and Florida Administrative Code.

[2/] Ms. Gray and Mr. Zych were both party representatives of the Department.

[3/] The NOD assessed sales tax against GBR in the amount of $246,230.93, plus interest, for a total assessment of $298,977.10. Of this amount, $1,218.48 was for additional sales (Exhibit A01); $4,181.41 was for purchase expenses (Exhibit B02); $13,790.00 was for untaxed rent (Exhibit B02); and $227,041.04 was for a license to use real property (Exhibit B03). GBR paid sales tax on the sale of the revenue items sold from the vending machines, which was subject to sales tax on the products sold. The only remaining issue in DOAH Case No. 18-2722 is whether GBR is liable for $227,041.04 as a tax on a license to use real property, plus applicable interest. On this issue, the undersigned has recommended order authority, and the challenge in that case is being addressed in a separate Recommended Order. The challenges in DOAH Case Nos. 18-4475RX and 18-4992RU are being addressed in the instant Final Order because the undersigned has final order authority in DOAH Case Nos. 18-4475RX and 18-4992RU.

[4/] Section 1.1.3.3 of the SAP provides as follows:

> For vending machines only, if both the owner of the machine and the location owner have the keys to the money box and are responsible for removing the receipts, then they shall designate in writing who shall be considered the operator. Absent such written designation, the owner of the machine shall be deemed to [b]e the operator (See Rule 12A-1.044, F.A.C.). Do not confuse with Section 212.05(h)2c., F.S., which provides otherwise. For both amusement and vending machines, if available, check written agreement for terms. The agreement should identify who is responsible for remitting the tax on the receipts, who is responsible for purchasing the certificate (as operator of an amusement machine or will provide a notice on the vending machine, and whether the arrangement

> if a lease of tangible personal property (the machines) or a lease of real property (See TAA 96A-006 and TUB 95(A)1-001).

[5/] Rule 12A-1.044, titled Vending Machines, was first promulgated by the Department in 1968. The rule has been amended many times since 1968, with the most recent amendment enacted in January 2018. In the most recent amendment in January 2018, subsection (6)(a) was renumbered as (5)(a), but the substantive language within the rule remained the same. Thus, the operative rule provision in effect during the audit period, cited in the NOD and relied on by the Department in making the B03 assessment, was subsection (6)(a).

[6/] Notably, the Legislature had not even enacted the "flush-left" provision when the Final Order in Family Arcade Alliance was issued. The flush-left provision, which was adopted in 1999, represents the Legislature's intent to clarify significant restrictions on agencies' exercise of rulemaking authority. Bd. of Trs. of the Int. Imp. Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001).

[7/] This Final Order only addresses the validity of existing rule 12A-1.044(5)(a), formerly (6)(a) because that is the only rule provision cited in the NOD as legal authority for the B03 assessment and the Department's proposed agency action to impose a sales tax on the monies paid by GBR to the schools as a license to use real property. Because the undersigned has determined that section (5)(a) is invalid, and the NOD does not rely on any other provisions of the rule as a basis for the Department's proposed action, it is unnecessary for the undersigned to specifically address the validity of any provisions in the rule other than (5)(a). However, to the extent the Department may seek to justify the B03 assessment against GBR based on any other provisions within the rule, such other provisions would also constitute an invalid exercise of delegated legislative authority for the same reasons discussed above.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.