STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WKDR II, INC.,

Petitioner,

vs. Case No. 22-0117RU

FLORIDA DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH) on March 2, 2022, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael J. Bowen, Esquire
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For Respondent: J. Clifton Cox, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether a statement by the Department of Revenue (Department or Respondent) constitutes an unadopted rule in violation of section 120.54(1), Florida Statutes.

PRELIMINARY STATEMENT

Background

On February 19, 2021, WKDR II, Inc. (WKDR), filed a Petition for Chapter 120 Hearing to contest the Department's Notice of Proposed Assessment (NOPA), dated January 13, 2020, which assessed sales and use tax, a penalty, and interest against WKDR following an audit. A few days later, on February 23, 2021, WKDR filed a separate Petition for Chapter 120 Hearing to contest the Department's Notice of Intent to Levy (NIL), dated February 18, 2021, which gave notice that the Department was proceeding to freeze WKDR's bank account to collect the underlying audit assessment. The Department referred both petitions to DOAH on March 3, 2021, for the assignment of an administrative law judge to conduct chapter 120 hearings.

At DOAH, WKDR's challenge to the NOPA was designated Case No. 21-0845 and the challenge to the NIL was designated Case No. 21-0844. Both cases were assigned to the undersigned. Both cases were "substantial interests" proceedings brought under sections 120.569 and 120.57(1).

On March 12, 2021, the Department filed a Motion to Consolidate Cases and to Bifurcate Issues. The undersigned granted the motion, in part, and consolidated the two above-styled cases for a hearing on the NOPA and the NIL.

On May 5, 2021, WKDR filed a Petition to Determine the Invalidity of Existing Administrative Rule 12-6.003 (Existing Rule Challenge). The

Existing Rule Challenge, filed pursuant to section 120.56(3), was designated Case No. 21-1488RX, and assigned to the undersigned.

On May 12, 2021, the Department filed the Department of Revenue's Agreed Motion to Consolidate Cases, Agreed Motion for Continuance, and Unagreed Motion to Bifurcate Issues. The undersigned granted the motion. With this, WKDR's Existing Rule Challenge was consolidated with the already consolidated challenges to the NOPA and NIL, and the proceeding was bifurcated for a hearing on the threshold jurisdictional issues prior to a final hearing on the merits. For the challenges to the NOPA and NIL, the threshold jurisdictional issue raised by the Department was timeliness; for the Existing Rule Challenge, the threshold jurisdictional issue raised by the Department was WKDR's standing.

The hearing on the threshold issues was held on August 18, 2021. On December 1, 2021, the undersigned issued an Order on Standing, finding that WKDR had standing to bring the Existing Rule Challenge, pursuant to section 120.56(3).

The undersigned issued a Recommended Order in Case Nos. 21-0844 and 21-0845 on November 30, 2021, recommending dismissal of WKDR's challenges to the NOPA and NIL, finding that WKDR was time barred from bringing the challenges.

On March 4, 2022, the undersigned issued a Summary Final Order, dismissing the Existing Rule Challenge.

This Proceeding

On January 13, 2022, WKDR filed a Petition to Challenge the Department's Unadopted Rule for Notifying Taxpayers of Assessments (Petition). The parties waived the requirement of a hearing within 30 days and the formal hearing was scheduled for March 2, 2022. *See* § 120.56(4)(b), Fla. Stat.

Prior to the hearing, the parties filed a Joint Prehearing Stipulation for the March 2, 2022, Hearing on Petitioner's Challenge to an Alleged Unadopted Rule, in which they stipulated to a number of facts. The agreed facts are incorporated in the findings below, to the extent relevant.

The final hearing was held on March 2, 2022, in Tallahassee, Florida. WKDR and the Department both presented the testimony of Douglas Plattner (Mr. Plattner) and Robert DuCasse (Mr. DuCasse). WKDR's Exhibits 1 through 3, 5, 6, 12, and 13 and the Department's Exhibits 2 through 7 were admitted into evidence.

The one-volume Transcript of the final hearing was filed on May 26, 2022. The parties timely filed post-hearing submittals.[1] Both submittals have been duly considered in preparing this Final Order.

All references to the Florida Statutes are to the 2021 version.

[1] WKDR filed a Motion for Summary Final Order and in it, incorrectly stated that "the [ALJ] instructed the parties to file motions for summary final orders within twenty (20) days of the filing of the hearing transcript with DOAH. The filing of this motion by Petitioner complies with the instruction of the ALJ." At the final hearing, the undersigned stated that "the proposed final orders will need to be submitted within 20 days of the filing of the transcript with DOAH." Per a request from WKDR, the undersigned accepts the Petitioner's Motion for Summary Final Order as its Proposed Final Order.

FINDINGS OF FACT

1. The Department administers Florida's sales tax statutes and performs audits to ensure compliance with sales tax laws.

2. WKDR is a Ford franchise car dealership operating as LaBelle Ford. WKDR is organized as an "S" corporation and is wholly owned by Mr. Plattner.

3. WKDR's address is 851 South Main Street, LaBelle, Florida 33935.

4. Lisa Weems (Ms. Weems) is a revenue specialist III for the Department. She has worked for the Department, in its Compliance Standards Section, for over 15 years. In addition to other tasks, Ms. Weems is responsible for printing NOPAs to send out to taxpayers and their representatives.

5. Mr. DuCasse is a revenue program administrator II for the Department. Mr. DuCasse supervises Charles Kelly (Mr. Kelly), who, in turn, supervises Ms. Weems.

6. On or about March 21, 2019, the Department began a sales tax audit of WKDR for the period of March 1, 2016, through February 28, 2019.

7. On January 13, 2020, the Department issued a NOPA to WKDR. WKDR's NOPA assessed taxes of $801,967.01, a penalty of $200,491.75, and interest of $166,431.12, for a total due by WKDR of $1,168,889.88 following the audit.

8. As testified to by Ms. Weems at an evidentiary hearing in Case Nos. 21-0844 and 21-0845, at the time the NOPA was issued to WKDR, the Department's practice was to send NOPAs that had assessments for less than $100,000.00 (small assessments) by regular mail and NOPAs that had assessments over $100,000.00 (large assessments) by fax and e-mail, in addition to regular mail.

9. As an exception to its typical practice, and upon request of the taxpayer or taxpayer representative, the Department would send NOPAs that had small assessments by e-mail and/or fax.

10. This practice of sending large assessments by regular mail, fax, and e-mail, and small assessments by regular mail only, is a description of the agency statement identified in WKDR's Petition and is the crux of this unadopted rule challenge.

11. WKDR's assessment was for an amount greater than $100,000.00, and, as such, the Department sent the NOPA to WKDR by regular mail, fax, and e-mail.

12. Following the evidentiary hearing in Case Nos. 21-0844 and 21-0845, the undersigned issued a Recommended Order on November 30, 2021, finding that WKDR and its representative received actual notice of the NOPA but failed to file a timely challenge to the NOPA, pursuant to the requirements of section 72.011(2)(a), Florida Statutes, which requires all such challenges to be filed within 60 days after an assessment becomes final. Consequently, the undersigned found WKDR was time barred from challenging the NOPA and recommended that the Department enter a final order dismissing Case Nos. 21-0844 and 21-0845.

13. In a footnote in the Recommended Order, the undersigned noted that "the Department's internal policy to send NOPAs with assessments over $100,000.00 by e-mail and fax is an unadopted rule; however, it is not necessary to rely on it as the basis for the determination in this matter. *See* § 120.57(1)(e)1., Fla. Stat." The Recommended Order also plainly stated that "[t]he undersigned finds that the absence of a rule that promulgates the 'procedures' by which taxpayers are to be notified of assessments does not overcome the fact that WKDR was actually notified of the NOPA."

14. On February 28, 2022, the Department issued a Final Order adopting the Recommended Order in its entirety.

15. In January 2022, the Department changed its practice of sending NOPAs to taxpayers and their representatives, such that the Department no longer made a distinction between small assessments and large assessments when determining how to send NOPAs. Instead, the Department decided to

send all NOPAs by U.S. mail, unless requested by a taxpayer or its representative to send it by other means. In short, the Department abandoned its former practice, which was the challenged agency statement, and took up a revised practice that is in line with the requirements of section 213.0537, Florida Statutes.

16. On January 20, 2022, Mr. DuCasse met with Ms. Weems and her supervisor, Mr. Kelly, to tell them to cease the Department's former practice. Mr. DuCasse instructed Ms. Weems and Mr. Kelly to provide all NOPAs by regular mail, regardless of the amount of the proposed assessment. In addition, he informed them that NOPAs may be sent by fax and e-mail, as well, if a request for such is received from the taxpayer or taxpayer representative (also without regard to the amount of the proposed assessment).

17. The Department's new revised practice is a direct application of section 213.0537, which provides, as follows:

> (1) Notwithstanding any other provision of law, the Department of Revenue may send notices electronically, by postal mail, or both. Electronic transmission may be used only with the affirmative consent of the taxpayer or its representative. Documents sent pursuant to this section comply with the same timing and form requirements as documents sent by postal mail. If a document sent electronically is returned as undeliverable, the department must resend the document by postal mail. However, the original electronic transmission used with the affirmative consent of the taxpayer or its representative is the official mailing for purposes of this chapter.
>
> (2) A notice sent electronically will be considered to have been received by the recipient if the transmission is addressed to the address provided by the taxpayer or its representative. A notice sent electronically will be considered received even if no individual is aware of its receipt. In addition, a notice sent electronically shall be considered

> received if the department does not receive notification that the document was undeliverable.
>
> (3) For the purposes of this section, the term:
>
> (a) "Affirmative consent" means that the taxpayer or its representative expressly consented to receive notices electronically either in response to a clear and conspicuous request for the taxpayer's or its representative's consent, or at the taxpayer's or its representative's own initiative.
>
> (b) "Notice" means all communications from the department to the taxpayer or its representative, including, but not limited to, billings, notices issued during the course of an audit, proposed assessments, and final assessments authorized by this chapter and any other actions constituting final agency action within the meaning of chapter 120.

18. Section 213.0537 was enacted on July 1, 2020, several months after WKDR's NOPA was issued. The statute provides guidance as to what means the Department may utilize to serve NOPAs, "notwithstanding any other provision of law." It provides that NOPAs may be sent by postal mail and, also, that NOPAs may be sent electronically if the Department receives affirmative consent from the taxpayer or its representative.

19. Beginning January 21, 2022, the Department has provided all NOPAs, regardless of the amount of the assessment, to taxpayers solely in accordance with the allowances of section 213.0537, and abandoned reliance upon its previous practice.

20. The Department's former practice and its current practice are similar. The differences, however, are important to a determination regarding the claimed usage of an unadopted rule. In January 2020, when the Department issued a NOPA to WKDR, it did so based on a procedure, not adopted by rule, or set forth in statute, that provided that NOPAs with small assessments were to be provided by mail and NOPAs with large assessments were to be

provided by mail, fax, and e-mail. The Department's current practice is quite similar in that the Department follows a procedure whereby both small and large assessments are sent by regular mail, but additional means of service (by fax or e-mail) may be provided upon request of the taxpayer or taxpayer representative. Its current practice is not only different than its former practice in that there is no differentiation between large and small assessments—more importantly, its current practice is different because it is a direct application of current law.

21. In its Petition, WKDR challenged the Department's former practice—a practice that, at the time WKDR was issued a NOPA, was not set forth in rule or statute. The Department's current practice of sending NOPAs in accordance with section 213.0537 has not been challenged and is not the subject of this proceeding.[2]

22. Because the Department has ended its former practice, and provides NOPAs to all taxpayers in accordance with current law, an order that the Department cease reliance upon the challenged agency statement would not cause any change in the Department's practices.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.56, 120.569, and 120.57(1).

24. Section 120.56(4)(a) provides that persons substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates section 120.54(1)(a). Section 120.54(1)(a) provides, in general, that each agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure in section 120.54.

[2] In its post-hearing submittal, WKDR asserted that the nature of the controversy in this proceeding is "did the Respondent impermissibly rely on an unadopted rule under section 120.54(1)(a), Florida Statutes, at the time it issued the sales and use tax assessment to the Petitioner in January 2020?"

25. Section 120.52(16) defines "rule" in pertinent part, as follows:

> (16) "Rule" means 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. The term also includes the amendment or repeal of a rule.

26. A "rule" is "each agency statement of general applicability that implements, interprets, or prescribes law or policy." *See* § 120.52(16), Fla. Stat. The definition of "rule" expressly includes an agency statement that "describes the procedure or practice requirements of an agency." *See* § 120.52(16), Fla. Stat.

27. An agency statement must be of "general applicability" to be considered a rule. An agency statement of general applicability is one that the agency is uniformly applying to a category or class of similarly-situated persons or activities, rather than just a single person or in singular situations. *McCarthy v. Dep't of Ins.*, 479 So. 2d 135, 137 (Fla. 1st DCA 1985).

28. WKDR brings a section 120.56(4) unadopted rule challenge to challenge the Department's statement. Section 120.56(4) provides as follows:

> (4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED RULES; SPECIAL PROVISIONS.—
>
> (a) *Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a).* The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.
>
> (b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the

administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule.

(c) If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(d) *The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order.* The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Register.

(e) *If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action.*

(f) If proposed rules addressing the challenged unadopted rule are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance upon the unadopted rule and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

> (g) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e). (emphasis added).

29. WKDR set forth a description of the challenged agency statement in its Petition, which provides that the Department "has a procedure whereby taxpayers with assessments less than $100,000.00 are notified solely by USPS first class mail" and "taxpayers with assessments greater than $100,000.00 are notified by USPS first class mail, via fax, and via email[.]" *See* § 120.54(4)(a), Fla. Stat.

30. WKDR has the burden to prove, by the preponderance of the evidence, that the challenged agency statement is an unadopted rule and that it is substantially affected by the challenged statement. *See* § 120.56(1)(e), Fla. Stat. As with other proceedings conducted pursuant to sections 120.569 and 120.57(1), this is a de novo proceeding. *See* § 120.57(1)(k), Fla. Stat.

Standing

31. A challenge to an agency statement as an unadopted rule may only be brought by a person who is "substantially affected" by the alleged unadopted rule. *See* § 120.56(4)(a), Fla. Stat.

32. A substantially affected person is one who will suffer a real or immediate injury in fact because of the alleged unadopted rule and who is within the zone of interests to be protected or regulated. *See*, *e.g.*, *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

33. The allegations in the Petition—that the Department is using an agency statement that is a generally applicable procedure for giving notice to taxpayers—were deemed sufficient to plead standing, based on WKDR's

status as a taxpayer to whom the agency statement could be applied in the future. In its Petition, WKDR contended that it "is potentially subject to future audits and assessments by the Department," in explaining how they continue to be substantially affected by the challenged statement.

34. However, it was incumbent on WKDR to prove its standing at the hearing. WKDR failed to prove that the challenged agency statement exists currently and is applied to taxpayers, or that the former, now-abandoned agency statement, could be applied to WKDR, as a taxpayer, in the future. The challenged statement is not currently a statement of "general applicability"; it is a statement of no applicability. *See Beermunder v. Dep't of Ag. & Consumer Servs., Div. of Licensing,* Case No. 14-6037, FO at 9-10, and 14 (Fla. DOAH Apr. 10, 2015), *aff'd per curiam,* 186 So. 3d 1024 (Fla. 1st DCA 2016) ("Captain Beermunder has not proven the present existence or application of the alleged unadopted rule. This also means he has not proven he is substantially affected by the statement. Therefore, he lacks standing to bring this proceeding.").

Retrospective Relief Not Available

35. WKDR contends in its Petition that the challenged agency statement *is* an "unpromulgated rule" and, therefore, should have been adopted in accordance with the rulemaking procedures set forth in section 120.54(1)(a). However, in its Proposed Final Order, WKDR shifted its perspective to frame the issue as whether the challenged statement was an unadopted rule in January 2020, when the NOPA was issue to WKDR. That is not a proper matter for determination in a proceeding under section 120.56(4).

36. WKDR did not raise as a defense in Case Nos. 21-0844 and 21-0845 that the Department's proposed action was improperly relying on an unadopted rule. As the undersigned noted in footnote 4, at page 12 of the Recommended Order, the undersigned did not rely on an unadopted rule in recommending agency action, and those recommendations were adopted by the Department in its Final Order.

37. Here, it is undisputed that the challenged agency statement, which is no longer being applied, was not formally promulgated as a rule of the Department. But it is also undisputed that the Department is no longer applying the challenged agency statement.

38. Through its Petition, WKDR is seeking retrospective relief from the Department's former procedure, pursuant to the provisions of section 120.56(4). As a section 120.56(4) unadopted rule challenge, the issues to be resolved in this case are whether the challenged agency statement is a rule; and, if so, whether the rule violates section 120.54(1)(a). "If the administrative law judge rules in favor of the challenger on this issue, the agency can no longer rely upon the statement as a basis for agency action and the challenger is entitled to reasonable costs and attorney's fees under section 120.595(4)." *See Osceola Fish Farmers Ass'n, Inc. v. Div. of Admin. Hearings*, 830 So. 2d 932, 934 (Fla. 4th DCA 2002). No other relief is available in a section 120.56(4) proceeding.

39. "When section 120.54(1)(a) is read together with section 120.56(4), it becomes clear that the purpose of a section 120.56(4) proceeding is to force or require agencies into the rule adoption process. It provides them with incentives to promulgate rules through the formal rulemaking process." *Id.* at 934. Section 120.56(4) proceedings stop agencies from continuing to rely on unadopted rules—by forcing agencies into the rule adoption process. Where, as here, the agency is no longer utilizing the challenged agency statement, the purpose of the statute cannot be effectuated.

40. Further, the undersigned has no legal authority to find that a *past* agency statement—that is, the Department's former practice, upon which it no longer relies—*was* a violation of section 120.54(1)(a). That is because section 120.56(4) is forward-looking, offering prospective relief only against an agency's continued reliance on an unpromulgated statement. A former agency statement that is no longer relied upon is not subject to challenge. Section 120.56(4)(a) provides, in pertinent part, that "any person

substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement *violates* s. 120.54(1)(a)." (emphasis added). Similarly, section 120.56(4)(d) states that the "administrative law judge may determine whether all or part of a statement *violates* s. 120.54(1)(a)." (emphasis added). *See also* § 120.56(4)(e), Fla. Stat. ("If an administrative law judge enters a final order that all or part of an unadopted rule *violates* s. 120.54(1)(a), *the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action*.") (emphasis added).

41. It is clear the Department is not currently *relying* on the challenged statement and, as such, the former practice could not presently violate section 120.54(1)(a). It is pointless for the undersigned to issue an Order directing the Department to discontinue reliance on a practice it has already ceased reliance on. Although the Department is utilizing a similar practice, it is *relying* on an enacted law to do so.

42. The competent, substantial, undisputed evidence adduced at the final hearing shows that the Department has ceased reliance on its prior practice as of January 20, 2022. Since then, the Department mails NOPAs to taxpayers by U.S. mail, regardless of the amount of the proposed assessment, and, additionally, provides NOPAs by fax or e-mail upon request, in accordance with section 213.0537. The Department's current practice, which is not challenged by the Petition and is not at issue in this proceeding, is a direct application of section 213.0537. Since the Department has voluntarily ceased reliance on the challenged statement, and such is not a basis for future agency action, there is no current unadopted rule to find in violation of section 120.54(1)(a), and no relief can be provided through section 120.56(4). *See Fair v. Bd. of Elec. City of Tampa*, 211 So. 2d 239 (Fla. 2d DCA 1968) (The question raised by appellant was rendered moot by virtue of the repeal of the contested statute.).

43. The Department does not rely on the former agency statement challenged in this proceeding, and no practical purpose would be served by prohibiting the Department from relying on a former practice—WKDR would not obtain any relief from such a prohibition. Because no meaningful relief remains available to WKDR in this proceeding, WKDR's Petition is moot. *Fla. Retail Fed. v. Ag. for Healthcare Admin.*, Case No. 04-1828RX (Fla. DOAH July 19, 2004), *aff'd per curiam*, 903 So. 2d 939 (Fla. 1st DCA 2005) (stating "the pertinent question is whether it is possible for the [Petitioner] to obtain effective relief in this section 120.56 proceeding. If the answer is 'no,' then this cause is moot and must be dismissed."); *J.B. Coxwell Contracting v. Dep't of Trans.*, 580 So. 2d 621, 623 (Fla. 1st DCA 1991) (noting that a rule challenge appeal was dismissed as moot upon amendment of the rule at issue).

44. DOAH Final Orders in unadopted rule challenge proceedings have consistently determined that these proceedings are forward-looking only, with the only available relief being a declaration that an agency shown to be applying a statement of general applicability, that has not been properly promulgated, must cease relying on that statement. *See, e.g., Zimmerman v. Dep't of Fin. Servs., Off. of Ins. Regul.*, Case No. 05-2091RU, FO at 11 (Fla. DOAH Aug. 24, 2005) ("The statute [section 120.56(4)] is forward-looking in its approach. It is designed to prevent future agency action based on statements not adopted in accordance with required rulemaking procedures[.]").

45. Accordingly, when, as in this case, the evidence establishes that the agency has stopped using a challenged statement, there is no relief that can be provided and the unadopted rule challenge petition must be dismissed. It is irrelevant whether an agency's former statement would have met the definition of a rule before the agency discontinued reliance on the statement. In a de novo proceeding, it is incumbent on a petitioner to prove that the statement is now an unadopted rule—that the statement currently meets the

definition of a rule in that it is now a statement being uniformly applied by the agency. Retrospective relief is not available in a section 120.56(4) proceeding. The only remedy available is to require an agency currently relying on an unadopted rule to stop doing so, prospectively. *See, e.g.*, *Beermunder v. Dep't of Ag. & Consumer Servs., Div. of Licensing,* Case No. 14-6037, FO at 9-10, and 14 (Fla. DOAH Apr. 10, 2015) *aff'd per curiam*, 186 So. 3d 1024 (Fla. 1st DCA 2016) (unadopted rule challenge dismissed based on the following:

> "The Division … is no longer using the 2008 Manual and 2011 Certificate challenged as unpromulgated rules and has adopted rules incorporating more current versions of both. This … raises a factual defense of whether the person claiming an agency has an unadopted rule has successfully proved the existence and application of it. The plain language of the statute requires a petitioner to prove 'agency statement of general applicability that implements, interprets, or prescribes law or policy.' § 120.52(16), Fla. Stat. … Captain Beermunder has not proven the present existence or application of the alleged unadopted rule.");

Davis v. Dep't of Child. & Fam. Servs., Case No. 05-3532RU, FO at 13-14, and 17 (Fla. DOAH Feb. 1, 2006)

> ("The agency statement that Petitioner is seeking to challenge in the instant Section 120.56(4) proceeding is one that Respondent has already 'abandoned' and replaced (with a substantially different policy statement). Because it has been rescinded and thus will not be relied on by Respondent as a basis for future agency action, it is unnecessary to adjudicate Petitioner's claim that this statement violates Section 120.54(1)(a), Florida Statutes, and he thus is entitled to prospective injunctive relief under Section 120.56(4). … Inasmuch as no determination has been (nor need be) made that the Challenged Statement violates Section 120.54(1)(a), Petitioner

> is not entitled to reasonable costs and attorney's fees pursuant to Section 120.595(4), Florida Statutes.");

Fla. Pub. Employees Council 79 v. Dep't of Labor & Emp. Sec., Case No. 98-4706RU, FO at 12 (Fla. DOAH Feb. 23, 1999)

> ("Because the Department had utilized the alternate method of layoff [challenged as an unadopted rule] to effectuate the reduction in force prior to the time the Petition in this case was filed and before the evidentiary hearing was conducted, this case is moot. A determination that the Department's request for approval of the use of the alternate method constitutes an unpromulgated rule will offer no relief to the sole remaining Petitioner, because the layoff has been completed and has no prospective application.").

Attorney's Fees

46. WKDR is not entitled to attorney's fees in this proceeding as the undersigned has not "determine[d] that all or part of an agency statement violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement and any substantially similar statement pursuant to s. 120.56(4)(f)," because, as set forth above, there is no need to do so. Also, as recognized in the Davis Final Order, the prospective relief in section 120.595(4) is unnecessary and not available when an agency has chosen to abandon its use of an agency statement. *See Davis v. Dep't of Child. and Fam. Servs.*, Case No. 05-3532RU (Fla. DOAH Feb. 1, 2006) (ALJ found that a petition challenging an agency statement had to be dismissed as moot where the statement was abandoned and not relied upon for future agency action, and that the potential for attorney fees was not a collateral legal consequence precluding dismissal).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

(1) WKDR's Petition to Challenge the Department's Unadopted Rule for Notifying Taxpayers of Assessments is dismissed.

(2) WKDR's request for attorney's fees and costs pursuant to section 120.595(4) is denied.

DONE AND ORDERED this 14th day of July, 2022, in Tallahassee, Leon County, Florida.

JODI-ANN V. LIVINGSTONE
Administrative Law Judge
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2022.

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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.