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DIVISION OF ADMINISTRATIVE HEARINGS

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

DEPARTMENT OF REVENUE,

Petitioner,

v.

CASE NO. ____________
DOAH CASE NO. 03-2441RX

SHERATON BAL HARBOUR
ASSOCIATION, LTD,

Respondent.
_______________________________/

PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE HONORABLE C. B. ARRINGTON, ADMINISTRATIVE LAW JUDGE OF THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

Petitioner, the Florida Department of Revenue, by and through its undersigned counsel, pursuant to Fla. R. App. P. 9.030(b)(3) and Fla. R. App. R. 9.100, seeks a Writ of Prohibition directed to the Honorable C. B. Arrington, Administrative Law Judge and the Division of Administrative Hearings to prohibit the further exercise of jurisdiction by the Division of Administrative Hearings in the case of Sheraton Bal Harbour Associates, LTD. v. The Department of Revenue, DOAH case number 03-2441RX, a challenge to a repealed rule of the Department of Revenue.

NATURE OF RELIEF SOUGHT FROM THIS COURT

The Department is seeking a Writ of Prohibition from this Court directed at the Division of Administrative Hearings prohibiting DOAH from proceeding with the rule challenge until this Court determines if the Division of Administrative Hearings has jurisdiction to entertain a rule challenge to a repealed rule.

PREFACE

Petitioner, the Department of Revenue, (the Department) is the Respondent below in the Rule Challenge action before the Division of Administrative Hearings (DOAH, or the Division). Respondent, Sheraton Bal Harbour Association, LTD. (Sheraton) is the Petitioner below in the Rule Challenge. The Administrative Law Judge (ALJ) below is the Honorable C.B. Arrington, Administrative Law Judge, Division of Administrative Hearings.

JURISDICTION

This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(b)(3) and Fla. R. App. P. 9.100. An extraordinary petition to review a nonfinal order or to challenge the jurisdiction of the Division of administrative hearings is properly filed in District Court of Appeal. See Florida Department of Community Affairs v. Escambia County, 582 So. 2d 1237 (Fla. 1st DCA 1991); Department of Health and Rehabilitative Services v. Career Service Commission, 448 So. 2d 18 (Fla. 1st DCA 1984). "The power to issue the writ of prohibition is predicated on appellate review and supervisory power." Florida Department of Community Affairs v. Escambia County, 582 So. 2d at 1238. Section 120.68, Florida Statutes, grants the right of judicial review to a party who is adversely affected by final agency action. Section 120.68(2), Florida Statutes, provides that "[e]xcept for matters for which judicial review by the Supreme

Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides." See Florida Department of Community Affairs v. Escambia County, 582 So. 2d, at 1239.

THE BASIS FOR THE ISSUANCE OF THE WRIT

By Order dated August 12, 2003, (App. 1) and without opinion, the ALJ denied the Department's Motion to Dismiss (App. 3) Sheraton's rule challenge petition.[1] The ALJ scheduled a final hearing for September 23, 2003 and directed the parties to complete discovery. In issuing the order denying the motion to dismiss and retaining the matter in the Division, the ALJ exceeded the jurisdiction granted to DOAH by the Legislature in Section 120.56, Florida Statutes.

The basis for seeking the Writ of Prohibition is to test the jurisdiction of the Division to hear Sheraton's rule challenge to a repealed rule of the Department. Said Writ is necessary to halt and further prohibit DOAH from hearing the rule challenge because DOAH has no jurisdiction to entertain a rule challenge to a rule that has been repealed. The Legislature, by clear statutory mandate, has accorded DOAH jurisdiction to hear challenges to proposed or existing rules. See Section 120.56 (2) and (3),

[1]See Transcript of the Hearing on the Department's Motion to Dismiss. App. 2.

Florida Statutes. It is undisputed that the rule sought to be challenged was repealed by the Department prior to Sheraton's filing of the Petition for Rule Challenge. See Sheraton's Petition for Rule Challenge App. 5.

What is at stake here is an administrative agency's ability to rely upon actions taken pursuant to a duly promulgated rule while the rule is in existence, and not have its actions challenged after the rule is no longer in effect.

Without the Writ, and the accompanying Motion for a Stay,[2] the very purpose of the statutory mandate providing DOAH with jurisdiction only over proposed and existing rules will be defeated. The Department will be subject to the expense of defending a rule that is no longer in existence at a final hearing with the likelihood that the matter will be overturned at a subsequent appeal for DOAH's lack of jurisdiction. Any relief upon appeal, while still possible, will be after the agency has gone through the time and expense of defending the rule challenge proceedings.

By permitting the case to proceed, DOAH has completely ignored the Legislature's limitation on DOAH's jurisdiction to rules that are proposed or existing. The jurisdiction to rule on the validity of a proposed or existing rule does not extend to rules that have

[2]The Department has also requested a stay of the proceedings below, pending evaluation by this Court of the instant petition.

been repealed and are no longer in effect.

THE NECESSITY FOR INVOKING JURISDICTION

As an administrative agency, DOAH has only those powers granted to it by statute. See Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982), review denied, 436 So. 2d 98 (Fla. 1983). DOAH's powers extend only to rule challenges to proposed rules and existing rules. The legislature has clearly set the time during which DOAH may entertain a rule challenge to an existing rule, and that is during the time the rule is in existence. See 120.56(3)(a), Florida Statutes.

Section 120.56(3)(a), Florida Statutes, provides for challenges to existing rules at any time during the existence of the rule, states:

> 3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
> (a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. (e.s.)

In denying the motion to dismiss, the ALJ acted beyond the scope of the jurisdiction granted to DOAH by statute. DOAH has only such power as expressly or by necessary implication is granted by legislative enactment. DOAH may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. Thus, when acting outside the scope of its delegated authority, DOAH acts illegally. See Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d, at 793.

The ALJ erred in failing to dismiss Sheraton's petition for rule challenge and so, at this time, the Department is faced with the prospect of preparing for and defending its repealed rule at a full administrative hearing before a quasi-judicial body that has no jurisdiction.

UNDERLYING FACTS:

Until September 2001, Chapter 203, Florida Statutes, imposed a gross receipt tax on telecommunication providers. In 1989, the Department began notifying hotels and motels that they must begin collecting gross receipts tax on all local and long distance telephone service charges separately billed to their guests. Section 203.012(2)(b), Florida Statutes, provided a tax exemption excluding from gross receipts "[c]harges made by hotels and motels ... for local telephone service or toll telephone service, *when such charge occurs incidental to the right of occupancy* in such hotel or motel." Section 203.012(2)(b)3., Florida Statutes (1989) (emphasis added).

In interpreting the term "incidental charges," the Department promulgated Rule 12B-6.001(1)(c)3.b., Florida Administrative Code, which provides that charges to customers by hotels and motels for the use or access to telecommunication service are not considered incidental to the right of occupancy when such charges are separately stated, itemized or described on the bill, invoice, or other tangible evidence of the sale of the service. Under this rule, separately billed charges would not be within the statutory exemption from gross receipts tax because such charges were not "incidental to the right of occupancy."

The rule was challenged in a circuit court action by the hotel and motel association and individual operators of hotels and motels See State, Department of Revenue v. Brock, 576 So. 2d 848, 849, 850 (Fla. 1st DCA 1991). Upon consideration of the matter, this Court ruled that in promulgating Rule 12B-6.001(1)(c)3. b., Florida Administrative Code, "... it is clear that the Department did not act without colorable statutory authority. The Department is authorized to adopt rules to carry out the intent and purposes of the revenue laws. Section 213.06(1), Florida Statutes (1989). Far from repealing section 203.012(2)(b) 3., the Department's rule recites the statute and interprets the limited exemption that is provided under its terms." Brock, 576 So. 2d, at 850.

In July 2003, Sheraton filed the present rule challenge. By that time, the rule was no longer in existence and, having been repealed, had no further application.

The rule had been correctly applied to Sheraton at the time the tax was imposed in 1992 to 1997. Sheraton filed a refund request in 2002, solely on the ground that the rule should be held invalid. Despite the fact that the rule, which had been in effect since 1989, was unsuccessfully challenged when initially promulgated, Sheraton did not file a rule challenge during the time the rule was in existence and being applied to Sheraton. The Department denied the refund on the ground that Sheraton was subject to the tax and since the rule was valid at the time that the tax was imposed, the tax was not paid in error. See Section 215.26(1)(c), Florida Statutes.

Sheraton alleges that since the rule was applied by the Department in denying the refund, Sheraton is entitled to challenge the rule's validity or in the alternative to challenge the Department's action as based upon an unpromulgated rule. [3] See Response to Motion to Dismiss, App. 4. However, the basis for the issuance of a refund is that the tax was paid in error. See Section 215.26(1)(c), Florida Statutes. The denial of the refund was based on the fact that the tax was not paid in error but rather assessed and paid pursuant to a rule that was valid at the time the tax was paid. See Department's Notice of Reconsideration. App. 5, Exhibit A.

Sheraton filed a request for refund in 2002 seeking a tax refund for taxes paid during the period from 1992 through 1997. The sole ground for the refund request was that Rule 12B-

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[3]At the hearing on the motion to dismiss, the ALJ ruled that the denial of the refund was not an unpromulgated rule. See App. 2.

6.001(1)(c)3.b, Florida Administrative Code, was invalid. At the time the taxes were paid, the challenged rule was valid and in effect. See App. 5, Exhibit A. The Department denied the request for refund in May 2003. See App. 5, Exhibit A. The Department's decision to deny the tax refund was based on the validity of the rule at the time the rule was in existence. See App. 5, Exhibit A. Sheraton sought to contest the denial of the refund both in circuit court[4] and by a rule challenge petition in DOAH[5].

Sheraton filed its rule challenge petition on July 2, 2003. The challenged rule was repealed effective May 4, 2003. The rule was repealed as the statute the rule sought to implement, section 203.012(2)(b), Florida Statutes, was repealed by the Legislature. See, Ch. 2000-260, section 42, Laws of Florida. The petition alleges that Rule 12B-6.001(1)(c)3.b., Florida Administrative Code, was based upon Section 203.012(3)(b)3, Florida Statutes, which stated that gross receipts for telecommunication services did not include charges made by hotels and motels for local telephone service or toll telephone service when such charge occurs incidental to the right of occupancy in such hotel or motel. This statutory section provided a tax exemption to hotels or motels for

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[4]See Sheraton Bal Harbour Association LTD, v. Department of Revenue, Case No. 03-1513, Second Judicial Circuit in and for Leon County, Florida.

[5]Sheraton has not brought a Section 120.57, Florida Statutes challenge to the agency action (denial of the refund) in DOAH.

gross receipts tax on local or toll telephone service. The Rule interpreted the tax exemption. Petitioner challenges the rule as inappropriately depriving Petitioner of the tax exemption granted by the statute. However, as of October 1, 2001, Section 203.012(3)(b)3, Florida Statutes, was repealed by the legislature and the tax exemption no longer exists. See, Ch. 2000-260, Section 42, Laws of Florida. The petition states that the Petitioner is affected because the Department issued a denial of a tax refund for a tax that was paid in during the period from January 1992 through January 1997. See App. 5, paragraph 6. The request for a tax refund is based on statutory language that Petitioner alleges grants Petitioner an exemption from having to pay the gross receipts tax. Petitioner alleges that the application of the rule deprives Petitioner of a tax refund based on that exemption. However the exemption no longer exists and was not re-enacted by the Legislature.

Sheraton did not contest the repeal of the rule and filed this rule challenge after the rule had been repealed.

ARGUMENT

Section 120.56(3), Florida Statutes, provides that a substantially affected person may file a challenge to an existing rule at any time during the existence of a rule. There is no case law and no DOAH Orders which address a challenge to a rule that is no longer in existence. However, in Discovery Experimental and

Development, Inc., v Dept. of Health, 1999 Fla. Div. Adm. Hear. LEXIS 5406, DOAH case numbers 99-0005RX, and 99-0006RX, (February 22, 1999), another Administrative Law Judge, David Maloney, stated the obvious, that a challenge to a rule that was no longer in effect was not only "moot" but:

> That the rule is no longer in existence deprives the division of jurisdiction under Section 120.56, Florida Statutes: "a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule."

Id., at *28 (e.s.). Thus, the fact that by statute, DOAH has no jurisdiction to challenge a rule that is no longer in existence has been recognized by other administrative law judges.

At the time the tax was paid the Department could not legally deviate from its valid existing rule. Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So. 2d 1055, 1057 (Fla. 1 st DCA 1986); Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977)(agencies must honor their own substantive rules until they are amended or abrogated).

Section 120.56(3)(b), Florida Statutes, does not provide for retroactive invalidation of a rule. If the rule is declared invalid under these proceedings, it would not become void until after the time for an appeal had expired. See Palm Bay v. State, DOT, 588 So. 2d 624 (Fla. 1st DCA 1991) (Duly promulgated agency rules will be treated as presumptively valid until invalidated in a Ch. 120.56, Florida Statutes, rule challenge. A successfully challenged rule then becomes void and ineffective as of the date the decision of the appellate court becomes final.)

I. DOAH HAS NO JURISDICTION TO ENTERTAIN A CHALLENGE TO A REPEALED RULE UNDER THE CLEAR LANGUAGE OF SECTION 120.56(3)(A), FLORIDA STATUTES.

Section 120.56(3)(a), Florida Statutes, states:

> 3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
> (a) A substantially affected person may seek an administrative determination of the invalidity of an <u>existing</u> rule <u>at any time during the existence of the rule.</u> (e.s.)

In denying the Department's Motion to Dismiss and retaining jurisdiction over a challenge to a repealed rule, the ALJ departed from the plain meaning of the words used by the Legislature in this statute.

In ascertaining the legislative intent, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think the legislature intended or should have intended. <u>Tropical Coach Line, Inc. v. Carter</u>, 121 So. 2d 779, 782 (Fla. 1960). In this regard, the province of the judiciary is to interpret the law and not to legislate. <u>Hancock v. Board of Public</u>

Instruction of Charlotte County, 158 So. 2d 519, 522 (Fla. 1963). The primary guide to statutory interpretation is to determine the purpose of the legislature. Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963).

Applying the above-stated principles, in this case, the legislature clearly defined DOAH's jurisdiction to entertain a rule challenge and the time during which such action may lie. Any substantially affected person may challenge an existing rule at any time the rule is in existence. Section 120.56(3), Florida Statutes. A substantially affected person may challenge a proposed rule, (Section 120.56(2), Florida Statutes), an existing rule (Section 120.56(3), Florida Statutes), an agency statement defined as a rule (Section 120.56(4), Florida Statutes),[6] or an emergency rule (Section 120.56(5), Florida Statutes). Each of these sections establishes specific provisions for the specific type of rule

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[6]Sheraton's challenge also alleges that if the rule is not in existence, in the alternative Sheraton challenges the denial of the refund request based on the rule that has since been repealed as an unpromulgated agency rule (agency statement defined as a rule). At the hearing on the motion to dismiss, the ALJ ruled that the agency's denial of the refund was not based upon an unpromulgated rule. See App. 2. In Environmental Trust v. State, Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998) the court held "an agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under Section 120.57, Florida Statutes."

challenged. Nowhere does section 120.56, Florida Statutes, prescribe a procedure for challenging a rule that has been repealed and no longer in existence.

It is a cardinal rule of statutory construction that a statute must be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts; statutory interpretations that render statutory provisions superfluous or meaningless are, and should be, disfavored. Hawkins v. Ford Motor Company, 748 So. 2d 993, 997 (Fla. 1999). The legislature is presumed not to pass meaningless legislation. Smith v. Piezo Technology and Professional Administrators, 427 So. 2d 182, 184 (Fla. 1983). The courts are not to presume that a given statute employs "useless language." Piper Aircraft Corporation v. Schwendmann, 564 So. 2d 546, 547 (Fla. 3d DCA 1990).

Again, applying the foregoing principles to section 120.56(3), it is evident that the legislature intended the statute to provide jurisdiction for DOAH to entertain a rule challenge to an "existing" rule only "during the time the rule is in existence." The statute is *clear on its face* that the rule may be challenged only during its existence. Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

This Court has recognized the difference between an existing rule and a repealed rule. See Agency for Health Care Administration, Board of Clinical Laboratory Personnel v. Florida

Coalition of Professional Laboratory Organizations, Inc., 718 So. 2d 869, 871 (Fla. 1st DCA 1998)(We find nothing in the 1996 revisions, however, requiring an agency, once it seeks to repeal or amend its existing rules, to prove that the existing rules are arbitrary or capricious, or to furnish a sufficiently reasonable explanation for the repeal or amendment of same.) In Agency for Health Care, this Court stated:

> It is clear that the above provisions relate solely to the rule or rules that are actually subject to a challenge. It is equally clear that both proposed and existing rules may be challenged. *See* §§ 120.56(1)(a), Fla. Stat. (Supp.1996). Here, the Coalition challenged only the proposed rules; it did not challenge the existing rules. Thus, the Board's ultimate burden of persuasion was to show that the proposed rules were valid; it was not required to make any showing regarding the existing, unchallenged rules. ... In our opinion, the primary means for examining the validity of a rule--existing or proposed--continues to be whether the contested rule falls within the "particular powers and duties granted by the enabling statute." §§ 120.52(8), Fla. Stat. (Supp.1996). Agency for Health Care, 718 So.2d at 871 (Fla. 1st DCA 1998)

Thus, this Court also accepted and took for granted the fact that the statutory authority for DOAH in determining the validity of a rule in a rule challenge proceeding encompasses only existing or proposed rules.

The statutory scheme of Chapter 120 is intended to avoid "the chaotic uncertainty that would necessarily flow from retroactively invalidating agency action taken in reliance on the presumed validity of its rule prior to a proper rule challenge proceeding holding the rule invalid." State of Florida Board of Optometry v.

Florida Society of Ophthalmology, 538 So. 2d 888, 889 (Fla. 1st DCA 1989).

Further, decisions of Florida courts support the interpretation that Chapter 120 is intended to provide for challenges to proposed or existing rules, not to repealed rules. In this case, the tax was assessed and collected in reliance of a valid rule,[7] in existence since 1989. The request for a refund in 2003, was based solely on the premise that the rule should be declared invalid. The denial of the refund request was proper as the tax was not overpaid, not due or paid in error,[8] but rather

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[7]A rule is presumed valid until declared invalid in a rule challenge. Palm Bay v. State, Department of Transportation, 588 So. 2d 624, 628 (Fla. 1st DCA 1991). A successfully challenged rule becomes void and ineffective as of the date the decision of the appellate court becomes final, or the time for appeal has run. Palm Bay, 588 So. 2d, at 628. An administrative rule is operative and binding on those coming within its terms from its effective date until it is modified or superseded by subsequent legislation, or by subsequent regulations adopted in compliance with duly ordained standards of administrative procedure. Hulmes v. Division of Retirement, Department of Administration, 418 So. 2d 269, 270 (Fla. 1st DCA 1982).

[8] Section 215.26(1)(c), Florida Statutes, provides the basis for the state to grant a refund:

> 215.26. Repayment of funds paid into State Treasury through error.
>
> (1) The Chief Financial Officer may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:
> (a) An overpayment of any tax, license, or account due;
> (b) A payment where no tax, license, or account is due; and
> (c) Any payment made into the State Treasury in error.

paid pursuant to a valid rule implementing the statute imposing the tax.

Further, when the applicable provisions of Chapter 120, Florida Statutes, are read *in pari materia*, it is evident that a rule challenge cannot lie if the rule has been repealed as the rule cannot be invalidated retroactively. For example, a rule may be invalidated only on a prospective basis in accordance with Section 120.56(3)(b), Florida Statutes. <u>See</u> <u>State of Florida Board of Optometry v. Florida Society of Ophthalmology</u>, 538 So. 2d, at 889.

Section 120.56(3)(b), Florida Statutes, provides that the administrative law judge may declare all or part of a rule invalid. "The rule or part thereof declared invalid <u>shall become void when the time for filing an appeal expires</u>. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue <u>after</u> the rule has become void." (e.s.)

Thus, Section 120.56(3)(b), Florida Statutes, does not provide for retroactive invalidation of a rule. If a rule is declared invalid under these proceedings, it would not become void until after the time for an appeal had expired. <u>See</u> <u>Palm Bay v. State, Department of Transportation</u>, <u>supra</u>.

In this case, Section 120.56, Florida Statutes, refers to rules in terms of rule challenges as either "existing" or "proposed rule". For example, Section 120.56(2), Florida Statutes, provides for the challenge to "proposed rules" and Section 120.56(a), Florida Statutes, provides that "any substantially affected person may seek an administrative determination of the invalidity of any <u>proposed</u> rule by filing a petition seeking such a determination with the division." (e.s.) Section 120.56(3), Florida Statutes, refers to challenges to "existing rules" and Section 120.56(3)(a), Florida Statutes, provides that "a substantially affected person may seek an administrative determination of the invalidity of an <u>existing</u> rule at any time during the <u>existence</u> of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the <u>existing</u> rule is an invalid exercise of delegated legislative authority as to the objections raised." (e.s.) The use of the adjectives "proposed" and "existing" to modify the term "rule" cannot have been an accidental enactment by the Legislature.

Section 120.56 (3)(b), Florida Statutes, further provides that the rule that is declared invalid "shall become void when the time for filing an appeal expires" and requires that the agency whose rule has been declared invalid "shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void."

The term "existing rule" is also used in Section 120.52(8), Florida Statutes, in the definition of the term "invalid exercise of delegated legislative authority" and provides that "a proposed or <u>existing</u> rule is an invalid exercise of delegated legislative authority if any one of the following applies..." Section 120.52(15), Florida Statutes, uses the term "existing rule" in its definition of a rule:

> [E]ach 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. (e.s.)

Section 120.56(1), Florida Statutes, provides that a petition to challenge the validity of a rule must be in writing and must "state with particularity facts sufficient to show the person seeking relief **is** substantially affected by the rule and facts sufficient to show the invalidity of the rule." (e.s.) "Just as that language inexorably leads to the conclusion that the challenger's personal interests must be substantially affected, so too, it makes inescapable the conclusion that the substantial effect must be presently felt by the challenger. The use of the present verb tense demands that the challenger demonstrate some present effect which is substantial." See Dore, Access to Florida's Administrative Proceedings, 13 Fla. St. U. L. Rev. 965, 1043, 1044 (1986).

Where a statute enumerates the things on which it is to operate, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned therein. Ideal Farms Drainage District v. Certain Lands, 19 So. 2d 234 (Fla. 1934); Dobbs v. Sea Isle Hotel, 56 So. 2d 341 (Fla. 1952); Thayer v.State, 335 So. 2d 815 (Fla. 1976). Missing from the nomenclature of the rule challenge language in Chapter 120 is the challenge to a rule that has been repealed. Also missing from the definition of a rule is a repealed rule, even though the repeal of a rule is a rule. Section 120.52(15), Florida Statutes.

II. DOAH HAS ONLY THOSE POWERS CONFERRED BY THE LEGISLATURE

No statute confers any "plenary" jurisdiction or power to DOAH. For example, courts have held that DOAH has no authority to pass on the constitutionality of statutes or existing rules. See Key Haven v. Board of Trustees of the Internal Improvement Fund, 427 So. 2d 153 (Fla. 1982). In order to determine DOAH's substantive jurisdiction, it is important to understand that DOAH is a creature of statute.[9] Sections 20.22 and 120.65, Florida Statutes. Like any other agency subject to the APA, DOAH may not act beyond its prescribed statutory authority.

DOAH's powers are limited to the authority and powers granted to it by statute, either expressly or by necessary implication. State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA), cert. denied, 300 So. 2d 900 (Fla. 1974), State Department of Citrus v. Office of Comptroller, 416 So. 2d 820 (Fla. 2nd DCA 1982). If there exists any reasonable doubt as to the lawful existence of a particular power that is being exercised by

[9] DOAH is a division within the Department of Management Services. See Sections 20.22, and 120.65, Florida Statutes.

DOAH, the further exercise of that power should be arrested. See Greenberg, 297 So. 2d, at 628.

A legislative direction as to how a thing should be done is, in effect, a prohibition against its being done in any other way. When the Legislature provides that an administrative power shall be exercised in a certain way, such prescription precludes doing it in another way. Kirk v. Publix Super Markets, 185 So. 2d 161 (Fla. 1966).

It is well-established that an agency has no jurisdiction to proceed beyond that granted it by statute; it has no inherent rulemaking authority. Section 120.54(14), Florida Statutes (1983). See Gardinier, Inc. v. Florida Department of Pollution Control, 300 So. 2d 75 (Fla. 1st DCA 1974); Fiat Motors of North America, Inc. v. Calvin, 356 So. 2d 908, 909 (Fla. 1st DCA 1978).

An administrative agency cannot enlarge its own jurisdiction nor can jurisdiction be conferred upon the agency by parties before it; thus, deviations from an agency's statutorily established sphere of action cannot be upheld because they are based upon an agreement, contract, or consent of the parties. Nor can they be made effective by waiver or estoppel. 2 AM JUR 2d ADMINISTRATIVE LAW § 226.

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. State of Florida ex rel. Walter G. Arnold, Relator. v. P. B. Revels, 109 So. 2d 1, 8 (Fla. 1959)

citing Ex parte McCardle, 1868, 7 Wall. 506, 514, 19 L. Ed. 264.

The power and authority of administrative boards, commissions and officers are limited to those granted, either expressly or by necessary implication, by the statute of their creation. See Florida State University v. Jenkins, 323 So. 2d 597 (Fla. 1st DCA 1975). See also State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); Gardinier, Inc. v. Florida Department of Pollution Control, 300 So. 2d 75 (Fla. 1st DCA 1974). See generally, 73 C.J.S. Public Administrative Law and Procedure § 50. While an administrative agency may make and enforce regulations to carry out powers definitely conferred on it, it cannot be clothed by the Legislature with, nor can it assume, the power to do more. See State ex rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948). See also Keating v. State ex rel. Ausebel, 167 So. 2d 46 (Fla. 1st DCA 1964), quashed on other grounds, 173 So. 2d 673 (Fla. 1965) (an administrative board or office which is solely of statutory creation has only such limited and special powers as are legally conferred upon it by statutes expressly or impliedly for the purpose of carrying out the aims for which they were established).

A writ of prohibition is not appropriate where the court has authority to exercise its discretion. English v. McCrary, 348 So. 2d 293 (Fla. 1977). In this case, however, the ALJ had **no** discretion in determining whether or not DOAH had jurisdiction to rule over a challenge to a rule that was no longer in existence. In this situation, Section 120.56 (2) and (3), Florida Statutes, makes it clear that DOAH has jurisdiction to rule on the validity of either a proposed or an existing rule, not on a rule that is no longer in existence. By legislative edict, the challenge to an existing rule must be brought during the time the rule is in existence, otherwise, DOAH has no jurisdiction to declare the rule invalid.

CONCLUSION

For the reasons set out above, the Division of Administrative Hearings was clearly required to grant the Department's motion to dismiss and dismiss Sheraton's rule challenge. By not doing so, DOAH has exceed its jurisdiction by permitting a case to proceed where the legislative jurisdictional mandates were not complied with.

Wherefore, the Department requests that this Court grant its Petition and issue the Writ to the Respondent barring the Division of Administrative Hearings from further hearing the rule challenge of the Respondent.

Dated on this 15th day of September 2003.

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

MARTHA F. BARRERA
Fla. Bar No. 234036

Assistant Attorneys General
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, FL 32399-1050
850-414-3300
850-488-5865 (Facsimile)
Attorneys for Petitioner
Department of Revenue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to: The Honorable Claude B. Arrington, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and, Rex D. Ware, Esquire, Elizabeth C. Daley, Esquire, Steel, Hector & Davis LLP, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301, this 15th day of September, 2003

MARTHA F. BARRERA
ASSISTANT ATTORNEY GENERAL

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